Study G-300 May 28, 2014

Memorandum 2014-22

State and Local Agency Access to Customer Information from Communication Service Providers: Constitutional Issues — Free Expression and Association

In 2013, the Legislature enacted Senate Concurrent Resolution 54 (Padilla), which directs the Commission[1] to make recommendations to revise the statutes that govern the access of state and local government agencies to customer information from communications service providers. The revisions are intended to do all of the following:

(1) Modernize the law.
(2) Protect customers' constitutional rights.
(3) Enable state and local agencies to protect public safety.
(4) Clarify procedures.

Memorandum 2014-5 introduced the study and proposed an overall organizational plan for conducting it. The Commission approved the proposed plan.[2] This memorandum continues the first step in that plan, analysis of the constitutional rights that are at issue in this study. It examines the constitutional rights of free expression and association and discusses how those rights might be affected by government access to the customer records of communication service providers.

Future memoranda in this study will discuss federal and state statutes affecting government surveillance of communications. Once we have established that background information, the Commission will be prepared to discuss policy and draft proposed legislation.

The content of the memorandum is organized as follows:

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 Minutes (Feb. 2014), p. 4.

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The Commission invites public input on the matters discussed in this memorandum and any other point that is relevant to this study. Any interested person or group can submit formal comment to the Commission, either in writing or at a meeting. The staff is also open to receiving informal input, and is willing to meet with any interested group.

FREE EXPRESSION AND ASSOCIATION

Free Expression

The First Amendment to the United States Constitution expressly protects the freedom of speech:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment is applicable to the states.[3]

The California Constitution also expressly protects freedom of speech, in Article 1, Section 2(a):

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

As discussed in prior memoranda, the California Constitution can provide greater protection than the United States Constitution (subject to the "Prop. 8" rule that suppression of evidence may not be available for a violation of a right afforded only by the California Constitution).[4]

There are many different scenarios in which government action could impermissibly restrain or deter the exercise of the right of free speech. In this study, we are only concerned with government access to customer information of communication service providers. Consequently, this memorandum only discusses how such access might infringe on a customer's right of free speech. The general nature of that problem is discussed below, under "Indirect Restraint."

Free Association

The United States Constitution does not expressly guarantee the freedom of "association." Nonetheless, in *National Association for the Advancement of Colored People v. Alabama*,[5] the Supreme Court stated:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. … Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[6]

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3. Near v. Minnesota, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property.").

4. See Memorandum 2014-13, pp. 3-5; Cal. Const. art. 1, §§ 24 & 28(f)(2); Raven v. Deukmejian, 52 Cal. 3d 336 (1990) (invalidating Cal. Const. art. 1, § 24); In re Lance W., 37 Cal. 3d 873 (1985) (affirming and construing Cal. Const. art. 1, § 28(f)(2)).

5. 357 U.S. 449 (1958) (hereafter "NAACP v. Alabama").

6. *Id.* at 461-62.

The existence of the right of free association, the grounding of that right in the First Amendment's protection of freedom of speech, and the applicability of the right to the states under the Fourteenth Amendment, have been repeatedly reaffirmed.[7]

There are a number of California Supreme Court cases that address the right to free association that arises under the First Amendment.[8] The staff did not find any opinion of the Court discussing whether the California Constitution affords more extensive protection of free association.

Like the broader free speech right, the right of free association can be restrained in many different ways. This memorandum only considers those situations where government access to communication data could affect the right of association.

Indirect Restraint

The most obvious type of infringement of the rights of free speech and association is a direct restraint (e.g., censorship of unpopular speech or a prohibition on associating with an unpopular group). The staff does not see any way in which government access to communication data would result in a direct restraint on speech or association.

However, government conduct can also *indirectly* restrain speech or association, in ways that can violate free speech and association rights. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[9]

The staff sees four ways in which government access to private communication data could indirectly restrain free speech or association:

(1) *Group privacy*. The Internet enables the formation of private groups for the discussion and advancement of ideas. If the government can determine the identity of every participant in an online discussion forum, it could chill the free association of those who wish to "gather" online for the purpose of private group discussions.

(2) *Anonymous speech.* The Internet makes it very easy for a person to make public statements anonymously. If the government can determine the identity of a person associated with an anonymous

7. See, e.g., Bates v. Little Rock, 361 U.S. 516 (1960); Gibson v. Florida Legislative Investigation Committee No. 6, 372 U.S. 539 (1963).

