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America's War on Terror Goes into Cyberspace. Will the First Amendment Prevent the Government from Giving Chase?

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INTRODUCTION

"On September 11, 2001, life in the United States forever changed."[2] While both the United States and the global community have been dealing with terrorist threats for decades, that day is one that will forever affect American political, social, and economic decisions. This note will examine how this era of "America's War on Terror" may cause a shift in legal jurisprudence, similar to the way in which the social structure of the mid-twentieth century created a shift in the law's views of civil rights and racial equality.[3]

While terrorism has always been a background threat to America, not until 9/11 did terrorism enter the forefront of politics.[4] However, since that day, preventing its repeat has consumed citizens and politicians alike.[5] It signals the beginning of a new era of thought for America. However, the War on Terror is unlike any war in American history.[6] People are at the whim of "invisible armies of terror."[7] Even the battlefield has changed.[8] While troops continue to fight in the streets of the Middle East, this new breed of terrorists has expanded the war to a

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[2] Kathleen M. McCarroll, *With Liberty and Justice for All: The November 13, 2001 Military Order Allowing the Use of Military Tribunals to Try Those Suspected of Aiding Terrorists Violates the Rights Guaranteed to Non-Citizen United States Residents Under the Constitution*, 80 U. DET. MERCY L. REV., at 231 (2003).

[3] *See, e.g.,* Brown v. Board of Ed., 347 U.S. 483, 489-90 (1954) (stating that while the Supreme Court had never required equal opportunities between the races previously, as a result of the changing society, new jurisprudence was necessary).

[4] Robin Wright, *Top Focus Before 9/11 Wasn't on Terrorism: Rice Speech Cited Missile Defense*, WASH. POST, Apr. 1, 2004, at A01, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A40697-2004Mar31?.

[5] *See Id.*

[6] "It is a form of warfare typified by children playing with toys in a day care center one moment, and dying violently the next . . . [it] is a form of warfare in which, by design, innocent civilians are indiscriminately killed and civilian property devastated." Spencer J. Crona and Neal A. Richardson, *Justice For War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 354 (1996).

[7] *Id.*

[8] *Denying Terrorist Sanctuaries: Hearing Before the House Armed Services Comm.*, 108th Cong. (2004) (statement of Paul Wolfowitz, Deputy Secretary of Defense).

different front.[9] They have created a virtual battlefield where the Internet has become their tool, even their weapon.[10] The question now becomes, after identifying this new weapon, what can the United States do to stop it?

BACKGROUND: REEVALUATING THE SYSTEM AFTER SEPTEMBER 11

In almost all aspects, America was ill-prepared for what occurred on 9/11.[11] In response to that unpreparedness, Congress assembled ten commissioners to examine the events surrounding the attacks and to provide analysis to ensure that America will be on guard in the future.[12] From that committee, The 9/11 Commission Report was born.[13]

Along with providing an in-depth analysis of the events surrounding 9/11, the Commission included broad suggestions on how to combat future acts of terrorism.[14] The focus of this note stems from the proposals offered by the Commission. It observed that in order "[t]o find sanctuary, terrorist organizations have fled to some of the least governed, most lawless places in the world."[15] It is likely that when the Commission wrote those words, it had the nations of Afghanistan and Iraq in mind. Again, however, the new breed of terrorists have blurred national boundaries and located themselves in any country that will have them.[16] They disguise their "battles" as suicide bombings, hijackings and other unconventional tactics.[17] Moreover, terrorist-friendly countries are not the only sanctuary at their disposal.[18] The Internet has become a safe haven for terrorist communication, training and planning.[19] Moreover, that lawless sanctuary has become a place where the military cannot follow.

While soldiers are unable to pursue terrorists onto the Internet, that is where the Department of Justice may take over and begin the task of quelling terrorist activity.[20] In August

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[9] *Id*.

[10] *Id.*

[11] NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 108th CONG., THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY, *available at* http://www.9-11commission.gov/report/911Report_Exec.pdf.

[12] *Id*.

[13] *Id*.

[14] *See Id*.

[15] *Id*. at 366.

[16] *See Id*.

[17] It is an "asymmetric warfare where there are no front lines, and no clear enemies. The enemy includes both state and non-state actors, and the tactics include the full gamut from traditionally military battles, to guerilla warfare, to terrorism. Recent actions in Afghanistan and Iraq have encountered enemy forces utilizing [these] tactics." Captain William C. Taylor Jr., *Transformation of Army Capabilities: A Congressional Perspective*, 10 GEO. PUB. POL'Y REV. 83, 98 (2004).

[18] *Denying Terrorist Sanctuaries: Hearing Before the House Armed Services Comm.*, *supra* note 7.

[19] *Id*.

[20] *See Id*.

