

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Certain Wireless Service Interruptions.

GN Docket No. 12-52

**REPLY COMMENTS OF COMMITTEE ON DEMOCRATIC COMMUNICATIONS
AND MEDIA ALLIANCE**

**ARGUMENTS COMPILED BY:
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Introduction

The intentional interruption of wireless by Bay Area Rapid Transit (BART) agency is subject to the right to communication, U.S. Constitutional Law, the Communications Act, the Open Internet Rules as well as International Law protection of freedom of speech. The comments of the California Public Utilities Commission and the People of the State of California (CPUC) incorrectly argues that the Federal Communications Commission (FCC) does not have jurisdiction to regulate the intentional interruption of Commercial Mobile Radio Service (CMRS) when such intentional interruption is in exercise of State police power to ensure public safety. The Committee on Democratic Communications (CDC) reply comment supports the position that the FCC has jurisdiction to preempt state or local governmental or law enforcement agencies from intentionally interrupting CMRS to address immediate threats to public safety. Furthermore, CPUC's comments ignore that the perceived immediate threat to public safety was an expression of free speech where some opposing views of BART would be expressed. Thus, BART's actions were to silence free speech.

The speech in question was a pending demonstration to protest specific actions by BART And one of its employees. Without any demonstration having yet appeared, let alone any threat to public safety, BART acted to attempt to disrupt the demonstration by cutting off cell phone communications to prevent demonstrators from organizing and from communicating with each other. Neither BART nor the CPUC has given any reason why this action was necessary or how this pending demonstration was a threat to public safety.

Even had previous demonstrations posed a threat, there is definitive case law barring government agencies from acting in prior restraint to disrupt or prevent the demonstration, or to punish those participating in it prior to actual illegal conduct.

The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct. **Collins v. Jordam 102 F.3d406 (9th Cir 1996)** citing Carroll v. President and Comr's of Princess Anne, 393 U.S 175.

Enjoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation. Carroll at 180”

Here, not only did the demonstrators not pose a clear and present danger to public safety, it hadn't even occurred yet.

BART was acting based simply on its belief that a demonstration was about to occur. This amounts to a prior restraint.

Prior restraints are viewed by the U.S. Supreme Court as “the most serious and the least intolerable infringement on First Amendment rights”. **Nebraska Press, Assn v. Stuart 427 U.S. 559 (1976)**. Since 1931, the Court repeatedly has found that such attempts to censor the media and other forms of free speech before they occur are presumed unconstitutional, beginning with **Near v. Minnesota 283 U.S. 697 (1931)**: see also **New York Times v. United States, 403 U.S. 713 (1971)** the Pentagon Papers case and **Bantam Books. Inc v. Sullivan 372 U.S 58 (1963)**.

In addition, neither BART nor the CPUC has cited any other example or instance where BART has acted in this manner under any circumstance. Where the only instance of such disruption of First Amendment activity and the right to communicate is in the case of an anticipated demonstration against the agency in question, there is a strong presumption that this action by BART is based on the content of the speech.

Content-based restrictions are subject to strict scrutiny and subject to extremely limited exceptions virtually never upheld. See e.g. *Erznoznik v. City of Jacksonville* 422 U.S 205 (1975) and *Chicago Police Department v. Mosley* 408 U.S. 92 (1972). None of those restrictions apply here. The speech, which has not occurred, yet was not obscene, nor did it present a clear and present danger to safety at the time the restrictions were imposed by BART. Instead this was a blatant act to silence criticism of the agency doing the silencing.

This amounts to a gross abuse of power to silence communication for wholly self-serving and inappropriate reasons, and is precisely the reason why the FCC should act to protect the right of the public to communicate and prevent public agencies from acting in this manner.

Allowing a public agency to cut off communications in this manner, also severely restricts the rights of uninvolved persons to communicate about the basic situations of life for no reason other than because its convenient to disrupt the critics of the agency. Thus it penalizes those seeking to exercise their First Amendment right to demonstrate and those who are not without any justification whatsoever.

