Fading Privacy Rights of Public Employees

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Introduction

There has recently been a marked increase in the volume of social commentary highlighting the erosion of the Fourth Amendment. And perhaps no other segment of society has witnessed its constitutional privacy protections disappear at a faster pace than public employees, who have been told by the courts that they are subject to warrantless searches of their offices, telephones, and computers. Courts have held that public employees do not enjoy an expectation of privacy regarding information contained in their personnel files, like their salaries and other personal financial records. Privacy rights involving drug testing and audio and video monitoring have likewise diminished over the last several years. Finally, with the proliferation of social media, public employees are falling victim to free speech retaliation that bears an eerily similar complexion to that of their vanishing privacy rights.

I recently had the opportunity to argue a public employee privacy case before the United States Supreme Court. The case involved the search and seizure of a police officer's personal text message communications by his employer. The research I conducted in preparation for my argument confirmed what I already believed to be the case—privacy rights of public employees are rapidly fading. Cases interpreting both the federal government's Freedom of Information Act, as well as cases interpreting its California analog, the California Public Records Act, continue to expand the scope of disclosure, while reducing the privacy protections of government employees.[1]

Expansion of government, with the contemporaneous constriction of privacy rights for government employees, places us on a crash course with the prospect of virtually becoming a police state, where there is little to no protection from governmental intrusions. Every day, more and more indi-

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[1] *See, e.g., Milner v. Dep't of the Navy*, 131 S.Ct. 1259 (2011) (broadening disclosures under the Freedom of Information Act by narrowly construing the term "personnel" in Exemption 2 of the Act); *Comm'n on Peace Officer Standards and Training v. Superior Court*, 165 P.3d 462 (Cal. 2007) (holding that peace officers' names, employing agency, and employment dates were not confidential "peace officer personnel records" and thus were subject to disclosure under the California Public Records Act). Also, although recently depublished following a grant of certiorari by the California Supreme Court, the California Court of Appeal held, in *Long Beach Police Officers Assn. v. City of Long Beach*, 203 Cal.App.4th 293 (2012), that the names of police officers involved in shootings was subject to disclosure under the California Public Records Act.

viduals find themselves under the watchful eye of the government, not as a sovereign, but as their employer. Government employees find themselves being disciplined for speech or activities they reasonably believed to be private—speech and activities that have no nexus to their workplace.

One might ask, "Shouldn't public employees enjoy greater protections than private employees, given their ability to sue their employers for constitutional violations?" But public employment can best be characterized as a double-edged sword when it comes to constitutional protections. On one hand, the government typically maintains a level of oversight and control of its employees that is much more extensive than that of a private employer.[2] It has long been recognized that "the government as employer indeed has far broader powers than does the government as sovereign."[3] On the other hand, a public employee's boss is a state actor, which affords the employee the right to redress when subjected to free speech retaliation, unlawful searches and seizures, or other constitutional violations. Such redress would not be available to a private employee. So while a public employee may have the right to sue his employer under the Constitution for privacy breaches, it is much more likely that such a situation would arise for public employees than their private counterparts.

The purpose of this Article is to provide some background on public employee privacy rights, explain the approach taken by the courts in interpreting and defining those rights, and discuss troubling indicators that suggest that privacy rights are fading for public employees. As the managing partner of a law firm that represents more than 120 public employee unions, as well as a former police officer, I have been involved in many aspects of public employee privacy. Hopefully, my thoughts and impressions on this issue will add to the ongoing discourse.

I. The Murky Privacy Rights of Public Employees

There exists no express right to privacy in our Constitution. But over the decades, courts have interpreted the Bill of Rights so as to establish certain individual protections against government intrusions. These protections include certain privacy guarantees, which, as the analysis goes, are contained within the penumbra of the Bill of Rights,[4] particularly under the First,[5] Fourth,[6] Fifth,[7] and Ninth[8] Amendments. These privacy rights also

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[2] *See, e.g.*, Engquist v. Or. Dep't of Agric., 553 U.S. 591, 599 (2008) ("[G]overnment has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.").

[3] Waters v. Churchill, 511 U.S. 661, 671 (1994).

[4] Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (finding that specific guarantees in the Bill of Rights have penumbras, one of which is privacy).

[5] 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.").

extend to citizens who find themselves under government control as a result of their public employment.

A. Initial Limitations on Privacy Rights in O'Connor v. Ortega

Over two decades ago, in *O'Connor v. Ortega*,[9] the Supreme Court explained that the Fourth Amendment applies to "[s]earches and seizures by government employers or supervisors of the private property of their employees[.]"[10] However, the Court concluded, some privacy expectations held by public employees may be unreasonable given the "operational realities of the workplace."[11] The operational realities test has become the measure by which courts gauge whether public employees have an expectation of privacy that is deemed reasonable.[12]

O'Connor involved an administrative search that led to the dismissal of the Chief of Professional Education at the Napa State Hospital, Dr. Mango Ortega.[13] Hospital officials suspected that Dr. Ortega had committed multiple acts of misconduct. The officials alleged that he provided misleading statements about the acquisition of a computer for use in the hospital's residency program, allegations that he committed sexual harassment, and allegations that he took inappropriate disciplinary action against a resident.[14] Dr. Ortega was placed on administrative leave while hospital officials conducted an investigation into the misconduct allegations.[15]

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[6] Terry v. Ohio, 392 U.S. 1, 9 (1968) ("[W]herever an individual may harbor a reasonable 'expectation of privacy' . . . he is entitled to be free from unreasonable government intrusion.") (citation omitted).