8. See, e.g., Britt v. Superior Court, 20 Cal. 3d 844, 852 (1978); White v. Davis, 13 Cal. 3d 757 (1975); Huntley v. Public Util. Com., 69 Cal. 2d 67 (1968).

9. *Bates v. Little Rock*, 361 U.S. at 523.

user name on an Internet discussion forum, that could chill the free expression of those who are only comfortable speaking anonymously.

(3) *Reader privacy*. The Internet is an extremely important source of information and opinion. If the government can access a person's communication data, it could determine what content a person has been reading or viewing. This invasion of a reader's privacy could chill the right to read unpopular or embarrassing material.

(4) *Content monitoring*. If government is known to monitor the content of electronic communications, that monitoring could chill free expression on the monitored medium.

Those concerns are discussed more fully below.

GROUP PRIVACY

Privacy of Group Association

In *NAACP v. Alabama*, a discovery order required the NAACP to produce a full list of its Alabama membership. The NAACP refused to do so and was found to be in contempt. The matter was eventually appealed to the United States Supreme Court, which held that compelled production of the group's membership list would unconstitutionally infringe on the members' rights of free association.

The Court first explained that the Constitution protects the right of free association, which is enforceable against the states under the Fourteenth Amendment:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. … It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. … Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[10]

10. NAACP v. Alabama, 357 U.S. at 460-61.

While an order to produce a membership list does not directly restrain the members' association, that is not the only way in which the right of association can be infringed. The right can also be violated if free association is indirectly discouraged or deterred:

> The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action … to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. … In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. Thus in [*American Communications Assn*. v. *Douds*, 339 U.S. 382 (1950)], the Court stressed that the legislation there challenged, which on its face sought to regulate labor unions and to secure stability in interstate commerce, would have the practical effect "of discouraging" the exercise of constitutionally protected political rights, … and it upheld the statute only after concluding that the reasons advanced for its enactment were constitutionally sufficient to justify its possible deterrent effect upon such freedoms. Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. … The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.
>
> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn*. v. *Douds*…: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. *Inviolability of privacy in group association may in*

> *many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.*[11]

Based on that reasoning, the Court held that the state court order compelling production of the NAACP's membership list "must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."[12]

The Court then considered whether Alabama had demonstrated a sufficiently important public interest to justify the deterrent effect that would result from compelled disclosure of the membership list. It held that the state's justification must be based on a "compelling interest." It found no such justification.

Thus, *NAACP v. Alabama* established that the constitutional right of free association can, in some situations, require the "inviolability of privacy in group association." This is particularly the case where the group promotes unpopular ideas and the disclosure of membership could result in harassment or worse (as the Court found to be true with respect to the NAACP in 1958 Alabama). In such cases, governmental invasion of group privacy can only be justified by a compelling public interest.[13]

Campaign Contributions

It is worth noting one area in which the Court has found a sufficiently compelling public need to justify a governmental invasion of group privacy: the disclosure of campaign contributions.

In *Buckley v. Valeo*,[14] the Court considered a number of constitutional challenges to various federal campaign finance laws. One of the challenged provisions required the public disclosure of the name, profession, and business address of any person who contributed more than $100 to a political committee in a year. (A "political committee" is a group of persons that makes contributions or expenditures of over $1,000 per year, for the purpose of influencing a federal election.[15])

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11. *Id*. at 461-62 (emphasis added).
12. *Id*. at 462.
13. See, e.g., Gibson v. Florida Legislative Investigation Committee No. 6, 372 U.S. 539 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960). See also Shelton v. Tucker, 364 U.S. 479 (1960) (invalidating statute that required public school and university teachers to annually disclose all groups in which teacher had been member or had supported financially in preceding five years).
14. 424 U.S. 1 (1976).
15. *Id.* at 62-63 (discussing 2 U.S.C. §§ 431, 434, 438).

Opponents of that requirement objected that it was an indirect restraint on the right of free association, under the reasoning of *NAACP v. Alabama*. The Court generally agreed that the disclosure requirement could indirectly restrain association:

> [T]he disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. …
>
> We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. … We also have insisted that there be a "relevant correlation" … or "substantial relation" … between the governmental interest and the information required to be disclosed. … This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure.[16]

The fact that *NAACP* involved a membership list, and the statutes at issue in *Buckley* involved contribution lists made no difference:

> As we have seen, group association is protected because it enhances "[(e]ffective advocacy." … The right to join together "for the advancement of beliefs and ideas," … is diluted if it does not include the right to pool money through contributions, for funds are often essential if "advocacy" is to be truly or optimally "effective." Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs." … Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably.[17]

Nonetheless, the Court found sufficient justification for the disclosure requirements:

> The strict test established by *NAACP vs. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently

16. *Id.* at 64-65 (citations and footnotes omitted).
17. *Id.* at 65-66 (citations omitted).

