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Counter Terrorism Measures via Internet Intermediaries: A First Amendment & National Security Dilemma

Mohamed H. Aziz¹

“The Internet is a prime example of how terrorists can behave in a truly transnational way; in response, States need to think and function in an equally transnational manner.”

Ban Ki-moon, Secretary-General of the United Nations²

INTRODUCTION

Global communication has altered considerably since the rise of the Internet. Advancements in technology during the mid-1990s dramatically expanded the range of the digital network, delivering a low barrier of entry to individuals. Evolving social media and easy access to Wi-Fi networks provide individuals with platforms to anonymously communicate

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² *The Use of the Internet for Terrorist Purposes*, September 2012, U.N. OFFICE ON DRUGS AND CRIME (Oct. 13, 2014)

extraterritorially to an often limitless audience.³ The Internet has developed a platform for participation in the ‘marketplace of ideas’ – creating a virtual, less restrictive, magnification of an individual’s expressions and thoughts.

However, while the Internet enables such communication, legal initiatives are being implemented to constrain terrorists as they exploit the Internet for the purpose of carrying out their violent agenda in the U.S. and abroad. This article will explore recent counter-terrorism measures taken by the U.S. government and other liberal democracies as they relate to issues of First Amendment Freedom of Speech, as well as the complexities of trans-border enforcement mechanisms to constrain and punish speech.

I. HOW TERRORISTS UTILIZE THE INTERNET

The United Nations Office on Drugs and Crime (UNODC), in collaboration with the United Nations Counter-Terrorism Implementation Task Force, identifies areas such as financing, training, planning, and propaganda that terrorists use in order to carry out their agenda.⁴ Propaganda, for example, is described by the UNODC as involving three objectives that terrorists seek to accomplish: *recruitment, incitement, and radicalization*.⁵ In order to carry out these objectives, terrorists seek to gain the support of primarily vulnerable and marginalized groups with appeals to sentiments of injustice,

³ *Id.* at 3 (discussing the evolution of the Internet since the 1980s and both the benefits and challenges of the ever-expanding digital network).

⁴ *Id.* at 3.

⁵ *Id.* at 3-7.

exclusion and humiliation.⁶ For example, propaganda in the form of online video games may be used to appeal to minors from oppressed areas of the world, particularly in the middle-east.⁷ The terrorists seek to spread material that is considered to be an unlawful glorification of, or provocation to, acts of terrorism and are keen on transmuting recruits into violent people – by using an extreme and twisted indoctrination of their faith as justification.⁸

II. U.S. GOVERNMENT RESPONSE: COUNTER-TERRORISM MEASURES

The U.S. government utilizes the Internet to gather intelligence and counter terrorist threats. For example, the Center for Strategic Counterterrorism Communications is an inter-agency initiative that aims to identify extremist propaganda and responds with targeted counter-narratives.⁸ For instance, in May 2012, the Center was cited as having responded, within 48 hours, to banner advertisements promoting extremist violence posted on various websites by Al-Qaeda in the Arabian Peninsula, with counter-advertisements on the same websites featuring an

⁶ *Id.* at 4-5.

⁷ *Id.* at 4.

⁸ *Id.* at 4-5 (Violence is commonly used by terrorists in order to attract others, particularly minors. Video games developed by terrorist organizations allow minors to simulate acts of terrorism in first person – similar to a ‘Call of Duty’ game on the PlayStation gaming console. Such virtual role-playing rhetoric fuels hatred into the hearts and minds of innocent adherents across the world – particularly within the middle-east. The content is commonly distributed using websites, virtual chat rooms, online magazines, social networking platforms, and video-sharing websites such as YouTube).

⁸ *Id.* at 12.

altered version of that same message that was intended to convey that the victims of the terrorist organization's activities were Yemeni nationals.⁹ The counter-narrative campaign involved cooperation among the United States Department of State, the intelligence community and the military. The Center also uses media platforms such as Facebook and YouTube for counter-narrative communications.¹⁰

However, to counter the growing threat of terrorist groups like ISIS (the Islamic State of Iraq and Syria), the U.S. government has taken steps that are quite contentious. Increasingly, the government is cooperating with social media companies like Twitter, Facebook and Google to prevent terrorist groups, like ISIS, from carrying out their recruitment methods on social media through rhetoric and videos of beheadings. As described in a U.S. News & World Report article, "Twitter, Facebook, YouTube Grapple with Islamic State Censorship," "the White House took a rare step in asking social media sites to remove a video that surfaced...showing a member of the terrorist group murdering journalist James

⁹ *Id.* at 13.