2004, U.S. Deputy Secretary Paul Wolfowitz testified before the House Armed Services Committee about the 9/11 Commission's recommendations on how to deny terrorist sanctuaries.[21] However, the testimony's focus was not the sanctuaries of Afghanistan and Iraq; instead, it was concerned with closing off the "other" sanctuary, the Internet.[22] Wolfowitz emphasized that in order to ensure that terrorists are without refuge, the U.S. government must prosecute anyone who drafts a Web site providing information to terrorists.[23] Moreover, he alluded to the idea that in addition to Web site designers, the government may also prosecute the Internet Service Providers (ISPs) that sold and serviced the Web space.[24] To Wolfowitz, the elimination of these "cyber-sanctuaries" is just as important in the War on Terror as the liberation of Afghanistan, for "drying up sanctuaries, wherever they may exist, is the lynchpin of a successful strategy."[25]

While the Internet may not be what the 9/11 Commission had in mind when it drafted its report, the expansion of the War on Terror to this virtual battlefield is not an asinine idea. In its broad suggestions, the Commission asserted that "[t]he U.S. government must identify and prioritize actual or potential terrorist sanctuaries. For each, it should have a realistic strategy to keep possible terrorists insecure and on the run, using all elements of national power."[26] The U.S. policy in Afghanistan, in the terms of the Commission, was to ensure that terrorists were unable to "find safe haven where their organizations can grow and flourish."[27] Why, then, should the Internet's non-traditional theatre of war be treated any different?

In his closing arguments to the Armed Services Committee, Wolfowitz opined that:

> [o]ur goal should be to reduce the space in which terrorists find sanctuary to the maximum extent possible. There should be no room in this world for governments that support terrorism, no ungoverned areas where terrorists can operate with impunity, no easy opportunities for terrorists to abuse the freedoms of democratic societies, no ideological sanctuary, and no free pass to exploit the technologies of communications to serve terrorist ends . . . It will require protecting civil liberties while reducing the ability of terrorists to operate in our midst.[28]

By expanding the Commission's recommendations into the virtual world, Wolfowitz has suggested that the War on Terror must punish people for the content of their Web sites and

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[21] *Id*.

[22] *Id*.

[23] *Id.*

[24] *Denying Terrorist Sanctuaries: Hearing Before the House Armed Services Comm.*, *supra* note 7.

[25] *Id*.

[26] NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 10, at 366.

[27] *Id* at 364.

[28] *Denying Terrorist Sanctuaries: Hearing Before the House Armed Services Comm.*, *supra* note 7.

ultimately restrict freedom of speech.[29] That goes against history, where "a hallmark of the Internet [is] that it has been relatively unregulated by government…"[30] Adding fuel to the controversy is the fact that the 9/11-induced Patriot Act is the sword with which the government would slay these Web site creators.[31] The Patriot Act asserts that "whoever provides material support . . . knowing or intending that [it] be used in preparation for, or in carrying out" a terrorist act is subject to prosecution.[32] Further, the statute defines "material support," as it applies to the aforementioned provision, as providing "expert advice or assistance."[33] Wolfowitz is advocating a modification to the recommendations of the 9/11 Commission and the restriction of freedom of speech using a law already steeped in criticism for its erosion of civil rights.[34]

As a result, a myriad of issues arise from Deputy Secretary Wolfowitz's sales pitch to the Armed Services Committee. First, whether creating a Web site that provides (1) a means of communication for terrorists (2) promotes their cause (3) or provides them with information is "expert advice" under the meaning of the USA Patriot Act.[35] Second, and certainly more important, whether the U.S. government would be infringing its citizens' freedom of speech rights by restricting the content of Web sites for its objectionable content.

IS THE INTERNET REALLY A THREAT TO NATIONAL SECURITY?

One cannot begin to understand Wolfowitz's reasoning for placing so much emphasis on trying to restrict the Internet until one considers how broad and powerful of a terrorist sanctuary the Internet has actually become. To most, the Internet is nothing more than a nicety, used to stay connected with friends or to obtain local weather reports. However, the versatility of the Internet has created a place where terrorists can hide, disseminate plans and collect information effortlessly.[36] This section will focus on bringing to light all of the ways that terrorists use the Internet to their advantage.

The Internet has three distinct applications for terrorists: (1) it provides a medium for psychological warfare; (2) terrorists can use it to disseminate tactical advice; and (3) it acts as a

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[29] *Id.*

[30] Corey Field, *New Uses and New Percentages: Music Contracts, Royalties, and Distribution Models in the Digital Millennium*, 7 UCLA ENT. L. REV. 289, 297-98 (2000).

[31] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

[32] 18 U.S.C. § 2339A(a) (2005).

[33] 18 U.S.C. § 2339A(b) (2005).

[34] *See* Katherine K. Coolidge, *"Baseless Hysteria:" The Controversy Between the Department of Justice and the American Library Association over the USA PATRIOT Act*, 97 LAW LIBR. J. 7 (2005).

[35] 18 U.S.C. §§ 2339A(a)-(b) (2005).