> important to outweigh the possibility of infringement, particularly when the "free functioning of our national institutions" is involved. …
>
> The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" … in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. … This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. … And, as we recognized in *Burroughs v. United States* …, Congress could reasonably conclude that full disclosure during an election campaign tends "to prevent the corrupt use of money to affect elections." In enacting these requirements it may have been mindful of Mr. Justice Brandeis' advice:
>
> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." …
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.[18]

While recognizing that the disclosure of contributions could deter some donors or lead to some donor harassment or retaliation, the Court was not convinced that this would be common. Moreover, it found that the public interests served by disclosure were generally sufficient to justify the burdens that it might place on free expression and association.[19]

Opponents of the disclosure requirement also argued for special treatment of minor parties and independents, who are arguably the most vulnerable to the chilling effect of disclosure. The Court held that special treatment was not

18. *Id.* at 66-68 (citations and footnotes omitted).
19. *Id.* at 68.

constitutionally required. Instead, individual groups could make "as applied" challenges based on their particular circumstances:[20]

> Where it exists, the type of chill and harassment identified in *NAACP vs. Alabama* can be shown. We cannot assume that courts will be insensitive to similar showings when made in future cases. We therefore conclude that a blanket exemption is not required.[21]

The campaign contribution example is important for two reasons. First it demonstrates that the right of group privacy is not absolute. A sufficiently compelling public interest (like the integrity of the electoral process) can justify government invasion of a group's associational connections.

Second, it highlights a particular issue — campaign disclosures — that may warrant special treatment in the legislation that the Commission eventually proposes. The continuing significance of this issue was demonstrated in the relatively recent case of *Defenders of Marriage v. Bowen* (holding that the public has a compelling interest in campaign donation disclosures, sufficient to justify the resulting burdens placed on associational privacy).[22] It is also worth noting that the Legislature recently passed, and the Governor signed, a bill that would broaden existing campaign contribution disclosure requirements.[23] The Commission will need to be mindful of these important policies when preparing proposed legislation.

Group Privacy and Communication Surveillance

It appears that, in some circumstances, government access to customer information of communication service providers could unconstitutionally restrain the right to group privacy that is grounded in the rights to free expression and association.

For example, if a state or local agency were to request information from Google about the membership of a particular online discussion group, including the names and other identifying information about the group's membership, that could have exactly the sort of indirect restraint on free association at issue in *NAACP v. Alabama*. By invading the group's associational privacy, the government could chill participation in the group (by deterring the participation of those who fear retribution or stigma). While the cases on this issue deal with

20. *Id.* at 68-74.
21. *Id.* at 74.
22. 830 F. Supp. 2d 914 (E.D. Cal. 2010).
23. See SB 27 (Correa), 2014 Cal. Stat. ch. 16.

large and formally organized groups, it seems that the same principle could apply to small and informal groups (conceivably even to groups as small as two, under certain scenarios).

It also seems possible that GPS tracking data could be used to determine group associations. For example, if police know that a particular group would be meeting in a certain building at a certain time, GPS data could be used to determine who is present at the time of the meeting.[24] This would seem to pose the same sort of burden on associational privacy that is discussed above.

Such invasions of group privacy would not necessarily be unconstitutional. Many mainstream groups are quite innocuous and the disclosure of their membership would have little deleterious effect (and would therefore be unlikely to chill association). But in some cases, especially where a group's ideas or conduct is strongly disfavored by the majority (and perhaps the government itself), fears of harassment and injury could be real. In those cases, a government invasion of group privacy could deter protected association rights.

The right of group privacy is not absolute. However, government invasion of that privacy is subject to strict scrutiny. It seems very likely that some governmental attempts to access group membership data would not be sufficiently justified, in which case those efforts could violate the constitutional right of free association.