[7] Katz v. United States, 389 U.S. 347, 350 n.5 (1967) ("To some extent, the Fifth Amendment too 'reflects the Constitution's concern for' . . . the right of each individual 'to a private enclave where he may lead a private life.' ") (citation omitted).

[8] *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring) ("To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.").

[9] 480 U.S. 709 (1987).

[10] *Id.* at 715 (plurality opinion).

[11] *Id.* at 717.

[12] In *Quon*, the Supreme Court noted that the *O'Connor* plurality's operational realities test has not been clarified for over two decades. *See City of Ontario v. Quon*, 130 S. Ct. 2619, 2628-29 (2010). However, several cases are cited in Respondent's Brief in *Quon* evidencing the adoption of the operational realities test. *See* Respondent's Br. 29-32 (citing *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000); *United States v. Johnson*, 16 F.3d 69 (5th Cir. 1994); *American Postal Workers Union, Columbus Area Local AFL-CIO v. U.S. Postal Service*, 871 F.2d 556, 560 (6th Cir. 1989); *Gossmeyer v. McDonald*, 128 F.3d 481, 490 (7th Cir. 1997); *Narducci v. Moore*, 572 F.3d 313, 321 (7th Cir. 2009); *United States v. Thorn*, 375 F.3d 679 (8th Cir. 2004), *vacated on other grounds by* 543 U.S. 1112 (2005); *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002); *Stewart v. Evans*, 351 F.3d 1239 (D.C. Cir. 2003)).

[13] 480 U.S. at 712.

[14] *Id.*

[15] *Id.*

While Dr. Ortega was home on administrative leave, one of the hospital's investigators conducted a thorough search of Dr. Ortega's office.[16] Several of the items seized by the investigators from Dr. Ortega's office were subsequently used against him during a California State Personnel Board hearing.[17] Hospital officials argued that the search was made as part of an inventory, as was routinely conducted when an employee was terminated.[18] However, the search was commenced prior to Dr. Ortega's dismissal, and other facts also strongly suggested that the search had been conducted for purposes of gathering evidence.[19]

The Ninth Circuit Court of Appeals held that "Dr. Ortega had a reasonable expectation of privacy in his office" and that the hospital was liable for damages resulting from the unlawful search.[20] The Supreme Court granted *certiorari* and, by plurality decision, reversed the Ninth Circuit.[21] The Court's fractured opinion is worth a look, as it remains the rule to be applied by district courts in public employee privacy cases.

Chief Justice Rehnquist and Justices O'Connor, White, and Powell decided that the determinations of whether public employees have a reasonable expectation of privacy must be made on a case-by-case basis—the reason being that working conditions, or "operational realities," can vary greatly from one public employee to the next and the analysis is therefore always fact-intensive.[22] Under this rubric, the plurality found that Dr. Ortega had a reasonable expectation of privacy in some of the areas searched, including his desk and file cabinets.[23] Given that determination, the next question became whether the search was reasonable in its inception and in its scope.[24] Because a factual dispute still existed regarding the justification for the search, the case was remanded to the district court.

Justice Scalia, concurring, concluded that government searches like the one at issue, which would be reasonable and normal in the private employment arena, do not run afoul the Fourth Amendment.[25] Justice Scalia reasoned that this would be true whether the purpose of the search was to retrieve work-related materials or to investigate employee misconduct.[26] Justice Scalia's view of public employee privacy is essentially that it does not exist when the search is conducted by the employer, as opposed to the police.[27] But that interpretation misses the point. The Fourth Amendment protects citizens from unlawful searches and seizures *by the government*, not

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[16] *Id.* at 713.
[17] *Id.*
[18] *Id.*
[19] *See id.*
[20] *Id.* at 714.
[21] *Id.*
[22] *Id.* at 709–10.
[23] *Id.* at 710.
[24] *Id.* at 719.
[25] *Id.* at 731–32 (Scalia, J., concurring).
[26] *Id.* at 732.
[27] *See id.* at 731.

only by the police. What happens when the employer *is* the police? Although I obviously disagree with Justice Scalia's opinion of the scope of Fourth Amendment protections, I do find merit in his critique of the nebulous standard employed by the plurality:

> The plurality opinion instructs the lower courts that existence of Fourth Amendment protection for a public employee's business office is to be assessed "on a case-by-case basis," in light of whether the office is "so open to fellow employees or the public that no expectation of privacy is reasonable." No clue is provided as to how open "so open" must be; much less is it suggested how police officers are to gather the facts necessary for this refined inquiry. As we observed in *Oliver v. United States*, 466 U.S. 170, 181, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984), "[t]his Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." Even if I did not disagree with the plurality as to what result the proper legal standard should produce in the case before us, I would object to the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty in this field.[28]