[36] Eric Lipton & Eric Lichtblau, *Even Near Home, a New Front is Opening in the Global Terror Battle*, N.Y. TIMES, Sept. 23 2004, at A12; *See also generally* Site Institute: The Search for International Terrorist Entities, *at* http://www.siteinstitute.org/index.html (last visited March 27, 2005).

means for fundraising.[37] In order to communicate, terrorists do not simply send out e-mail or open a chat room.[38] The loosely connected web of terrorists carry out their Internet war by taking advantage of its lack of borders, laws and the ease through which they are able to operate.[39]

However, terrorist Web sites do not just show up in search engines results. They keep their information one-step ahead of unwanted onlookers by attaching themselves to unsuspecting sites or hiding their information at innocuous addresses where they are least expected.[40] What's more, the Web host may be completely unaware that the terrorist group is even using space on its server.[41] However, if an unwanted visitor does get too close, it is nothing for the terrorist Web site's controller to simply pack up and move the site to another address. For example, on September 8, 2004, the Site Institute, a private terrorist reporting agency, published that Al-Qaida's Web site made its home on a free Web-hosting service called "Hosting Anime."[42] However, three months later, the Web site was no longer available, the link Site Institute had provided was broken, and Al-Qaida had set up shop at a new, unknown location.[43] It appears that almost all of the world's terrorist groups are sharing information and planning their next move on the same Internet that lay-citizens surf every day.[44]

The question then becomes, so what? Why does a terrorist group's ability to have a Web site mean danger for American security? Wolfowitz answered that question best, saying that the Internet "is essentially an unregulated medium which is especially attractive to terrorist organizations. . . This tool – which enables so much good – also provides terrorists the ability to conceal their identities, to move large amounts of money, to encrypt messages, and to plan and even conduct operations remotely."[45]

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[37] Todd M. Hinnen, *The Cyber-Front in the War on Terrorism: Curbing Terrorist Use of the Internet*, 5 COLUM. SCI. & TECH. L. REV. 3 (2003); Jim Maceda, *Terrorists and the Internet*, MSNBC (June 24, 2004) *at* http://www.msnbc.msn.com/id/5279657?.

[38] Maceda, *supra* note 37.

[39] *Denying Terrorist Sanctuaries*, *supra* note 7.

[40] Site Institute, *Terrorist Web site,* (March 27, 2005), *at* http://www.siteinstitute.org/Web sites.html.

[41] Lipton & Lichtblau, *supra* note 36.

[42] Site Institute, *supra* note 39. The Site Institute lists its Mission as the "[t]hrough continuous and intensive examination of extremist Web sites, public records, and international media reports, as well as through undercover work on both sides of the Atlantic, the SITE Institute swiftly locates links among terrorist entities and their supporters." Site Institute, *Mission* (March 27, 2005), *available at* http://www.siteinstitute.org/mission.html.

[43] In December 2004, this author attempted to visit the URL for al-Qaida provided by the Site Institute (http://www.hosinganime.com/neda4/index.htm). However, the Web site no longer exists.

[44] Site Institute, *supra* note 40.

[45] *Denying Terrorist Sanctuaries*, *supra* note 7.

While terrorist groups are publishing Web sites in order to mobilize, organize, and recruit, they are not the only ones using the Internet to influence the War on Terror.[46] Terrorist sympathizers are designing webpages that provide tactical information to anyone interested in the subject.[47] For instance, on December 1, 2004, a user on a popular Jihadist Internet message board posted a 12-page manual that "provides thorough, step-by-step instructions for procuring required materials, assembling, and effectively deploying [a] chemical weapon."[48] Only two weeks later on another popular Jihadist Internet message board, a user posted a video describing how to make an explosive belt for suicide bombers.[49] All of the information a terrorist needs to plan an attack can be accessed with just a few minutes of Internet access.

In addition, "terrorism adds a psychological warfare component to the rest of the attack. The terrorist hopes the target population will panic and become its own worst enemy."[50] While terrorists see a suicide bomber that kills five soldiers as having won a battle, the psychological effects of that attack are a big part of their *overall* war.[51] Moreover, the Internet makes this task even easier by allowing the terrorists "to wage psychological warfare as never before."[52] Using the Internet, terrorists are now able to alert the world of a successful attack or to release footage from its leaders to show their continued strength and solidarity.[53] Every time terrorists use the Internet to demonstrate their strength, they are firing a psychological bullet at their enemies in an attempt to injure the opposition's confidence.[54]

Compounding the problem is the fact that not just the rich have access to the Internet. Over 327 million people were expected to use the Internet users worldwide by the end of the year 2000.[55] Obviously, the number of people using the internet have risen and now even more people can find some form of Internet access. Knowing this, terrorists are able to shape "their own image and that of their foes."[56] Through the Internet, terrorist organizations disseminate

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[46] *See, e.g.,* Site Institute, *Message Posted to Jihadist Message Board Provides Instruction Booklet for Home-Made Chemical* Weapon (Dec. 3, 2004), *at http://siteinstitute.org/bin/articles.cgi?ID=publications12204&Category=publications&Subcategory=0*.

[47] *Id*.

[48] *Id.*

[49] Site Institute, *Manufacture of the Explosive Belt for Suicide Operations* (Dec. 2, 2004), *at* http://siteinstitute.org/bin/articles.cgi?ID=publications13804&Category=publications&Subcategory=0.

[50] Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955, 957 (2003).