¹⁰ *Id.* at 14-18 (explaining that the U.S. government, other liberal democracies, and intergovernmental organizations such as the United Nations, have developed universal legal instruments to counter terrorism. While such universal instruments do not define specific offenses as crimes under international law, they create an obligation for States to criminalize terrorism under their domestic law, prosecute and extradite alleged offenders, and maintain commitment to human rights standards. Aside from the debate regarding the effectiveness of such universal instruments, it is important to note that such international dialogue and cooperation among nations is vital to countering terrorism on the Internet – particularly with its expanding global reach).

Foley.”¹¹ Furthermore, White House spokesman Ned Price told U.S. News “[o]ur engagement is confined only to extraordinary circumstances” and “[t]he White House as well as relevant departments and agencies do engage with social media sites when appropriate to flag postings or material that may have national security implications and that typically are not in keeping with these providers’ own policies.”¹² The article provides a tweet by Twitter CEO Dick Costolo, in which he promised to suspend accounts posting “graphic imagery” related to ISIS’ execution of Foley. Interestingly, Twitter removed many instances of the beheading images – but news sites including the New York Post, as well as the Israeli Consulate’s posting of the images were not removed.¹³ Jillian York, director for international freedom of expression at the Electronic Frontier Foundation stated that such selective flagging of content appears to demonstrate that there are different rules online for individuals than for news groups or prominent organizations.¹⁴

With the emergence of terrorist groups, like ISIS, it is becoming clearer that social media companies are facing increasing pressure from governments to restrict and flag content. The

¹¹ Tom Risen, *Twitter, Facebook, YouTube Grapple with Islamic State Censorship*, U.S. NEWS & WORLD REP. (Sept. 5, 2014).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (After Foley’s murder, an analysis by the web intelligence company, Recorded Future, found that there had been more than 27,000 active pro-ISIS twitter accounts. It is clear that social media companies will have to adopt bright line policies regarding what content they flag, why and how they are flagging it, and who they sanction for the posting of such content).

companies' employees use automated tools to flag accounts related to terrorist groups, along with messages from other users reporting abuse.¹⁵ Unlike the U.S., European countries like France, Germany, and the U.K. explicitly outlaw hate speech online.¹⁶ France's tough laws enabled national officials to make 87 percent of the requests to remove content from Twitter in the second half of 2013, according to a transparency report from the company.¹⁷

Is direct government flagging of content a slippery slope likely to result in abuses of government power? Are governments (including the U.S.) hiding behind a veil of social media proxies to flag and censor content? And are these counter-terrorism measures unfairly restrictive of individuals' free speech under the First Amendment?

III. FIRST AMENDMENT UNPROTECTED & LESS PROTECTED SPEECH

The First Amendment states: "Congress shall make no law... abridging the freedom of speech..."¹⁸ However, the Court has traditionally allowed the government to place certain restrictions on offensive speech in the public forum. The three relevant restrictions to censorship of terrorist content on the Internet are: *Incitement* of illegal activity, *Fighting Words*, and *True Threats*.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ U.S. Const. amend. I. The Amendment reads, in full, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Supreme Court's most speech-protective edifice of incitement of illegal activity is *Brandenburg v. Ohio*.¹⁹ In *Brandenburg*, a Ku Klux Klan group leader was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."²⁰ The Ku Klux Klan leader ("appellant") called a local television station reporter and invited him to appear at a Ku Klux Klan rally.²¹ The reporter and a cameraman then attended the rally and filmed the events – the film showed hooded members, some of whom carried firearms, gathered around a large burning wooden cross.¹⁸ The film captured utterances which included phrases that were derogatory of African Americans and of Jews.¹⁹ Appellant, also in a Klan hood, gave a speech in which he stated: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."²⁰

The Supreme Court struck down the Ohio Criminal Syndicalism Statute and overturned Appellant's conviction.²¹ The Court stated that the Act created a blurred line between mere advocacy and incitement to imminent lawless action; the Act,

¹⁹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²⁰ *Id.* at 444-45.

²¹ *Id.* at 445.

¹⁸ *Id.*

¹⁹ *Id.* at 446.

²⁰ *Id.* at 447.