Justices Blackmun, Brennan, Mashall, and Stevens dissented, taking the position that Dr. Ortega had an expectation of privacy in his office and that the search had been unlawful.[29] The dissent, like the plurality, drew the distinction between retrieving documents from an employee's office for necessary, work-related purposes and conducting an investigatory search.[30] Because the search of Dr. Ortega's office was for investigatory purposes, the employer should have been required to adhere to the warrant and probable cause requirements under the Fourth Amendment.[31]

The *O'Connor* dissent provides a much more workable model than that provided by the plurality for analyzing public employee privacy rights. Regardless of which rule the Court applied, public employers would surely try to characterize investigatory searches as being routine so as to avoid the heightened scrutiny. But if the Court had adopted the dissent's approach, we would be on much more solid ground: If the public employer wanted to conduct an investigatory search of an area in which the employee maintains a reasonable expectation of privacy, it would have to satisfy the probable cause/warrant requirement. If, on the other hand, the public employer entered into one of its employee's workplaces in good faith to obtain necessary work-related materials, even an area in which the employee maintains a reasonable expectation of privacy, the employer would not be expected to sat-

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[28] *Id.* at 729–30 (internal citation omitted).
[29] *Id.* at 732–33 (Blackmun, J., dissenting).
[30] *See id.* at 745–46.
[31] *See id.*

isfy the probable cause/warrant requirement. To the extent this rule could be characterized as more well-defined, it still exists only hypothetically in the form of a dissenting opinion. As I discovered in one of my own cases, we remain under the *O'Connor* plurality's hazy framework.

B. Quon v. City of Ontario*: Kicking the* O'Connor *Can Further Down the Road*

On April 19, 2010, I argued *City of Ontario v. Quon*[32] before the U.S. Supreme Court, which gave the Court the opportunity to revisit *O'Connor*. The case centered around Sergeant Jeff Quon, who had been issued an alphanumeric pager by the City of Ontario in connection with his duties on the Ontario Police Department's SWAT team.[33] Sgt. Quon, as well as other members of the SWAT team, was allowed to use his pager for personal use, but was required to pay any overage fees that resulted from personal use.[34] Although the City's general computer policy stated that the City could access employees' work computers and audit emails, it did not mention pagers.[35] Moreover, Sgt. Quon's Department Commander agreed not to audit the use of pagers so long as the employee paid the overage fee.[36] Given the fact that he was paying for the personal-use portion of his pager bill, Sgt. Quon reasonably believed that he maintained privacy in his personal text messages.[37]

After several months of this arrangement, the police chief ordered an audit of the text messages.[38] At the police chief's request, the text messages of Sgt. Quon and one of his coworkers were obtained from Arch Wireless.[39] This action was taken without procuring a warrant, without issuing a subpoena, and without the police department notifying Sgt. Quon.[40] Arch Wireless simply provided the text messages at the city's request, which the Ninth Circuit would later find violated the Stored Communications Act.[41]

Sgt. Quon and others with whom he corresponded via text message brought suit against the City of Ontario, alleging that the city violated their Fourth Amendment rights by conducting an unlawful search of their text messages.[42] The district court decided that Quon had a reasonable expectation of privacy in his text message communications.[43] Next, under the *O'Connor* approach, the court also had to determine whether the search was

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[32] 130 S. Ct. 2619 (2010).
[33] *Id.* at 2625.
[34] *Id.* at 2625–26.
[35] Brief of Respondents at 2, *Quon*, 130 S. Ct. 2619 (No. 08-1332), 2010 WL 989696, at *2.
[36] *Id.*
[37] *Id.*
[38] *Quon*, 130 S. Ct. at 2626.
[39] *Id.*
[40] *See id.*
[41] *Id.* at 2626–27.
[42] *Id.* at 2626.
[43] *Id.*

reasonable in its inception and scope.[44] Because a factual dispute existed regarding the purpose of the search, the issue was resolved by a jury, which found that the search was not investigatory, but instead was conducted for the purpose of auditing the sufficiency of the character limit on the pager accounts.[45] In other words, the defendants convinced the jury that the audit of Quon's text messages had not been performed to find out whether he was sending personal text messages while on duty: instead, it was performed to make sure that the character limit on the text message account was sufficient so that members of the SWAT team were not paying for work-related communications. Based on that finding of fact, the district court entered judgment in favor of the defendants on the free speech claim.[46]

On appeal, a Ninth Circuit panel agreed with the district court that Quon had a reasonable expectation of privacy in his text message communications.[47] The court further held that notwithstanding the jury's determination that the search was justified at its inception, the search was not reasonable in scope.[48] In its analysis, the panel pointed out that the search was overly intrusive.[49] If the purpose of the search was simply to audit the text message accounts regarding character limits, the task could have been accomplished without the need to read through all of Quon's messages, work-related as well as private.[50] The panel's analysis framed the issues on appeal to the Supreme Court.

