Bloomberg BNA

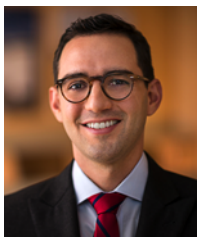
The United States
Law Week

Case Alert & Legal News™

Civil Procedure

Litigants should not make discovery demands that, if granted, will violate their adversaries' First Amendment right protecting private associational political speech, WilmerHale's Jeffrey P. Schomig and Chesapeake Energy Corp.'s Reagan E. Bradford say. To help curtail such fishing expeditions, the authors argue that Congress should set an example by demanding that government agencies refrain from subpoenaing associational membership lists and protected, private political speech without first making a *prima facie* showing that the association or speech was likely used in furtherance of a crime.

In Search of an Effective Defense to Litigation Fishing Expeditions Into Private, Associational Political Speech



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"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances*." U.S. Const., amend. I. (emphasis added).

One of the chief objectives of the First Amendment is to protect political speech. Central to this protection is the right to confer with others in a confidential setting.

This does not mean that all private, political discussions must be afforded absolute confidentiality. Associational speech in furtherance of a crime is not protected, and all rights can be regulated within reason to balance important societal aims.[1]

Publicity surrounding the government's electronic data collection efforts has renewed attention to the high regard citizens hold for the privacy of speech. Citing privacy concerns, a federal judge in the District of Columbia recently chastised government prosecutors for

[1] This article takes no position on the separate issue of campaign finance. Rather, the type of speech referenced here concerns the detailed discussions about legislation, political representation and strategies for petitioning the government—the core processes of associational members as they develop ideas about how they might engage with their government.

 ISSN 0148-8139

requesting warrants intended to allow fishing expeditions into a target's e-mail account.[2]

But a far more common First Amendment intrusion occurs when government investigators and private litigants employ the adversarial nature of our judicial system to force members of public interest and trade associations to reveal their most sensitive private speech.

Unlike more publicized constitutional-based privacy issues, this practice does not involve the mass collection of private speech for mere potential (but unlikely) review. Rather, it involves targeted attempts to gain, read and then analyze private political and legislative speech for use against the very parties from whom it is collected.

As a result, this data collection is far more likely to reveal a target's most sensitive private speech at the height of political strategizing.

This intrusion occurs when parties in lawsuits or investigations face ''discovery demands'' from the government, business competitors, political rivals, or other adversaries bent on doing them financial harm. The purpose of such demands is to obtain information for trial regarding private discussions on what a person or organization thinks about proposed laws, how those laws might help or harm their organization, their views of certain regulatory agencies and prosecutors, or their strategy about how to engage their elected representatives.

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These discovery attempts are not the sole concern of captains of industry in smoke-filled back rooms. Environmental organizations, civil rights groups, grassroots community coalitions and small business associations commonly engage in, and benefit from, private speech about sensitive political and legislative matters.

Concerns about this practice are not speculative. Organizations like these have seen their private speech targeted in government investigations and lawsuits.

Imagine the chilling effect on the willingness of a large corporation and an environmental group to meet about and share concerns on proposed energy policies, if a business rival or state attorney general can then demand that they produce transcripts of that meeting as supposedly relevant to a broad investigation or exploratory lawsuit.

Fortunately, from the U.S. Supreme Court down, courts have recognized that using litigation and investigations to probe protected, private political speech can have a substantial chilling effect on people's willingness to engage in this speech. Unfortunately, the Supreme Court's guidance provides a test that is the opposite of what is needed to effectively protect associational speech from a litigation opponent's unwarranted fishing expedition.

The court's guidance is that the speech proponent must first demonstrate to the court that it would not engage in the targeted speech, or would not join the association through which the speech was made, had it known that a litigation opponent would demand it. Only after making such a showing will the court weigh the chilling effect against the opponent's need for the information to pursue its case.

This test short-circuits the First Amendment's protections. It prevents courts from balancing the constitutional right versus a litigation opponent's need for the protected, private speech until at least some associational members submit to the court self-evident, sworn declarations that they would not join the association, or engage in the private speech, if they knew that speech would be subpoenaed.

Demonstrating this chilling effect is an exercise in the obvious, and the process of forcing association members to satisfy it is, in and of itself, chilling of associational speech.