[51] *Id*.

[52] Ariana Eunjung Cha, *From a Virtual Shadow, Messages of Terror*, WASH. POST, Oct. 2, 2004, at A1.

[53] Maceda, *supra* note 37.

[54] *See generally* Gouvin, *supra* note 50.

[55] Matthew James Zappen, *How Well Do You Know Your Computer? The Level of Scienter In 18 U.S.C. § 1462*, 66 ALB. L. REV. 1161, 1177 (2003).

[56] Cha, *supra* note 52.

propaganda to citizens, portraying the terrorists in a positive light while making their enemies look like infidels.[57] That psychological weapon, facilitated by the Internet, is an essential tool for modern terrorists.[58]

Therefore, while most Americans see their computers as a means to make life simpler, an entirely different ethos caused terrorists to use this tool to plan the downfall of American society.[59] However, what exactly can the government do to stop them? The technology exists to chase down and prosecute those people providing the terrorists with information, but the question now becomes, will the Constitution allow it?

HOW DO YOU WEIGH FREE SPEECH RIGHTS AGAINST THE NEED TO STOP TERRORISM?

"Congress shall make no law . . . abridging the freedom of speech . . ."[60] Moreover, many see "[t]he First Amendment [as] . . . the cornerstone of our Independence."[61]

> The Court's high regard for freedom of speech . . . may have been best summarized by Justice Brandeis' concurrence in . . . *Whitney v. California*. Those who won our independence believed that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech . . . discussion would be futile; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[62]

However, while for years the Supreme Court and the Constitution have protected the most appalling speech, such as burning the American flag, in free speech there are no absolutes, just as there are no absolutes in any area of the law.[63] As alluded to previously, this note asserts that 9/11 triggered a new era of thought and policymaking for Americans.[64] The Supreme Court was willing to affirm the suspension of civil rights for Japanese-Americans after the attack on

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[57] *Id.*

[58] Gouvin, *supra* note 50.

[59] Site Institute, *supra* note 40.

[60] U.S. CONST. amend. I.

[61] Jay Krasovec, *Cyberspace: The Final Frontier, For Regulation?*, 31 AKRON L. REV. 101, 144 (1997).

[62] Kim M. Shipley, *The Politicization of Art: The National Endowment for the Arts: the First Amendment, and Senator Helms*, 40 EMORY L.J. 241, 261 (1991) (quoting Whitney v. California, 274 U.S. 357, 375 (1926) (Brandeis, J., concurring)).

[63] Texas v. Johnson, 491 U.S. 397 (1989). Respondent set an American flag on fire as a political protest. Respondent was convicted of desecrating the American flag. The Supreme Court held that such a prosecution was contrary to the freedom of speech.

[64] Wright, *supra* note 3.

Pearl Harbor.[65] The nation may again deem it proper to suspend the basic liberties of a few to protect the citizenry as a whole.

Therefore, the question must be asked, how does a nation balance national security interests against the most sacred of all Constitutional Amendments? The U.S. government wants to begin prosecuting people who create Web sites that provide terrorists with "expert advice."[66] Does that mean someone who publishes information on the Internet is amenable to prosecution merely for their words and thoughts? Conversely, can a manual describing how to make a chemical weapon actually be what the forefathers intended to protect when they drafted the Bill of Rights?

For the purposes of the forthcoming constitutional analysis, this note will focus on the most heinous speech that terrorists are producing. For example, the advice and instructions on how to make deadly weapons that Internet users posted on Jihadist message boards.[67] While those citing national security as his or her primary concern surely would prefer that engaging in any terrorist-related communication would make someone amenable to prosecution, that would call for throwing the Bill of Rights more-or-less out the window. Freedom of speech does not mean allowing uncontested speech to continue unabated. It means the ability to allow disgusting speech and to accept its presence as the consequence of having freedom. However, as previously suggested, Americans may not have to sit idly by while terrorists plan future attacks. This note will show that there is a possibility that the expert advice can be restricted due to its limited/non-existent social value, coupled with it being highly dangerous.

The first step is to determine whether information posted on the Internet by terrorists and terrorist sympathizers is speech. In deciding *Texas v. Johnson*, the Supreme Court asserted that in order to determine whether something is speech, one must establish "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[68] As despicable as the message may be, a posting to a message board on how to make a suicide bomb certainly has the intent to convey a message.[69] It was a message of destruction and hatred aimed toward anyone willing to take the plan to the next level. Further, while deplorable to consider, anyone who read that posting knew its intent. This was not an indirect or incidental form of communication. Those who viewed the message board knew exactly what the author was inferring, especially when they chose a Jihadist Web site as the forum for their information.[70] Therefore, it is obvious that these "informational" posts are within the legal definition of speech.

Now, the question becomes, can the government prosecute that speech? The Supreme Court has formulated several tests to determine whether something warrants First Amendment protections. This note will focus on the Clear and Present Danger test, which is the test that the

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[65] Korematsu v. United States, 323 U.S. 214 (1944).

[66] *Denying Terrorist Sanctuaries*, *supra* note 7.