ANONYMOUS SPEECH

Anonymous Speech Generally

In *Talley v. California*,[25] the Supreme Court held that the right of free expression includes the right to speak anonymously.[26] The case involved a municipal ordinance that forbade the distribution of any handbill that did not state the name and address of the person who prepared, distributed, or sponsored it.

The Court first discussed prior cases in which it held that a complete prohibition on the public distribution of printed literature violated the

24. For example, it has been reported that the NSA collects billions of bits of cell phone location data daily, and uses the information to "infer relationships" between co-located persons. <http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/10/new-documents-show-how-the-nsa-infers-relationships-based-on-mobile-location-data/>

25. 362 US 60 (1960).

26. See also Huntley v. Public Utilities Com., 69 Cal. 2d 67 (1968) (invalidating requirement that recorded messages identify their source).

constitutional right of freedom of speech.[27] It then considered whether a narrower prohibition, on the distribution of *anonymous* literature, would be constitutional.

The Court had "no doubt" that requiring the source of a pamphlet to be identified "would tend to restrict freedom to distribute information and therefore freedom of expression."[28]

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies, was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. … Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. … Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.
>
> We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates* v. *Little Rock*, 361 U.S. 516; *N. A. A. C. P.* v. *Alabama*, 357 U.S. 449, 462. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance [generally prohibiting the public distribution of printed literature], is void on its face.[29]

27. *Id.* at 62-63.
28. *Id.* at 64.
29. *Id.* 65 (footnotes omitted).

The majority opinion did not closely analyze the justifications for the ordinance that were offered by counsel (preventing fraud, false advertising, and libel). It appeared to find those justifications unconvincing because the ordinance at issue was not tailored to achieve the asserted purposes and there was no legislative history showing that they were, in fact, the intended purposes.[30]

The right of anonymous publication was reaffirmed, in the context of anonymous campaign literature, in *McIntyre v. Ohio Elections Commission*:

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. … It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.[31]

Campaign Contributions and Expenditures

As discussed above, in *Buckley v. Valeo*[32] the Court considered a number of constitutional challenges to various federal campaign finance laws. One of the challenged provisions required individuals who make campaign contributions or expenditures of a specified nature to file a statement with the Federal Election Commission. "Unlike the other disclosure provisions, this section does not seek the contribution list of any association. Instead, it requires direct disclosure of what an individual or group contributes or spends."[33]

Appellants challenged the disclosure requirement as a violation of the principles enunciated in "*Talley v. California* … imposing 'very real, practical burdens ... certain to deter individuals from making expenditures for their independent political speech….'"[34]

30. *Id*. 64.
31. 514 U.S. 334, 357 (1995).
32. 424 U.S. 1 (1976).
33. *Id*. at 75.
34. *Id*.

In reviewing the disclosure requirement, the Court applied strict scrutiny.[35] It upheld the requirement (after separately addressing questions about vagueness and overbreadth) on the basis of the following public interests:

> [The requirement] is part of Congress' effort to achieve "total disclosure" by reaching "every kind of political activity" … in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible. The provision is responsive to the legitimate fear that efforts would be made, as they had been in the past, … to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act.
>
> …
>
> In enacting the legislation under review Congress addressed broadly the problem of political campaign financing. It wished to promote full disclosure of campaign-oriented spending to insure both the reality and the appearance of the purity and openness of the federal election process.[36]

The Court specifically held that the disclosure requirement, as construed to avoid vagueness, "does not contain the infirmities of the provisions before the Court in *Talley v. California*. … Here, as we have seen, the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced."[37] In other words, the Court found sufficient justification for breaching the anonymity of those making the specified contributions and expenditures.

In *McConnell v. Federal Election Commission*,[38] the Court considered the constitutionality of a federal statute requiring that certain televised political advertisements include a disclaimer that identifies the source of the advertisement. The disclaimer requirement effectively precludes anonymity for certain types of political speech. Nonetheless, the Court found that the rationale offered in *Buckley* also applies to the disclaimer statute and was sufficient to justify the burden on free expression.[39] That holding and reasoning was reaffirmed in *Citizens United v. Federal Election Commission*.[40]

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35. *Id*.
36. *Id*. at 76-77 (footnotes omitted).
37. *Id*. at 81.
38. McConnell v. Fair Election Comm'n, 540 U.S. 93 (2003), *overruled in part by* Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).
39. *Id*. at 230-31.
40. Citizens United v. Federal Election Comm'n, 558 U.S. 310, 367 (2010).