FCC as guardian of the right to communicate

The FCC is the guardian of the human right to communicate for the People of the United States of America. As guardian, the FCC holds in public trust our public radio and television waves, regulates promotes innovation, competition, and efficient modes of communication, and supports economic development by and through the human right to communicate. The FCC should view intentional interruption of CMRS by state, local, or law enforcement agencies as violations of international norms, and have a duty to protect the People of the United States of

America from such violations under the International Law, the United States Constitution, and the Communications Act.

During the Arab Spring of 2011, several foreign governments intentionally interrupted CMRS to suppress the human right to communicate.¹ Most famously, the Egyptian government shut down Internet, mobile and SMS service in attempt to suppress anti-government protests.² Secretary of State, Hillary Clinton, urged Egypt to “reverse the **unprecedented** steps it has taken to cut off communication.”³ White House spokesman Robert Gibbs warned: "Government must respect the rights of Egyptian people and turn on social networking and Internet."⁴ Further, the Obama administration has acknowledged: "From now on, any and all dissent movements will have technology as a core component.”⁵ Such strong statements by government officials indicate the important role respecting the human right to communicate plays in international relations, as well as the health of a democracy.

In *Charming Betsy*, a Dutch neutral ship was mistakenly captured, seized and sold under a domestic law intended to target French ships.⁶ The Supreme Court explains “when a court is faced with competing interpretations of a statute, the court should construe the statute in a way that does not conflict with international treaty obligations whenever it would be reasonable to do so.”⁷ This is done to prevent international discord. As applied to the intentional interruption of CMRS, the *Charming Betsy* doctrine mandates that the FCC prevent international discord by having state, local, or law enforcement agencies from undermining United States positions in foreign relations. The FCC violates its duty as guardian by permitting these agencies to proscribe to the same conduct being condemned internationally.

¹ Similar acts of suppression and censorship have been taken by governments in Tunisia, Nigeria, Pakistan, Kazakhstan, Afghanistan, Syria, China and the Philippines, among others. CITE CDC MA COMMENT.

² Egypt’s Web, Mobile Communication Severed, By Shereen El Gazzar, Lilly Vitorovich, and Ruth Bender | The Wall Street Journal | January 28, 2011, available at, <http://www.yhumanrightsblog.com/blog/2011/01/28/egypts-web-mobile-communications-severed/>

³ Dombey, Daniel, US Warns Aid is at Risk Unless Mubarak Eases Grip, Financial Times, Jan. 28, 2011, *available at*, <http://www.ft.com/cms/s/0/570d5474-2b0c-11e0-a65f-00144feab49a.html#axzz1s8NCb5oi>.

⁴ Sheridan, Mary-Beth, Washington Post, Jan. 28, 2011, *available at*, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/28/AR2011012804554.html>

⁵ *Id.* (citing Alec Ross, Clinton's senior adviser for innovation.)

⁶ *Murray v Schooner Charming Betsy*, 6 U.S. 64 (1804).

⁷ *Id.*

Technological advances progress society through the information age at high speeds, while the law is slow to react. International human rights law is relevant today and applicable to new communication technologies as traditional forms of expression, communication, and interaction take new form. Article 19 of the Universal Declaration of Human Rights provides: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁸ As champions of human rights, the United States rightly condemned the desperate unilateral actions of fearful dictators. The United Nations considers cutting off users from Internet access, regardless of justification, to be a violation of Article 19 and the Covenant.⁹ Violations of human rights should not be justified by state, local, or law enforcement agencies’ perceived threats to public safety. As BART’s actions demonstrate that without FCC oversight, these agencies will violate human rights to silence dissenting opinions adverse to its interests.

⁸ <http://www2.ohchr.org/english/law/ccpr.htm>

⁹ See, La Rue, Frank, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, United Nations, Human Rights Council, Seventeenth Session, May 16, 2011, **PAGE?** available at, <http://documents.latimes.com/un-report-internet-rights/>.