[67] Site Institute, *supra* notes 40, 49.

[68] *Johnson*, 491 U.S. at 404 (citing Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

[69] Site Institute, *supra* note 49.

[70] *Id*.

Supreme Court may use to analyze Wolfowitz's prosecutions, as the defendant would certainly challenge the charges on First Amendment grounds.[71] In deciding *Brandenburg v. Ohio*, the Supreme Court enumerated the modern test for analyzing a Clear and Present Danger free speech problem.[72] The Court asserted that the Constitution guarantees free speech except where the speech is intended to incite or produce imminent lawless action and is likely to do so.[73]

First, one can easily see that the message board postings intended lawless action. The fact that the postings listed instructions on how to create a bomb, in addition to the author's decision to post the information to a Jihadist Web site, makes it obvious that the author intended lawlessness.[74]

However, in order for speech to satisfy the Clear and Present Danger test and as a result, not be afforded First Amendment protection, the intended lawlessness must be imminent.[75] The question then becomes, did the Web posting's author intend "*imminent* lawless action?"[76] How immediate and likely does the action have to be for the Court to deem lawlessness as imminent? How much of a temporal gap between the author's posting and the actual bombing is too long? What if the posting was made a year before someone used the instructions to make a bomb, does that mean the bombing was imminent, despite a years time having passed?

Years of case law have maintained that for lawlessness to be imminent, the speech must be so closely related to the action that they are each one in the same event.[77] In deciding *NAACP v. Claiborne Hardware Co.*, the Supreme Court asserted that "the mere abstract teaching. . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to that action."[78] The language from that case is controlling.[79] While by no means is information that terrorists post on the Jihadist message boards impotent, simply because it is available does not mean that lawless action is inevitable.[80] While terrorist sympathizers and supporters are posting bomb-making instructions on the Internet, they cannot be certain how readers will use the information. Obviously, their intent is to have a dedicated Jihadist read their post and use the information to make a bomb. However, there exists the possibility that the information will go unnoticed or unused. Therefore, under the

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[71] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[72] *Id.*

[73] *Id.* at 447.

[74] Site Institute, *supra* notes 40, 49.

[75] *Brandenburg*, 395 U.S. at 447.

[76] *Id.* (emphasis added).

[77] *See* O. Lee Reed, *The State is Strong But I Am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech That Threatens Individuals With Violence*, 38 AM. BUS. L.J. 177 (2000).

[78] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (citing Noto v. United States, 367 U.S 290, 297-98 (1961)).

[79]*See Id.*

[80] Site Institute, *supra* notes 40, 49.

current definition of imminent, this speech would not reach the level of Clear and Present Danger and therefore would be protected speech. These are the costs of having freedom of speech held in such high regard.[81]

However, does that mean terrorists and their supporters will be safe on the Internet and as a result, no matter how successful the U.S. government is in drying-up the tangible sanctuaries, terrorists will always be free to promulgate and flourish in their cyber-sanctuary? While it may be disconcerting to think that the Constitution will prevent the prosecution of those plotting against the United States, all is not lost. The phrase "imminent lawless action" requires more scrutiny.[82] Webster's Dictionary defines "imminent" as "ready to take place; *especially*: hanging threateningly over one's head."[83] While the Supreme Court has not adopted this definition, due to America's new way of thinking after 9/11, things may change. It is possible that a new definition of immanency and a modified Clear and Present Danger Test are on the horizon.

Predicting a shift in Supreme Court jurisprudence is by no means straightforward, especially in an area as sacrosanct as the First Amendment.[84] However, the combination of Supreme Court history and the current state of American politics makes predicting a change in Free Speech decree more than mere guesswork. While the Supreme Court was designed to be a steadfast mainstay in American politics, one not influenced by outside forces or social pressure, that has not always been the case. An obvious example of this is the ruling that separate but equal is ok.[85] Today's people cringe at those words, but due to societal pressure and the mores of the times, the Court once ignored the plain meaning of the Equal Protection clause.[86] That case shows that the Supreme Court is not immune from having outside influences affect its decisions. A similar result may occur in the instant case as America's political system and people have adopted a completely different way of viewing the world, their safety, and governmental policy. A post-9/11 means of thought may create enough pressure for the Supreme Court to alter its First Amendment policy.

While a strict definition of immanency has been the standard for all Clear and Present Danger cases, that definition may not be set in stone.[87] When the Supreme Court announced its final version of the Clear and Present Danger rule, the Court used the rule to protect politically

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[81] Shipley, *supra* note 62.

[82] *Brandenburg*, 395 U.S. at 447.

[83] Merrium-Webster Online Dictionary, *at* http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=imminent (last visited Oct. 11, 2005).

[84] Shipley, *supra* note 62.

[85] Plessy v. Ferguson, 163 U.S. 537, 544, 551 (1896). A statute distinguishing between races does not reduce equality. In addition, it did not violate the Fourteenth Amendment. The Supreme Court held that separating races did not make one lesser than the other.

[86] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV, § 1.