These cases demonstrate that the right of anonymous speech is not absolute. The right can be overcome by a sufficiently important government interest. The cases also serve as a reminder that the Commission will need to be careful in drafting proposed legislation, to avoid interfering with legitimate statutory reporting requirements.

Anonymous Publication and Communication Surveillance

The Internet provides an ideal forum for anonymous speech. There are many public and private discussion sites that support the use of pseudonyms. If state or local agencies could access the customer records of the entities that maintain such sites, they could learn the true identity of those who have chosen to speak anonymously. While that would not prohibit or punish anonymous speech, it could well deter it.

The right to engage in anonymous speech is not absolute. But governmental attempts to restrict such speech are subject to strict scrutiny. It seems very likely that some governmental attempts to access the identities of anonymous speakers on the Internet would be an unconstitutional invasion of the freedom of expression.

The concern discussed above is not theoretical. A fairly recent California case, *Krinsky v. Doe 6*,[41] involved an action for defamation in which one party attempted to use discovery to compel disclosure of the identity of a person who had posted an anonymous Internet comment that was alleged to be defamatory. The court discussed the character and prevalence of anonymous Internet speech:

> As noted earlier, ordinary people with access to the Internet can express their views to a wide audience through the forum of the online message board. The poster's message not only is transmitted instantly to other subscribers to the message board, but potentially is passed on to an expanding network of recipients, as readers may copy, forward, or print those messages to distribute to others. The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers' identities, the online forum allows individuals of any economic, political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field.
>
> Yet no one is truly anonymous on the Internet, even with the use of a pseudonym. Yahoo! warns users of its message boards that

41. 159 Cal. App. 4th 1154 (2008).

> their identities can be traced, and that it will reveal their identifying information when legally compelled to do so. Nevertheless, the relative anonymity afforded by the Internet forum promotes a looser, more relaxed communication style. Users are able to engage freely in informal debate and criticism, leading many to substitute gossip for accurate reporting and often to adopt a provocative, even combative tone. As one commentator has observed, online discussions may look more like a vehicle for emotional catharsis than a forum for the rapid exchange of information and ideas: "Hyperbole and exaggeration are common, and 'venting' is at least as common as careful and considered argumentation. The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that 'anything goes,' and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world."[42]

Citing *Talley v. California*, the court acknowledged the long-standing constitutional protection of anonymous speech.[43] It further recognized that free speech rights extend to the Internet:

> Speech on the Internet is also accorded First Amendment protection. "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. ... [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[44]

Nonetheless, the right to free speech is not absolute. For example, it does not protect defamation.[45] In order to balance an anonymous defendant's free speech rights against a plaintiff's need to determine the identity of the defendant in pursuing a defamation claim, the court in *Krinsky* established two requirements that must be satisfied before breaching the defendant's anonymity: (1) the defendant must be notified of the attempt to determine his or her identity, and (2) the plaintiff must make a prima facie showing of the elements of the claim.[46] This would establish a sufficient basis for believing that the speech falls outside the scope of constitutional protection, justifying invasion of the speaker's anonymity. While the current study does not squarely encompass civil discovery

42. *Id*. at 1162-63 (footnotes omitted).
43. *Id*. at 1163.
44. *Id*. at 1164 (*quoting* Reno v. ACLU, 521 U.S. 844 (1997)).
45. *Id*. at 1164.
46. *Id*. at 1171-72.

orders, *Krinsky* does demonstrate that the concern about constitutional protection of anonymous Internet speech is a real one.

READER PRIVACY

The right of free speech includes the right to receive and read the speech of others.[47] And, just as the Constitution protects anonymous speech, the Constitution appears to protect a right of privacy as to what one reads.

Chilling Effect

In *United States v. Rumely*,[48] the Court was presented with the question of whether a congressional investigating committee could constitutionally compel a publisher to disclose the identities of those who have bought certain books. The Court did not ultimately answer that question, deciding the case on other grounds,[49] but a concurring opinion authored by Justice Douglas provides a cogent argument in favor of constitutional protection of reader privacy:

> Respondent represents a segment of the American press. Some may like what his group publishes; others may disapprove. These tracts may be the essence of wisdom to some; to others their point of view and philosophy may be anathema. To some ears their words may be harsh and repulsive; to others they may carry the hope of the future. We have here a publisher who through books and pamphlets seeks to reach the minds and hearts of the American people. He is different in some respects from other publishers. But the differences are minor. Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas. The aim of the historic struggle for a free press was "to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government." *Grosjean* v. *American Press Co*., 297 U.S. 233, 247. That is the tradition behind the First Amendment. Censorship or previous restraint is banned. *Near* v. *Minnesota*, 283 U.S. 697.

47. Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."). See also Lamont v. Postmaster General, 381 U.S. 301, 307-08 (Brennan, J., concurring) ("I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

48. 345 U.S. 41 (1953).

49. *Id*. at 47 ("Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power or delimiting the protection guaranteed by the First Amendment. Only by such self-restraint will we avoid the mischief which has followed occasional departures from the principles which we profess.").

Discriminatory taxation is outlawed. *Grosjean* v. *American Press Co.*, *supra*. The privilege of pamphleteering, as well as the more orthodox types of publications, may neither be licensed (*Lovell* v. *Griffin*, 303 U.S. 444) nor taxed. *Murdock* v. *Pennsylvania*, 319 U.S. 105. Door to door distribution is privileged. *Martin* v. *Struthers*, 319 U.S. 141. These are illustrative of the preferred position granted speech and the press by the First Amendment. The command that "Congress shall make no law . . . abridging the freedom of speech, or of the press" has behind it a long history. It expresses the confidence that the safety of society depends on the tolerance of government for hostile as well as friendly criticism, that in a community where men's minds are free, there must be room for the unorthodox as well as the orthodox views.

If the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship. A publisher, compelled to register with the Federal Government, would be subjected to vexatious inquiries. A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe. The finger of government leveled against the press is ominous. Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. The purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular, what the powers-that-be dislike. When the light of publicity may reach any student, any teacher, inquiry will be discouraged. The books and pamphlets that are critical of the administration, that preach an unpopular policy in domestic or foreign affairs, that are in disrepute in the orthodox school of thought will be suspect and subject to investigation. The press and its readers will pay a heavy price in harassment. But that will be minor in comparison with the menace of the shadow which government will cast over literature that does not follow the dominant party line. If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, book stores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press. Congress could not do this by law.[50]

50. *Id*. at 56-58 (Douglas, J., concurring).

A few years later, in *Lamont v. Postmaster General*,[51] the Supreme Court considered the constitutionality of a statute requiring that persons file a formal request with the Postal Service as a prerequisite to receiving certain "communist propaganda" by mail. In effect, this required recipients of such material to expressly affirm to the government their interest in reading it.

The Court found the statute to violate the *recipient's* constitutional right of free speech:

> This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment.[52]

Although the Court did not expressly state that it was concerned about the right to *privacy* as to what one reads, that concern is plainly implicit in the passage quoted above. If citizens must inform the government of the material that they read, that requirement could have a significant chilling effect on the exercise of the right to read unpopular materials.

Reader Privacy and Communication Surveillance

The Internet is an important source of news and opinion. If the government were able to access customer records of communication service providers, it would in some cases be able to determine what a person has been reading or is interested in reading. For example, access to a customer's Internet meta-data might reveal:

- What websites the person has visited.
- What search terms a person has used when conducting online searches.
- What PDF files or e-books a person has downloaded.

51. 381 U.S. 301.
52. *Id*. at 307.

- What image files or videos a person has viewed.

While government access to that type of information would not directly bar a person from accessing particular Internet content, it could have a chilling effect that would deter a person from fully exercising the constitutionally protected right to read what one pleases. This is especially likely where the content at issue is controversial, unpopular, or embarrassing.

While the scope of this memorandum is limited to constitutional issues, it is worth noting that California recently enacted a "Reader Privacy Act" that restricts disclosure of a person's reading choices.[53] That statute will be examined in a future memorandum that discusses relevant California statutory law.

CONTENT MONITORING

Chilling Effect

In *White v. Davis*,[54] the California Supreme Court considered the constitutionality of a Los Angeles Police Department operation that involved the use of undercover agents, posing as college students, who attended classes in order to collect intelligence on student dissidents and their professors. There was no allegation that the police were investigating illegal activity or acts. The undercover surveillance was challenged on a number of grounds, including an assertion that it violated the constitutional rights of free speech and association.[55]

While the Court recognized that the surveillance program did not directly prohibit speech or association, nonetheless "such surveillance may still run afoul of the constitutional guarantee if the effect of such activity is to chill constitutionally protected activity."[56] The Court found that the police surveillance at issue could have such an effect:

> As a practical matter, the presence in a university classroom of undercover officers taking notes to be preserved in police dossiers must inevitably inhibit the exercise of free speech both by professors and students. In a line of cases stretching over the past two decades, the United States Supreme Court has repeatedly recognized that to compel an individual to disclose his political

53. Civ. Code §§ 1798.90-1798.90.05.
54. 13 Cal. 3d 757 (1975).
55. See Memorandum 2014-21, pp. 12-14, for a discussion of the undercover operation with regard to the California Constitution's right of privacy.
56. *White v. Davis*, 13 Cal. 3d at 767.