In presenting the case to the Supreme Court, both parties analyzed the facts under the framework provided by the plurality in *O'Connor*—first, did Sgt. Quon and his co-plaintiffs enjoy a reasonable expectation of privacy in their text messages? If so, did defendants conduct a search of the text messages for purposes of the Fourth Amendment? If both of these elements are met, was the search reasonable? That is to say, was it justified at its inception and not excessive in scope?[51]

Unfortunately, the Court punted on most of these determinations, opting instead to focus on a single issue upon which it could dispose of the case—the scope of the search.[52] The Court assumed for purposes of its analysis that the plaintiffs had a reasonable expectation of privacy and that a search had been conducted within the meaning of the Fourth Amendment.[53] With those assumptions in place, the Court reversed the Ninth Circuit, holding that that the search had been reasonable in scope.[54] The Court's decision

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[44] *Id.* at 2627.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See* Brief of Respondents, *supra* note 35; Brief of Petitioners, *Quon*, 130 S. Ct. 2619 (No. 08-1332), 2010 WL 565207.
[52] *Quon*, 130 S. Ct. at 2622–24.
[53] *See id.* at 2630–31.
[54] *Id.* at 2633.

in *Quon* is limited to a very specific set of facts, which limits its application and does not make it a particularly controversial opinion. However, several things stand out in *Quon*.

First, the Court did not hesitate to reaffirm its previous holding in *O'Connor* that public employees are entitled to constitutional protections against unlawful searches and seizures conducted by their government employers.[55]

Next, the *Quon* Court's lack of understanding of high technology in a rapidly evolving workplace, perhaps coupled with its reluctance to analyze these issues, is notable. In oral argument, I was asked several questions by the Justices that underscored this troubling issue.[56] How can the Court decide whether someone has an expectation of privacy in a person's communications when it fails to understand the mode of correspondence? We no longer live in a world where communication is limited to postage and telephones.[57] I was surprised, as were many commentators in the media, by the Court's questions in oral argument regarding how cell phones and text messaging actually works.[58]

Another troubling aspect of *Quon* is that the Court completely sidestepped an opportunity to revisit *O'Connor* and resolve its ambiguities.[59] The Court refused to endorse the *O'Connor* framework, but offered neither modifications nor alternatives. Of course, Justice Scalia's concurrence wasted no time reaffirming his disapproval of the *O'Connor* rule. He wrote: "I continue to believe that the 'operational realities' rubric for determining the Fourth Amendment's application to public employees invented by the plurality in *O'Connor v. Ortega* . . . . is standardless and unsupported."[60]

Finally, a couple of the comments and questions raised in oral argument suggested that the Court was less than sympathetic to public employment privacy. Obviously, many questions posed by the Court involve no more than "devil's advocate" scenarios. But consider a question posed to me by Justice Stevens: "[W]ouldn't you just assume that the whole universe of conversations by SWAT officers who are on duty 24/7 might well have to be

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[55] *See id*. at 2622.

[56] *E.g.*, Transcript of Oral Argument at 29, *Quon*, 130 S. Ct. 2619 (quoting Chief Justice Roberts: "Maybe – maybe everyone else knows this, but what is the difference between a pager and email?").

[57] *Supreme Court Justice Elena Kagan Speaks in Tampa*, TBO.COM (Oct. 15, 2011), http://www2.tbo.com/news/breaking-news/2011/oct/15/supreme-court-justice-elena-kagan-speaks-in-tampa-ar-272250/ (quoting Justice Kagan as saying that Justices do not email each other, but instead send memos, hand-delivered by clerks).

[58] *See* Transcript of Oral Argument at 44, *supra* note 56 (quoting Chief Justice Roberts: "What happens, just out of curiosity, if you're – he is on the pager and sending a message and they're trying to reach him for, you know, a SWAT team crisis? Does he – does the one kind of trump the other, or do they get a busy signal."); *id.* (quoting Justice Kennedy: "And he's talking with a girlfriend, and he has a voice mail saying that your call is very important to us; we'll get back to you?").

[59] *See Quon*, 130 S. Ct. at 2628 ("[B]oth petitioners and respondents start from the premise that the *O'Connor* plurality controls . . . . It is not necessary to resolve whether that premise is correct.").

[60] *Id*. at 2634 (Scalia, J., concurring).

reviewed by some member of the public or some of their superiors?"[61] That question suggests the wholesale abandonment of factual analysis. Instead Stevens seems to urge simply adopting unsupported assumptions about public employment. Also, the mere existence of public records act laws should not eliminate public employee privacy, as some of the arguments implied.[62]

While it was perhaps convenient for the Court to dispose of *Quon* based on the scope of the search, government employees and employers are now left on very shaky ground regarding when employees have a reasonable expectation of privacy related to their employment. And while some of the blame should be shouldered by the Supreme Court for its failure to provide clear guidance on public employee privacy cases, it is becoming exceedingly clear that lower federal courts and state courts are largely responsible for the slow-but-sure annulment of public sector privacy rights.[63]

II. The Diminishing Constitutional Protections of Public Employees

Years ago, courts frequently recognized the privacy rights of public employees. It was not uncommon to read decisions containing declarations like, "[w]hat [a police officer] does in his private life, as with other public employees, should not be his employer's concern unless it can be shown to affect in some degree his efficiency in the performance of his duties."[64] Very rarely is that rule now espoused. Instead, courts seemingly take the position that public employees should expect diminished privacy protections by virtue of their employment with the government. This reduction of public employee privacy protections can be seen not only in constitutional legal opinions, but also in the media, and in legislative acts around our nation.