[87] NAACP v. Claiborne Hardware Co., 458 U.S. at 927.

motivated speech.[88] This note contends that the Clear and Present Danger rule adopted such a stringent definition of immanency solely to *favor* political speech.

However, recent cases have backed away from allowing the Clear and Present Danger rule to be the absolute guardian of speech.[89] This change did not come about because *Brandenburg* was not a good holding at its inception; instead, this note contends that the Supreme Court did not want to grant protections to speech that it found to be against all social, moral, and ethical values. Therefore, the Clear and Present Danger rule transformed.

The Supreme Court's decision in *Virginia v. Black* illustrates the aforementioned theory.[90] In that case, defendants burned several crosses, one in their neighbor's yard and another at a Ku Klux Klan meeting.[91] The state prosecuted the defendants under a Virginia law that made it illegal to burn a cross with the intent to intimidate.[92] Defendants argued that an absolute ban on cross-burnings was a violation of their free speech rights.[93] At first glance, the defendants' argument appeared plausible and seemed to lend itself to the Clear and Present Danger test. While burning a cross at a KKK meeting offends the ideals and values of the reasonable person, the defendants did not perform the act with the intent or likelihood of causing "*imminent* lawless action."[94] However, in deciding the case, the Supreme Court deviated from its definition of imminent and refused to employ what appeared to be an elementary application of the *Brandenburg* Clear and Present Danger test.[95]

Here, the Court revealed a caveat and announced another niche of unprotected speech. In addition to not protecting speech that incites imminent lawless action, "the First Amendment also permits a State to ban a 'true threat.'"[96]

> True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . A prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.[97]

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[88] *See* S. Elizabeth Malloy & Ronald J. Krotoszynski, *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1201 (2000). Asserting that the purpose of *Brandenburg* is to protect *political* speech.

[89] Virginia v. Black, 538 U.S. 343 (2003).

[90] *Id*.

[91] *Id* at 349-352.

[92] *Id.*

[93] *Id*.

[94] *Brandenburg*, 395 U.S. at 447 (emphasis added).

[95] *Black*, 538 U.S. at 365-67.

[96] *Id*. at 359.

[97] *Id.* at 360.

It appears that the Court deemed the social value of cross burning to be so low as to be unworthy of protection by the First Amendment.

So, why then did the Supreme Court decide that the "old" Clear and Present Danger test was insufficient when it came to cross-burnings? While Justices are supposed to remain dispassionate when making their decisions, it is likely that they have the same gut-wrenching reaction to cross burning as does the majority of society. Furthermore, they realized that such distasteful speech, that which can only be detrimental to society, must not be protected.[98] However, the question then became, how the Court goes about disallowing a type of speech obviously protected by the Clear and Present Danger test. From that, "true threats" were born. "Unlike incitement, the act of making a true threat is complete as soon as the actor publishes it. The threatener need only communicate it to another. In that instance, the triggering of liability does not depend upon the physical actions of others; it remains solely with the speaker."[99]

The problem that becomes glaringly obvious when looking at the new exception to free speech is the arbitrariness with which is it applied. How does one decide what is socially despicable enough to fall into the "true threat" category? Citizens must hope that the courts do not apply the laws based on the ideologies and whims of judges. However, it appears that since the justices did not agree with the type of speech in *Virginia v. Black*, they took the opportunity to put a new twist on the law and make it fit their desired outcome.[100]

Therefore, with true threats limiting the protections of free speech, one must ask whether it will reduce the protection that the terrorist Internet postings will receive. First, Wolfowitz has recommended prosecuting persons who provide dangerous people with information on how to kill more efficiently.[101] One can see that this speech is as egregious, if not more, than burning a cross. While cross-burning symbolizes something completely distasteful, that speech does not directly correlate to the loss of human life. By providing terrorists with bomb-making information, the direct link between speech and death becomes clearer. Moreover, analogous to cross-burning, a posting on a Jihadist Web site about how to make a suicide bomb has no social value, which must enter the Court's consideration on whether to apply the "true threat" doctrine.[102]

Next, how should the true threats rule be applied in the instant case? Remember, the "prohibition on true threats 'protect[s] individuals from the fear of violence' [and punishes] where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence."[103] A terrorist's main weapon is fear.[104] They thrive on the opportunity to create anxiety.[105] By applying the less-restrictive standard of true threats, the Supreme Court

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[98] *Id.* at 359-60.

[99] Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 570 (2004).

[100] *Black*, 538 U.S. at 343.

[101] *Denying Terrorist Sanctuaries*, *supra* note 7.

[102] Site Institute, *supra* note 49.

[103] *Black*, 538 U.S. at 359-60.

[104] Gouvin, *supra* note 50.

[105] *Id.*

would be decreasing the fear of violence. Reaching this conclusion requires a bit of legal imagination. While one can measure another's fear of violence by observing their reaction to a burning cross, actually seeing the burning cross is not necessary for them to be afraid. If a townsperson never saw the burning cross, but nonetheless knew it was going on, that person's fear of violence would still exist. Similarly, while Americans may not actually see the terrorist Internet postings, the fact that the American public knows of them is enough to create a fear of violence.