Other privileges against discovery—including ones not directly tied to a constitutional right, such as the privilege that protects the confidentiality of attorney-client communications—begin with a presumption that allowing open discovery of such communications would deter people from engaging in them.[3]

While a person who invokes the attorney-client privilege, for example, still has the burden of demonstrating that the particular communication meets the elements of that privilege, that burden does not include demonstrating the axiomatic point that one would be less likely to reveal sensitive, embarrassing or personally endangering information to her attorney if she thought that the information would later be revealed in a legal proceeding.[4]

The current application of the First Amendment's associational privilege stands in contrast to privileges such as the attorney-client privilege. Only if a court is satisfied that the technical requirements of this first part are met (submission of sworn declarations attesting that disclosure of the subpoenaed information would have a chilling effect on associational speech), will it weigh this effect against the government's or private litigation opponent's need for the information. Un-

[2] *In re Search of Info. Associated with @mac.com*, 25 F.Supp. 3d 1 (D.D.C. 2014) (''[T]he government must stop blindly relying on the language provided by the Department of Justice's *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* manual. By doing so, it is only submitting unconstitutional warrant applications.'').

[3] *See, e.g., Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998) (''[W]e have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.'') (citing *Jaffe v. Redmond*, 518 U.S. 1, 12 (1996); *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

[4] *See, e.g., Upjohn v. United States*, 449 U.S. 383, 393 (1981) (''But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.'').

  LW ISSN 0148-8139

surprisingly, this has led courts to arrive at varying outcomes in political speech protection.

Courts upholding First Amendment protection of associational speech most commonly do so to protect associational membership lists that the government or a private litigation opponent seeks to access and use against one or more of the association's members.

In the 1958 seminal case of *NAACP v. Alabama*, the Supreme Court held that the Alabama Attorney General's investigation into whether the NAACP had the proper state-issued license to operate in Alabama did not justify a subpoena demanding the name and address of every Alabama resident who was a member of the NAACP.[5] Similar court decisions have occurred with respect to disclosure of other organizational membership lists.[6]

A few courts, however, appear to have recognized that protecting associational political speech goes beyond merely guarding membership lists from unwarranted intrusion. These courts have found that private speech of the members, themselves, can deserve such protection.

A federal trial court in Washington, D.C., held that the First Amendment's freedom of association may protect ''strategic communications on policy issues with other environmental advocacy groups.''[7]

A California federal court noted that First Amendment protections may disfavor discovery of private communications that take place ''between or among people who share political views . . . .''[8]

Even the Supreme Court has ruled that, absent ''overriding compelling state interest,'' a communist party member could not be compelled to testify about private political discussions he made while an alleged past member of certain political associations.[9]

Other courts have allowed this type of private speech to be discovered in litigation over the speech-holder's First Amendment-based objection.

A technical error, such as an association member failing to submit a sworn statement about the self-evident chilling effect of disclosing private associational speech, can cause a court to not even consider the balance between the First Amendment's protections and the need of litigation opponents to intrude on private associational speech. These courts steadfastly require sworn statements ''that disclosure of private [legislative/political] speech will deter membership due to fears of threats, harassment or reprisal from either government officials or private parties which may affect members' physical well-being, political activities or economic interests.''[10]

Federal agencies can be even more intrusive in their regulatory investigations. The Department of Justice often demands, for example, disclosure of associational membership affiliation from any entity that is subject to its routine antitrust merger review, regardless of whether it has any evidence that such membership is used to further any illegal activity.

These examples leave us with an uncertain framework for First Amendment protection whereby associational membership lists are more likely to be protected from discovery than the far more sensitive private, political discussions among association members.

Forcing the latter to be revealed to the government or to business adversaries is often far more chilling of associational political speech than a mere membership list. This uncertainty renders virtually worthless any ''First Amendment privilege'' claimed by the courts to exist in common law.

There exists an uncertain framework for First Amendment protection whereby associational membership lists are more likely to be protected from discovery than the far more sensitive private, political discussions among association members.

The Supreme Court has warned that ''[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.''[11]

What to do about this? A standard lawyer's answer might be for parties to assert First Amendment protection more often, creating more opportunities for courts to consider the issue and, thereby, expanding and solidifying the common law of First Amendment privilege.

To be sure, one goal of this article is to make more people aware that this privilege exists so that they can make an informed decision about when to assert it if they find themselves facing a subpoena that targets their private political speech.

But crafting common law through court disputes is not very practical in the near term. Litigious behavior is expensive, courts are already overburdened and the common law typically develops at a glacial pace.

A better way to make the protection of private political speech more predictable in the near-term is for Congress and state legislators to act.

There is precedent for such action. Prior to 2008, government investigatory targets faced routine government

[5] *NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958) (''recognizing that a right to privacy is a ''vital'' component to freedom of association.)