> ideas or affiliations to the government is to deter the exercise of First Amendment rights.[57]

The fact that the students and professors were sharing their ideas in a setting that was not entirely closed to the public did not alter the Court's conclusion:

> Although defendant contends that the "semi-public" nature of a university classroom negates any claim of "First Amendment privacy," the controlling Supreme Court rulings refute this assertion. For example, in both *N.A.A.C.P.* and *Talley*, the fact that the private individuals involved had revealed their associations or beliefs to many people was not viewed by the court as curtailing their basic interest in preventing *the government* from prying into such matters. Although if either a teacher or student speaks in class he takes the "risk" that another class member will take note of the statement and perhaps recall it in the future, such a risk is qualitatively different than that posed by a governmental surveillance system involving the filing of reports in permanent police records. The greatly increased "chilling effect" resulting from the latter *governmental* activity brings constitutional considerations into play.[58]

The Court expressed particular concern about surveillance focused on university classrooms, because of the importance of academic freedom in a democratic society:

> The threat to First Amendment freedoms posed by any covert intelligence gathering network is considerably exacerbated when, as in the instant case, the police surveillance activities focus upon university classrooms and their environs. As the United States Supreme Court has recognized time and again: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[59]

However, the Court did not expressly limit its holding to the academic setting, and it acknowledged that "[i]n other contexts, a number of courts have issued injunctions against continued police surveillance in cases in which such conduct imposed a similar chilling effect on first Amendment rights."[60]

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57. *Id.* at 767-68.
58. *Id.* at 768, n.4 (emphasis in original).
59. *Id.* at 768-69.
60. *Id.* at 771. See Local 309 v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948) (union meeting); Bee See Books Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968) (adult book store). See also United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (recognizing that police presence at civil rights organizing meeting could deter exercise of federally guaranteed rights, but finding sufficient justification for on facts of case).

Ultimately, the Court held that the surveillance operation could pose "such a grave threat to freedom of expression" that the "government bears the responsibility of demonstrating a compelling state interest which justifies such impingement and of showing that its purposes cannot be achieved by less restrictive means."[61]

Legitimate Criminal Investigation

In *White v. Davis*, the Court conceded the legitimacy of undercover criminal investigation methods, while emphasizing that such methods are still subject to constitutional constraints:

> Although the police unquestionably pursue a legitimate interest in gathering information to forestall future criminal acts, the identification of that legitimate interest is just the beginning point of analysis in this case, not, as defendant suggests, the conclusion. The inherent legitimacy of the police "intelligence gathering" function does not grant the police the unbridled power to pursue that function by any and all means. In this realm, as in all others, the permissible limits of governmental action are circumscribed by the federal Bill of Rights and the comparable protections of our state Constitution.[62]

Unfortunately, the court did not provide guidance on how to determine when government surveillance of First Amendment activity is justifiable. Nor is there directly relevant guidance from the United States Supreme Court.[63]

However, the issue was addressed fairly recently by the Ninth Circuit. In *United States v. Mayer*,[64] the court considered whether the FBI's undercover infiltration of the North American Man Boy Love Association ("NAMBLA") violated that group's rights of free expression and association.[65]

The court discussed the standard to be applied when assessing the effect of an undercover police investigation on free speech and association (expanding on a prior Ninth Circuit decision, *United States v. Aguilar*[66]):

> When evaluating executive branch investigations that threaten First Amendment rights, this court and others have required that

61. *Id.* at 760-61.
62. *Id.* at 766.
63. There is one opinion discussing the effect of undercover infiltration on the First Amendment rights of a political group, but it is the opinion of a single Justice, sitting alone in his capacity as Circuit Justice. See Socialist Workers Party v. Attorney General, 419 U.S. 1314 (1974).
64. 503 F.3d 740 (9th Cir. 2007)
65. The court also rejected a Fourth Amendment claim because an undercover operation by an "invited informer" is not a search. *Id.* at 750.
66. 883 F.2d 662 (9th Cir. 1989) (undercover surveillance of "sanctuary church" movement).