Next, one must examine the later part of the true threats rule; a true threat is speech that "communicate[s] a serious expression of an intent to commit an act of unlawful violence."[106] While it looks similar to the *Brandenburg* Clear and Present Danger rule, there is one important difference. The imminency requirement has been removed from the analysis. Here, for something to be unprotected speech, the rule only requires a threat to commit an act of violence. The temporal relationship between the violence and the speech need no longer exist. The bar now becomes much lower for those looking to punish information providers. By showing that someone providing instructions on how to make a chemical weapon intended their readers to commit an act of unlawful violence, the Court has met the true threats test.

It appears that the terrorist Internet postings are extremely similar to the facts of *Virginia v. Black* and may provide the Supreme Court enough justification to restrict the despicable speech.[107] As previously stated, this note asserts that the Supreme Court will be searching for a justification to restrict terrorist speech, both because of the heinous nature of the speech and the post-9/11 way of thinking. Therefore, the Supreme Court may be looking for just enough justification to get it over the First Amendment hurdle.

In addition to using the "true threats" doctrine as a vehicle for the Supreme Court to cast aside despicable speech, it is this note's contention that another plausible means may exist. As previously maintained, the Supreme Court announced the *Brandenburg* Clear and Present Danger test as a way to protect political speech.[108] While political speech is a form of communication held dearly, this note contends that the Clear and Present Danger test, specifically, its definition of immanency, may be relaxed when examining cases not involving political speech.

> Applying Brandenburg, courts generally have held Harm Advocacy to be constitutionally protected expression . . . To address speech that does not produce imminent harm but nevertheless advocates harm . . . , perhaps at some later time, courts should develop a new category of speech that more appropriately weighs society's interest in protecting its citizens from socially harmful activities

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[106] *Black*, 538 U.S at 359.

[107] *Id.* at 343.

[108] Malloy & Krotoszynski, *supra* note 88, at 1201; *see generally* Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (holding that a state law requiring a political party to file an affidavit that it did not advocate the overthrow of the government was unconstitutional. The party refused. The Supreme Court held that this type of political speech was protected by the First Amendment, because it was not intended to cause imminent lawless action).

against the First Amendment's protection of free expression.[109]

While that author advocates a completely new test or category in order to protect society from speech with no social value, that large of a step is not necessary.[110] This note maintains that the Court can still apply the Clear and Present Danger test. However, the Court may modify the definition of imminent. Instead of requiring that the lawless conduct be so imminent as to be almost at the same time as the speech, the Supreme Court could simply broaden the temporal gap allowed to satisfy the imminent requirement.[111] While that becomes more of a stretch than the current Clear and Present Danger test, this note argues that by making bomb-producing information available to terrorists, lawless action is imminent. However, the action may not be immediate. It may take weeks, months, or even years before someone with the desire to make a bomb comes across those instructions and puts them to use. However, the action is instead inevitable.

Another possibility is that the Supreme Court may completely remove the imminent requirement from the Clear and Present Danger test. Under this modified standard, in order to satisfy the Clear and Present Danger test, the speaker would only need to have intended for lawless action stem from his or her words. This may be a modification to the test that the Court could make in order to reach its desired result. However, it becomes disconcerting when the Court is altering a rule of law in order for it to fit their desired out.

Moreover, does this make the Supreme Court an even bigger policy maker than it is already? Should the Supreme Court be a policy maker? Should the Supreme Court be altering the law to fit an agenda and make the U.S. government's War on Terror easier to fight? The Supreme Court may find a way around years of First Amendment jurisprudence, but is that wise? That question depends on each person's subjective opinion. Years from now, the restrictions imposed on free speech to fight the War on Terror may make American citizens cringe the same way as do the words "separate but equal."[112]

While the Supreme Court has yet to hear any cases relating to Wolfowitz's recommendations, several have begun at the trial level. Recently, an Idaho resident, Omar al-Hussayen, became the regional leader of the Islamic Assembly of North America.[113] In conjunction with that group, Hussayen created several Web sites to promote Islam.[114] However, along with information about Islam, the Web sites contained videos of dead bodies and requests for donations to help fight the "suicide operations against the Jews."[115] It is unclear whether Hussayan actually authored the Web site, but he did pay for the Web space that the site was using.[116] Due to Hussayan being the Web site's financier, the government charged him with

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[109] Malloy & Krotoszynski, *supra* note 88, at 1169-70.

[110] *Id.*

[111] Reed, *supra* note 77, at 191-92.

[112] Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting).

[113] Lipton & Lichtblau, *supra* note 36.

[114] *Id.*

[115] *Id.*

[116] *Id.*

providing information and support to terrorist organizations.[117] However, Hussayan was acquitted at trial.[118] Therefore, the case did not move forward in the appellate process. This case shows that prosecutions of those who aid terrorists are not mere threats.

A juror in Hussayan's case stated that he/she was not convinced of the defendant's direct connection to a terrorist organization.[119] However, the government is making more arrests and Hussayen's acquittal has not discouraged prosecutors.[120] According to Kevin J. O'Connor, a U. S. attorney from Connecticut, "[i]f you're going to use cyberspace, we're there and we're paying attention."[121] A conviction at the trial level will provide the vehicle for which the theory of this note will be tested.