²¹ *Id.* at 449.

by its own words and as applied, sought to punish mere advocacy and outlaw assembly with others merely to advocate a non-imminent action.²² As stated by the Court, "...the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except* where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action."²³

More recently, in *Holder v. Humanitarian Law Project*,²⁴ the Court determined that 18 U.S.C. §2339B, which makes it a "federal crime to knowingly provide material support or resources to a foreign terrorist organization" is constitutional because it seeks to regulate conduct rather than speech.²⁵ The Court found that Congress' most recent amendment to the definition of "material support or resources" is defined as: "...any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance..."²⁶ The Plaintiffs were two U.S. citizens and six domestic organizations who challenged the statute on four types of material support—"training," "expert advice or assistance," "service," and "personnel."²⁷ They claimed that the statute was invalid because it prohibited them from training, aiding and offering legal expertise to members of foreign designated terrorist groups on humanitarian

²² *Id.* at 449.

²³ *Id.* at 448 (emphasis added).

²⁴ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

²⁵ *Id.* at 40.

²⁶ *Id.*

²⁷ *Id.* at 11-12.

and political issues, in violation of the First Amendment.²⁸

The Court, in a 5-3 opinion led by Chief Justice John Roberts, relied on the idea that the Government's interest in combatting terrorism and national security threats are of utmost significance. The Court, agreeing with Congress' findings, recognized that international terrorist groups are promoted by legitimate contributions such as humanitarian training and support; such contributions only further legitimize and facilitate those groups and their unlawful conduct.²⁹ Interestingly, and as stated by Justice Breyer in the dissenting opinion, there is no general First Amendment exception that applies in this case – “the First Amendment protects advocacy even of *unlawful* action so long as that advocacy is not “directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action.”³⁰ The majority stressed the national security priority of combatting the threat of terrorism in upholding the statute, and did not require the *Brandenburg* test to be met.

In view of both *Brandenburg* and *Holder*, and the distinction between mere speech in the form of advocacy versus conduct, the Court has essentially turned its back on a longstanding test, in favor of an inexplicit and equivocal one. This presents a problem in the emerging global theater in which U.S. citizens will increasingly seek to participate in trans-border association and cooperation. Their associations will include humanitarian agencies and missions, human rights organizations, and international tribunals,

²⁸ *Id.* at 10-11.

²⁹ *Id.* at 15-23.

³⁰ *Id.* at 43-44.

corporate functions.

Also, while there are national security threats posed by foreign terrorists and governments, the same is true of domestic criminals and conspiracies.³¹ With this new construction, it is quite difficult to define exactly what might foreseeably implicate a national security threat. Justice Robert's sweeping justification may potentially constrain domestic speech or association that Congress and/or the State Department believe could negatively affect U.S. foreign diplomatic relationships and considerations. Despite the understandable justification and necessity to preserve the interests of national security, *Holder* provides a nebulous regime that blurs advocacy with conduct. Under this regime, any citizen in his or her living room with a Wi-Fi connection could essentially threaten U.S. interests by posting a recorded speech on YouTube, in which he or she indirectly advises a State Department-designated terrorist group on matters pertaining to humanitarian, political, and other legitimate activities.

Similarly, the U.S. government's wide latitude under *Holder* may go so far as to not only punish those citizens who contribute to ISIS' agenda, but who have no association with, and simply re-tweet or express opinionated support or expert advice to ISIS via their individual Twitter accounts. Would this be punishable under *Holder*? Probably not likely, however, "material support" could constitute many things – even something as simple as posting a tweet, or advising ISIS affiliates on political or religious matters – depending on how the term is defined. These questions, like the multiple other

³¹ *Id.* at 44.

questions that could be hypothesized under the *Holder* regime, demonstrate that the Court should consider a much more robust rule that preserves national security, without requiring commercial entities, humanitarian projects, and international institutions to second guess their important efforts abroad. Most importantly, the Court's conflation of mere advocacy and conduct creates confusion, leaving many questions unanswered – such as, when is the *Brandenburg* test triggered, if it still exists?