Consider public employee privacy rights vis-à-vis the Freedom of Information Act (FOIA).[65] FOIA permits broad disclosure of government records subject to specifically enumerated exceptions. Among the nine categories of records specifically exempted from disclosure, section 552(b)(6) is "personnel and medical files and similar files the disclosure of which would consti-

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[61] Transcript of Oral Argument at 39, *supra* note 56.

[62] Quoting Justice Breyer's dissent from *Garcetti*, Petitioners in *Quon* argued that "Police officers' text messages are particularly logical candidates for requests under public records laws because " 'public issues,' indeed, matters of 'unusual importance,' are often daily bread-and-butter concerns for the police . . . .' " Brief of Petitioners at 37, *supra* note 51.

[63] *See, e.g.*, *Citizens for Environmental Quality, Inc. v. U.S. Dept. of Agriculture,* 602 F.Supp. 534 (D.D.C. 1984) (ordering Dept. of Agriculture to release the results of medical tests on Forestry Service employees to environmental group); *Core v. U.S. Postal Service,* 730 F.2d 946 (4th Cir. 1984) (disclosure of the contents of a postal service employee's employment application did not constitute an unwarranted invasion of personal privacy); *Int'l Fed. of Prof'l and Technical Engineers, Local 21, AFL-CIO*, 42 Cal.4th 319 (2007) (requiring city to disclose records indicating name, job title, and gross salaries of all city employees who earned at least $100,000).

[64] Bruns v. Pomerleau, 319 F. Supp. 58, 67 (D. Md. 1970).

[65] 5 U.S.C. § 552 (2006).

tute a clearly unwarranted invasion of personal privacy."[66] A reasonable public employee would read the text of this statute and conclude that it protects disclosure of his personal information to the public.

Courts, on the other hand, have chosen to err on the side of disclosure by placing a high burden upon government agencies that invoke the invasion of privacy exception. First, the agency must demonstrate that the information at issue is in fact included in a personnel, medical, or similar document.[67] Then, the agency must demonstrate that release of the information would violate "substantial privacy interests" of the person involved.[68] Next, a balancing test is conducted, pitting this "substantial privacy interest" against the interests of disclosure as mandated by FOIA's purpose of opening "agency action to the light of public scrutiny,"[69] with the added hurdle that the invasion must be "clearly unwarranted" rather than being merely "unwarranted."[70] Lastly, courts are instructed to "tilt in the favor of disclosure" when applying this test because their purpose is to enforce the congressionally determined balance in favor of disclosure.[71]

Despite the Supreme Court's assertions to the contrary, what has developed is a case-by-case approach, giving little guidance on the judicial application of § 522(b)(6). The result is the appearance that a federal employee's privacy in the information held by their employer is certain only for very basic, intensely personal information. Social security numbers, medical information, and other personal data are private, but the privacy of any information beyond that is much less certain. The varied cases illustrate the wide range of seemingly personal information subject to disclosure under FOIA: names of employees subject to internal investigation by an employing agency;[72] records generated by the Internal Revenue Service for use in selecting among its employees for open promotions;[73] internal personnel records for former U.S. Department of Agriculture meat inspectors convicted of taking bribes;[74] documents and records reflecting settlements made and offered to former employees terminated by the Federal Aviation Administration;[75] names and home addresses of all employees of a particular bar-

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[66] *Id.* § 552(b)(6).

[67] Sims v. C.I.A., 642 F.2d 562, 572 (D.C. Cir. 1980). Even if information is contained in a personnel, medical, or similar document, the entire document is not conclusively exempt. Plaintiffs can show that only the truly private information should be withheld, by way of redaction. *See* Dep't of Air Force v. Rose, 425 U.S. 352, 381–82 (1976).

[68] *Sims*, 642 F.2d at 573.

[69] *Id.*

[70] *Rose*, 425 U.S. at 372.

[71] Getman v. NLRB, 450 F.2d 670, 674 n.11 (D.D.C. 1971) ("The legislative history suggests that use of the 'clearly unwarranted' standard is the expression of carefully considered congressional policy favoring disclosure.").

[72] *See* Stern v. Small Bus. Admin., 516 F. Supp. 145 (D.D.C. 1980).

[73] *See* Celmins v. U.S. Dep't of Treasury, Internal Revenue Serv., 457 F. Supp. 13 (D.D.C. 1977).

[74] *See* Columbia Packing Co. v. U.S. Dep't of Agric., 563 F.2d 495 (1st Cir. 1977).