> the investigation serve a legitimate law enforcement interest. While the explicit language of *Aguilar*'s "good faith" requirement appears narrower (limited to an intent not to violate First Amendment rights), we read it as drawing from a more general concept of good faith. The cases cited in *Aguilar* suggest that, to avoid running afoul of the First Amendment, the government must not investigate for the purpose of violating First Amendment rights, and must also have a legitimate law enforcement purpose. Alternatively, the government can satisfy its burden by showing that its interests in pursuing legitimate law enforcement obligations outweigh any harm to First Amendment interests.[67]

The challenged undercover infiltration of NAMBLA met that standard.

This suggests that undercover surveillance of First Amendment activity can be justified if (1) it is not intended to violate First Amendment rights, and (2) it is part of a legitimate criminal investigation. That principle seems compatible with the outcome in *White v. Davis*. That case involved "a regular, ongoing covert surveillance operation of university classes and university-recognized organizations" with the compilation of dossiers on "matters which *pertain to no illegal activity or acts.*"[68] The Court expressly distinguished this surveillance from a case involving the investigation of "specific criminal activity."[69] In other words, the surveillance at issue in *White v. Davis* was not shown to be part of a "legitimate criminal investigation."

Content Monitoring and Communication Surveillance

The discussion and holding in *White v. Davis* suggest that governmental monitoring of private Internet discussions could, in some circumstances, have an unconstitutional chilling effect on free expression and association. This is more likely when the government is seeking political intelligence, rather than investigating a specific crime.

For example, suppose that the police department in a large city is concerned about a particular dissident (but lawful) political organization. In order to gather intelligence about the group's plans, leadership structure, and ties with other groups, the police contact Google and request access to the content of all messages posted to the organization's invitation-only discussion forum. If this surveillance becomes known to members of the organization, it could chill

67. 503 F.3d at 751-52.
68. 13 Cal. 3d at 765 (emphasis added).
69. *Id.*

further discussion and deter some individuals from joining or continuing to participate in the group.

Of course, it is not reasonable to expect absolute secrecy with regard to communications that are exchanged within a large group, even if the group is only open to trusted confidants. Any member of the group could decide to breach the expected confidence and share group information with an outsider. This was discussed in Memorandum 2014-13, in considering whether the participants in a social media forum have a reasonable expectation of privacy as to content shared on that forum.[70]

The discussion in *White v. Davis* seems relevant to that question. The Court directly rejected the notion that the "semi-public" nature of a public university classroom somehow negated concern about covert police surveillance of student discussions. The Court noted that the risk of another student sharing information about classroom discussions with an outsider "is qualitatively different than that posed by a governmental surveillance system involving the filing of reports in permanent police records. The greatly increased 'chilling effect' resulting from the latter *governmental* activity brings constitutional considerations into play."[71]

The same reasoning seems applicable to a social media group. While one cannot reasonably expect every member of an online discussion group to protect the privacy of group communications, that does not mean that one expects government surveillance of the group's communications. Such surveillance, if conducted without sufficient justification, could violate the rights of free expression and association.

CONCLUSION

As discussed above, there are situations in which government access to customer records of communication service providers could burden constitutionally-protected rights of free expression and association. This could arise if the records obtained reveal private information about group membership, the identity of an anonymous speaker, or materials that a person has read. This is especially likely if public disclosure of the private information could lead to harassment, economic harm, or embarrassment. Fear of those consequences could chill association or expression. In addition, direct surveillance of the

70. Memorandum 2014-13, pp. 39-41.
71. *Id.* at 768, n.4 (emphasis in original).

content of a private discussion group could have a chilling effect on expression within that forum.

The rights burdened in these situations are not absolute. The infringement on free association and expression can be justified, if there is a sufficiently compelling public interest and the invasion is properly tailored to serve that interest.

It may be that constitutional violations of the type discussed in this memorandum would be rare. Most government surveillance of communication information would probably be focused on the investigation of crime, rather than flushing out private information about group associations, anonymous speech, or reading habits. That said, the case law in this area demonstrates that such violations have occurred. If government is free to access customer communication records, there could be situations in which the rights of free expression and association are violated.

Respectfully submitted,

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