WILL THE WAR ON TERROR STOP WITH THE WEB DRAFTERS THEMSELVES? EXAMINING THE LIABILITY OF INTERNET SERVICE PROVIDERS.

In addition to punishing Web site designers, the U.S. government may begin undertaking the task of prosecuting Web site operators as well.[122] Operators, also known as Internet Service Providers (ISPs), are companies that provide storage space to anyone who wishes to create a Web site.[123] These companies have thousands of customers and host nearly an infinite amount of information on their servers.[124] This raises a practical problem. If the government wants to prosecute those companies providing web-space, how are they supposed to protect themselves? It seems nearly impossible, if not certainly impractical, for a company to spend all of its time monitoring its users to ensure that the clients are not doing anything illegal. The Internet has become very user-friendly, allowing sites to be moved and relocated with ease. Based on this alone, Web-space provider liability would seem to place an unduly high burden on the ISPs.

For example, Jaish Ansar al-Sunna, a terrorist group, posted videos on its Web site, showing twelve dead contractors.[125] While an ISP removed the site soon after the Web designer published the videos, they reappeared almost immediately on a Web site hosted by a Utah company.[126] These ever-moving Web sites show the difficulty that ISPs face in preventing illegal use of their space. With the vast amounts of information streaming, it is foolish to think that any company can monitor or control the structured chaos of the Internet.

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[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] U.S. Internet Service Provider Association, *Electronic Evidence Compliance - A Guide for Internet Service Providers*, 18 BERKELEY TECH. L.J. 945, note 12 (2003).

[124] *Id.*

[125] *Id.*

[126] *Id.*

While the area of Internet law remains wholly unsettled, it continues to take shape and several recent circuit court decisions may shed light on the legal analysis a court would apply in an ISP prosecution. In *Doe v. GTE Corp.*, a Web site designer had secretly videotaped men's locker rooms and sold the videotapes on the Internet.[127] At the time of the appeal, the Web site designer was no longer part of the civil suit.[128] However, the plaintiff had also sued the ISP, because it had provided the Web space upon which the Web site sold the tapes.[129] The Seventh Circuit determined that for an ISP to be liable for "culpable assistance to a wrongdoer, [there must be] a desire to promote the wrongful venture's success."[130] That court avoided imposing vicarious liability on the ISP by requiring culpable conduct and knowledge by the ISP.[131] That court compared an ISP to the telephone company, asserting that an ISP is nothing more than a service provider that is unaware of the content transmitted over its lines.[132]

While the aforementioned case was a civil suit, much of the same reasoning would be applicable were an ISP prosecuted for hosting Web designers that assisted terrorists. The telephone company analogy is extremely useful for illustrating this point. First, expecting ISPs to monitor the content of the Web sites on their servers would be similar to asking a telephone company to make sure that no illegal activity occurs over their phone lines. There simply is no realistic way of doing that. The burden would be too great for any ISP to withstand.

In addition, an ISP has no personal stake or intent to aid a terrorist-assisting Web site. Their only intent is to turn a profit. As stated earlier, in order to be liable for assisting a wrongdoer, an ISP must have a "desire to promote the wrongful venture's success."[133] By providing the web-space used by terrorists, ISPs are not encouraging, supporting or even acknowledging the content of those Web sites. They simply are engaging in a capitalist transaction. What the purchasers of the web-space do is totally up to the Web site designer. Therefore, without (1) explicit evidence that an ISP knew its clients were providing noxious information to terrorists, (2) coupled with an express desire by the ISP to promote the dissemination of information throughout the terrorist world, ISPs cannot be subject to prosecution.[134]

While one can accept that federal prosecutors are attempting to heed the 9/11 Commission's advice and are trying to dry up terrorist sanctuaries, inflicting criminal liability on ISPs and making them responsible for Web designers' conduct is going too far. Only so many steps can be taken. At some point, those who the 9/11 Commission sets out to protect will be the ones damaged by the War on Terror.

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[127] Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003).

[128] *Id.* at 656.

[129] *Id.*

[130] *Id.* at 659.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 659.

[134] *See generally,* Doe v. GTE Corp., 347 F.3d 655.

HOW FAR IS TOO FAR?

Clear and Present Danger's definition of immanency has long been unsettled. As this note has shown, *Brandenburg's* definition is not set in stone. The Supreme Court will act as a political arm and a policy maker. Terrorist speech is so disgusting that the Supreme Court may simply be looking for a justification to leave it unprotected. Moreover, the current make-up of American society has placed a strong emphasis on homeland security and the ratcheting up of the War on Terror. However, the War on Terror can only go as far forward as the Supreme Court will allow the Patriot Act to function.

The question now becomes how much the First Amendment really means to America. Is free speech strong enough to allow terrorists to use it as the shield behind which they plot America's demise?

If Americans are not careful, the country will become so caught up in the War on Terror that it will turn around and realize its most sacred freedoms have eroded.