[75] *See* Norwood v. Fed. Aviation Admin., 580 F. Supp. 994 (W.D. Tenn. 1983).

gaining unit, to be given to an outside labor organizer;[76] and records of an employing agency's inquiry into alleged misconduct of an employee.[77] FOIA's broad disclosure policy even affects private contractors, allowing for disclosure of the names, home addresses, and payroll records for private construction workers hired by the federal government.[78]

Similarly, state freedom of information acts have failed to balance the right of the public to government disclosure against the privacy rights of public employees. The California Supreme Court, for example, has held that salary information concerning public employees is not exempt from disclosure under the California Public Records Act (CPRA).[79] It has further held that police officers' names, employing departments, and dates of employment are likewise not exempted from disclosure.[80] Several other states have interpreted their public records act just as broadly, and their exceptions just as narrowly.[81] While the goal of transparency in government is laudable, it must be tempered against the individual rights of public employees. Imagine going to work and having all of your interactions with others video and audio recorded. Then imagine that many components of your individual, personnel file are open to the public. After work, you go home, but your employer has rules over what you can say on Facebook, who your friends are, and to whom you can get married. This Orwellian scenario is not a hypothetical—it is the reality faced by many of our police officers. Stripping employees of their privacy rights, in many ways, is stripping them of their identity. It hardly provides an incentive for the best and brightest to enter into public service.

The reduction in public employee privacy is also connected to the recent push for government accountability. Such accountability should not require the disclosure of private personnel records, such as the pay records of individual employees.

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[76] 6 *See* Am. Fed'n of Gov't Emp. Local 1760 v. Fed. Labor Relations Auth., 786 F.2d 554 (2d Cir. 1986).

[77] *See* Kassel v. U.S. Veterans' Admin., 709 F. Supp 1194 (D.N.H. 1989).

[78] *See* Sheet Metal Workers' Int'l Ass'n Local 19 v. U.S. Dep't of Veterans Affairs, 940 F. Supp. 712 (E.D. Pa. 1995).

[79] *See* Int'l Fed'n of Prof'l & Technical Eng'rs Local 21 v. Superior Court, 42 Cal. 4th 319 (2007).

[80] *See* Comm'n on Peace Officer Standards & Training v. Superior Court, 42 Cal. 4th 278 (2007).

[81] *See In Re Charleston Gazette FOIA Request,* 222 W. Va. 771, 778 (2008) (release of activity logs and payroll timesheets of particular city police officers does not constitute a substantial invasion of individual privacy, with the court emphasizing that the disclosure provisions are to be "liberally construed", while the exemptions are to be "strictly construed"); *Detroit Free Press, Inc. v. City of Southfield,* 269 Mich.App. 275 (2005) (names of retired police officers and fire department retirees and their pension benefits not information of a personal nature exempt from disclosure); *The New York Times Co. v. City of New York Fire Dept.,* 4 N.Y.3d 477 (2005) (taped and transcribed interviews conducted with firefighters regarding events of 9/11 a few days after event disclosable); *King County v. Sheehan,* 114 Wash.App. 325 (2002) (list of full names of police officers subject to disclosure).

Numerous cases involving privacy and free speech related to postings on social media websites by public employees further call into question the rights of public employees. Last year, a school teacher in Massachusetts was fired for derogatory comments she made on Facebook about her students and their parents.[82] Similar recent stories involving disciplined school teachers have received media attention in New York, Florida, and Virginia.[83] Earlier this year, a firefighter in Bourne, Massachusetts, was fired for his posts on Facebook involving work-related issues.[84] These types of cases have led to the characterization of Facebook as the new "water cooler."[85] They illustrate that it is hard to separate privacy protections from free speech concerns.

Indeed, the waning support for public employee privacy concerns can be seen in public employee free speech cases. The seminal case on point is *Garcetti v. Ceballos*,[86] in which the Supreme Court analyzed free speech protections involving a deputy district attorney and held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[87] While that rule might sound workable at first blush, it has proven to be very difficult to apply—it is too broad in its scope, while at the same time too strict in its application.

One example of the potentially perverse outcome of the *Garcetti* rule is illustrated by the Ninth Circuit's decision in *Huppert v. City of Pittsburg*.[88] Huppert involved two police officers who alleged employment retaliation based on the exercise of their protected speech.[89] Specifically, both officers drafted reports and memoranda regarding the corruption at a local municipal golf course. Huppert assisted the local District Attorney's office with investigating corruption allegations within the police department, cooperated with

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[82] *See* Ki Mae Heussner & Dalia Fahmy, *Teacher Loses Job After Commenting About Students, Parents on Facebook*, ABC News Tech This Out, Aug. 19, 2010, *available at* http://abcnews.go.com/Technology/facebook-firing-teacher-loses-job-commenting-students-parents/story?id=11437248.