[6] *See, e.g., DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 829 (1966); *Shelton v. Tucker*, 364 U.S. 479, 480-84 (1960) (striking down Arkansas law requiring public school teachers to list names of all organizations to which they belong).

[7] *Wyoming v. USDA*, 208 F.R.D. 449, 454-55 (D.D.C. 2000).

[8] *Beinen v. Ctr. For Study of Popular Culture*, 2007 WL 1795693, *1-*2 (N.D. Cal. June 20, 2007). *See also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (''[T]he delicate nature of the materials demanded [internal political strategy documents] . . . represents the very heart of the organism which the first amendment was intended to nurture and protect'').

[9] *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 829 (1966) (finding the New Hampshire Attorney General's investigation into communist-based ''subversive activities too vague, the court cautioned ''the staleness of both the basis for the investigation and its subject matter makes indefensible such exposure of one's associational and political past—exposure which is objectionable and damaging in the extreme to one whose associations and political views do not command majority approval.'').

[10] *In re Ford Motor Fuel Temperature*, 707 F. Supp.2d, 1159 (D. Kan. 2010).

[11] *Upjohn v. United States*, 449 U.S. at 393 (1981).

intrusion into their privileged, private, attorney-client communications. That intrusion came in the form of prosecutorial pressure on investigatory targets to waive privilege protection in exchange for cooperation credit.

Congress, led by the Senate Judiciary Committee, responded by pressuring both the Department of Justice and Securities and Exchange Commission to enact policies curtailing prosecutors' practice of coercing privilege waivers.[12]

Congress should take similar action now. Without even passing legislation, it can use its persuasion to demand that government agencies refrain from subpoenaing associational membership lists and protected, private political speech without first making a *prima facie* showing that the association or speech was likely used in furtherance of a crime.

While this would not prevent private litigants from attempting to obtain the same information from their opponents, if government prosecutors formally announced a policy more respectful of private associational political speech, it would likely have broader influence on how courts rule on this issue in all matters.

Congress has often shown restraint in deference to the First Amendment's protections from government intrusion. For example, Congress continues to take a strong bipartisan position in favor of almost blanket protection from disclosure of political discussions by legislative aids by invoking the Constitution's ''speech and debate clause.''[13] Congress has taken this position even though it shields unlawful behavior. This argument recognizes the value in preventing political speech from being used as a weapon in a judicial proceeding, and goes well beyond any protections proposed here for First Amendment associational speech.

Instead, we propose protections more akin to the First Amendment's freedom of the press, to which Congress has also shown deference when this has been raised in congressional hearings. This ''reporter's privilege,'' which has largely proven to be a useful, workable framework of protecting one vital type of vital First Amendment Speech, is nearly identical to what we now propose the courts and Congress apply to equally vital associational speech.

In an era of partisan bickering, shielding private associational political speech from investigatory and litigious fishing expeditions would similarly serve the best interests of a wide range of constituents. It would be a stand for a critical constitutional right that would benefit associational members from all political persuasions.

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[12] In 2007, the Attorney-Client Privilege Protection Act passed the House of Representatives by a voice vote. *See* 153 Cong. Rec. H13562-64 (daily ed. Nov. 13, 2007) (passage on voice vote); see also H.R. 3013, 110th Cong., 1st Sess. (2009) (the Attorney-Client Privilege Protection Act of 2007); H. Rep. No. 445, 110th Cong., 1st Sess. (Nov. 13, 2007).On February 13, 2009, Senator Arlen Specter (R-PA) introduced S. 445, the Attorney-Client Privilege Protection Act of 2009. ''Like my previous bills, this bill will protect the sanctity of the attorney-client privilege by statutorily prohibiting Federal prosecutors and investigators across the executive branch from requesting waiver of the attorney-client privilege and work product protections in corporate investigations. 154 Cong. Rec. S2331-S2332 (Feb. 13, 2009) (remarks of Senator Specter). The legislation was referred to the Senate Judiciary Committee, but ultimately not passed in response to policy changes at DOJ and the SEC.

[13] *See* Kenneth P. Doyle, *Hill Aid in Abramoff-Linked Case Properly Convicted of Taking Gratuities*, Bloomberg BNA, Aug. 14, 2014 (testimony of congressional aide ''was barred after lawyers for the House convinced the trial judge that the aide was protected from having to testify by the Constitution's speech-or-debate clause''); *see also* (83 U.S.L.W. 274, 8/19/14).

   ISSN 0148-8139