

## Second Supplement to Memorandum 2016-5

### **Government Interruption of Communication Service (Discussion of Issues)**

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After releasing Memorandum 2016-5,<sup>1</sup> the staff consulted with Constitutional Law scholar, Professor Brian Soucek, of UC Davis School of Law. Professor Soucek reviewed the memorandum and provided some informal feedback on its content.

He expressed one concern. On page 7, the memorandum suggests that government interruption of communications would be content-neutral unless “the government took such action because of its disapproval of the views to be expressed at the public assembly.” The memorandum goes on to discuss a hypothetical example where government interrupts cell phone service because it believes that text messaging is being used to encourage others to join an ongoing riot.

Professor Soucek worries that such action might not be considered content-neutral, because its justification would depend on the content of the text messages. In other words, if government is acting because text messaging is being used to encourage rioting, its rationale would be based on the content of the text messages.

He points to last term’s Supreme Court decision in *Reed v. Town of Gilbert, AZ*<sup>2</sup> as support for his concern. In *Reed*, the Court held that an ordinance that imposed different rules for different categories of signs could not survive scrutiny as a content-neutral time, place, and manner rule. In that case, the town had adopted an ordinance that imposed different rules for size, materials, and display of election signs, ideological signs, signs directing people to events, etc.

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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](http://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. 135 S. Ct. 2218 (2015).

Because the rationale for the categorical distinctions depended on sign content, the ordinance was held to be content-based on its face.

The same rationale might well apply to government interruption of communications that is only exercised to address particular communicative content (e.g., incitement to riot).

That said, Professor Soucek suggests that such action by government might still survive scrutiny under *Brandenburg* or as a limited form of curfew.

The staff sees two possible ways to address Professor Soucek's concern: (1) Draft any future analysis in this study (in the tentative or final recommendation) so as to reflect the concern about content-neutrality. (2) Leave Public Utility Code Section 7908 unchanged with respect to content-neutrality. The two possibilities are not mutually exclusive.

**The staff greatly appreciates Professor Soucek's assistance.**

Respectfully submitted,

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Executive Director