[83] *See Rubino v. City of New York*, 2012 WL 373101, slip op. (N.Y. Sup. Feb. 1, 2012) (reversing termination of school teacher as a result of Facebook posting); Todd Starnes, *Florida Teacher Suspended for Anti-Gay Marriage Posts on Personal Facebook Page*, FoxNews, Aug. 19, 2011, *available at* http://www.foxnews.com/us/2011/08/19/florida-teacher-suspended-for-anti-gay-marriage-post-on-personal-facebook/; Eugene Volokh, *Is a Facebook "Like" Not "Substantive" Enough to "Warrant[ ] Constitutional Protection"?*, The Volokh Conspiracy, Apr. 29, 2012, *available at* http://volokh.com/2012/04/29/is-a-facebook-like-not-substantive-enough-to-warrant-constitutional-protection/.

[84] *See Doherty v. Guerino and the Town of Bourne*, C.A. No. 1:11-cv-10953 (D. Mass).

[85] *See, e.g.*, Michael Woodward, *Is Facebook the New Water Cooler?*, FoxBusiness, Nov. 15, 2010, *available at* http://www.foxbusiness.com/personal-finance/2010/11/15/facebook-new-water-cooler/.

[86] 547 U.S. 410 (2006).

[87] *Id.* at 421.

[88] 574 F.3d 696 (9th Cir. 2009).

[89] *Id.*

the FBI's investigation of the corruption, and testified before the grand jury charged with investigating the corruption.[90] The officers' claims were dismissed on summary judgment by the trial court, based on the court's determination that the speech was not made as private citizens, and was therefore not protected from retaliation under the First Amendment.[91] On appeal, the Ninth Circuit had little trouble determining that the officers had spoken on matters of public concern in discussing their golf course investigation.[92] However, the appellate court affirmed the lower court's opinion based on its decision that the officers' speech was made pursuant to their official duties.[93] Therefore, they were not speaking as private citizens.[94]

Garcetti and *Huppert* both resulted in remarkably unjust outcomes for the same reason—because of a Court-created rule that individuals have diminished constitutional protections once they don their government uniforms. Both cases involved public employees who spoke out regarding government corruption—clear matters of public concern. But the plaintiffs in both cases were subjected to government retaliation as a result of their speech, with no right to petition for redress under the Constitution. Had any other citizen spoken out on the dishonest testimony of a police officer in a criminal prosecution, as did Deputy District Attorney Richard Ceballos, that citizen's speech would have been protected. Had any other citizen spoken out about widespread government corruption, as did the officers in *Huppert*, their speech would have been protected. In both cases, the speech did not involve personal grievances and was not for the benefit of the speakers. Instead the speech in both instances was made in an effort to shine a light on government misconduct and corruption. Surely this is the speech the Framers had in mind to protect, whether the speaker works in the public or private sector.

Further aggravating the loss of privacy is the fact that even when a public employee can prove a constitutional violation against his employer, the employer is frequently held not liable based on governmental immunities.[95] We recently argued such a case before the Ninth Circuit in *Delia v. City of Rialto*,[96] a case involving a firefighter who was subjected to an unlawful search of his home by his municipal employer based on allegations of employment misconduct.[97] Nicholas Delia was provided with an off-duty

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[90] *Id.* at 699–702.
[91] *Id.* at 701.
[92] *Id.* at 704.
[93] *Id.* at 698.
[94] *Id.* at 698, 702.
[95] *See, e.g.,* Trujillo v. City of Ontario, 428 F. Supp. 2d 1094, 1125 (C.D. Cal. 2006) ("[W]hile Defendant Schneider violated Plaintiffs' rights under state law, Defendant is immune from liability for Plaintiffs' state law claims.").
[96] 621 F.3d 1069 (9th Cir. 2010), *cert. granted*, 132 S. Ct. 70 (Sept. 27, 2011).
[97] Although the Ninth Circuit decided that the city and its employees were entitled to qualified immunity, the only issue raised before the Supreme Court was whether the attorney contracted by the city is entitled to qualified immunity. Petition for a Writ of Certiorari, Filarsky 2011 WL 493939.

work order by a doctor after being exposed to a toxic spill at work.[98] The off-work order contained no activity restrictions. Delia's employer began a personnel investigation of Delia to determine whether he was off work on false pretenses.[99] This investigation included the surreptitious surveillance of Delia. The surveillance was completely unwarranted, considering that the work order had imposed no activity restrictions on Delia: any surveillance served only as a fishing expedition for some other misconduct.[100] Indeed, although the city cited Delia's disciplinary record as grounds for its suspicion about the validity of his off-work status, the court was skeptical as to why this would justify such suspicions even in the presence of repeated absences.[101]

While being watched, Delia was witnessed purchasing rolls of insulation at Home Depot.[102] Delia was interviewed by an investigator and readily admitted that he had purchased the insulation in anticipation of a remodel of his house.[103] Delia explained that he had not yet installed the insulation; in fact, it was still in its original packaging.[104] The investigator, who also happened to be an attorney, along with Delia's employer, the fire chief, ordered Delia to retrieve the insulation and bring it out to them.[105] There was no attempt to obtain a warrant—only an order given to Delia with a corresponding threat of insubordination if he refused to comply.[106] Delia retrieved the insulation, which was in its original packaging, just as he had described.[107]

Delia filed a lawsuit in district court challenging the unlawful search.[108] The case ended up before the Ninth Circuit, which held that the warrantless, compelled search of Delia's home violated his rights under the Fourth Amendment.[109] Unfortunately for Delia, the court also held that the City and its employees (although not the private attorney serving as the investigator) were entitled to qualified immunity.[110] We will soon be arguing issue of whether the contract-employee investigator is entitled to qualified immunity in *Delia* before the Supreme Court

Delia illustrates the sometimes harsh nature of public employment. Public employees are often treated like residents of a police state. There is little incentive for a private employer to pay investigators and attorneys tens of thousands of dollars to investigate and spy on their employees under *De-*

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[98] *Delia*, 621 F.3d at 1071.
[99] *Id.*
[100] *See id.*
[101] *Id.*
[102] *Id.* at 1071–72.
[103] *Id.* at 1072.
[104] *See id.*
[105] *Id.*
[106] *See id.*
[107] *Id.* at 1072–73.
[108] *Id.* at 1073.
[109] *Id.* at 1075.
[110] *Id.* at 1079, 1081.

lia's circumstances. But a public employer does not have to worry about efficiency, or bottom line personal costs. After all, the costs at stake are not the employer's money but the taxpayers' money. Furthermore, a private employer is not likely to follow its employee to his house to conduct an unlawful search of the residence. For the government, the practice is business as usual.

Ironically, government entities often hide behind their own dubious privacy assertions to avoid liability for violating the privacy rights of their employees. For example, it is not uncommon for municipalities to hire attorneys to conduct personnel investigations. This allows the municipality to assert the attorney-client privilege against disclosure of communications or materials related to the investigation. The practice is a complete sham—if the agency finds some sort of misconduct, it can tailor the investigation so as to punish the employee, whether or not there was any initial cause for the investigation. But if the investigation turns up nothing, the case is closed and the employee is unable to access information about the investigation conducted against him.

In addition to overreaching personnel investigations, the diminution of privacy for government employees is evidenced in the execution and interpretation of state privacy laws. For example, many of my police officer and firefighter clients in California enjoy protections under the Public Safety Officers Procedural Bill of Rights Act[111] and the Firefighters Procedural Bill of Rights Act.[112] These statutes provide various privacy protections, including the prohibition of compelled polygraph examinations,[113] privileged nondisclosure of financial records,[114] and privacy protections from the media.[115] The California Penal and Vehicle Codes also make peace officer personnel files confidential, including personal information, medical history, personnel complaints, and the like.[116] While these statutes seem to offer comprehensive privacy protections on their face, courts have continually chipped away at them.[117]

Left to their own devices, executive branches of state governments have also proven to be no friends of the public employee privacy cause. Take for example Florida Governor Rick Scott, who recently signed an executive order mandating drug testing for state employees, regardless of whether any

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[111] CAL. GOV'T CODE §§ 3300–3312 (West 1976).
[112] *Id.* §§ 3250–3262 (West 2008).
[113] *Id.* §§ 3257(1), 3307(a).
[114] *Id.* §§ 3258, 3308.
[115] *Id.* §§ 3253(e)(2), 3303(e).
[116] *See* CAL. PENAL CODE § 146e (West 2011); CAL. PENAL CODE § 832.7 (West 2004); CAL. VEH. CODE §1808.4(a)(11) (West 2011).
[117] *See, e.g., Barber v. Dep't of Corrections*, 203 Cal.App.4th 638 (2012) (narrowing the California Public Safety Officers Procedural Bill of Rights so as to restrict the ability of officers to review and request corrections to their personnel files to only officers who are employed *at the time of the request*); *see also Rosales v. City of Los Angeles*, 82 Cal.App.4th 419 (2000) (holding that although City violated state privacy statutes by releasing information from peace officer's personnel file, the officer had no private right of action under those statutes).

suspicion of drug use exists.[118] That executive order is currently being challenged by the A.C.L.U.[119] Unfortunately, challenges to the constitutionality of executive orders can be difficult and limited given Eleventh Amendment immunity.

In short, whether it is by way of freedom of information act disclosures, or physical searches of their workplaces, communications, and even their homes, public employees are witnessing the extinction of their privacy rights. The fact that they are private citizens who *happen to* work for the government should not function as their consent to be stripped of their individual rights. This point should not be lost on legislators, nor on our courts.

Conclusion

The difficulty for public employees is two-fold. First, they have a diminished expectation of privacy as a result of practicing their chosen professions. Second, there is very little certainty as to what expectation of privacy, if any, they enjoy. While some of this uncertainty is the result of the constant tinkering of legislators, it can really be attributed to the courts, which have failed to establish a reasonable, workable standard for reviewing public employee privacy cases.

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[118] Fla. Exec. Order No. 11-58 (Mar. 22, 2011).

[119] *See* Jay Weaver, *Federal Judge Raises Questions About Florida's Random Drug-Testing Policy*, Miami Herald, Feb. 12, 2012, *available at* http://www.miamiherald.com/2012/02/21/2654971/federal-judge-in-miami-will-hear.html.