While *Incitement* deals with the question of when speech must be punished because it advocates illegal acts, *Fighting Words* deals with a different question: when must speech be punished for provoking an audience into using illegal force against the speaker? *Feiner v. New York* involves the conviction of Irving Feiner, a college student, for the offense of disorderly conduct under the New York penal laws.³² Feiner had stood on a large wooden box on a sidewalk and addressed a crowd of African and Caucasian Americans.³³ He appeared to be taunting the crowd, instigating pushing and shoving – forcing two police officers to intervene by arresting Feiner to preserve order after he repeatedly ignored them, thereby ending the scuffle.³⁴ The Court upheld Feiner's conviction, stating: "[t]he findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."³⁵

Fighting Words deals with the preservation

³² *Feiner v. New York*, 340 U.S. 315 (1951).

³³ *Id.* at 316-17.

³⁴ *Id.*

³⁵ *Id.* at 321.

of order as a top priority. *Feiner's* conviction was upheld due to his deliberate defiance of police orders. Had the police officers not arrested *Feiner*, the scuffle could have turned into an even greater disorder. However, the Court has never used *Fighting Words* to regulate online conduct – this would be a radical measure taken by U.S. authorities. In the case of a domestic incident involving online videos of Quran burnings, offensive depictions of the Prophet Muhammad, or recordings of an act done by an ISIS affiliate abroad, mere offensiveness is not a proper ground for regulating or suppressing a speaker's message.³⁶ Despite hostile audience reactions abroad, which may include deadly unrest, it would be far-reaching for the Court to regulate such conduct.

The government may regulate or prohibit such conduct in only two narrow instances.³⁷ In the case of the burning of the Quran, as obscene and disrespectful as it is, the act must convey an unprotected message of some sort, such as a true threat, in order to punish the offenders.³⁸ Also, local authorities could intervene by requiring a permit, or ensuring that the act complies with local, content-neutral laws of public order and safety.³⁹ However, the question of national security remains. Could the Court declare that government authorities may prohibit such conduct because it has the potential to instigate mass riots within the Muslim world?

In the emerging global theater and expanded

³⁶ Timothy Zick, *Falsely Shouting Fire In A Global Theater: Emerging Complexities of Trans-Border Expression*, 65 Vand. L. Rev. 125 (2012).

³⁷ *Id.* at 141.

³⁸ See *infra* note 47 and accompanying text.

³⁹ Zick, *supra* note 41, at 141.

reach of the digital network, the marketplace of ideas will make its way to foreign audiences, who may react negatively to hateful speech and conduct on the Internet. The indirect and generic direction of speech should never implicate the necessity to regulate it.⁴⁰ Thus, foreign audiences, like domestic ones, must be encouraged to engage in counter-narratives and more peaceful means of combatting hateful speech through dialogue.⁴¹ In the event that U.S. foreign interests are complicated from online speech, U.S. officials, such as diplomats, representatives, heads of state, and the President, will always have a platform to clarify positions and agenda, and engage in diplomatic efforts to improve reputation abroad.⁴² These effective alternatives should be utilized instead of punishing or silencing alleged Fighting Words.

The third government-restriction on speech takes the form of what the Court refers to as *True Threats*, which are statements by a speaker that purports to communicate “a serious expression of [intent] to commit an act of unlawful violence to a particular individual or group of individuals.”⁴³ In

⁴⁰ See *Snyder v. Phelps*, 580 F.3d. 206 (2009), (“As a general matter, the fact that society may find speech offensive is not a sufficient reason for suppressing it. Speech that is called hateful, or speech that is unpopular, or speech with which you strongly disagree, may still be protected speech. The government, including the courts, can place reasonable time, place, and manner restrictions on how protected speech may be expressed. These restrictions must be narrowly tailored, and should balance the interests of all the people involved. Speech that is vulgar, offensive, and shocking...is not entitled to absolute constitutional protection under all circumstances.”).

⁴¹ See Zick, *supra* note 41, at 142.

⁴² *Id.* at 143.

⁴³ See *Watts v. United States*, 394 U.S. at 708 (1969).

Virginia v. Black, the Court stated that the speaker need not actually intend to carry out the threat, and that the purpose of the prohibition on true threats is to protect individuals from the fear of violence or the possibility that the threatened violence will occur.⁴⁴ In *Black*, defendants, Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating a Virginia statute that makes it a felony "for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place," and specifies that "any such burning...shall be prima facie evidence of an intent to intimidate a person or group."⁴⁵ At trial, Black objected on First Amendment grounds to a jury instruction that cross burning by itself is sufficient evidence from which the required "intent to intimidate" could be inferred, and was found guilty.⁴⁶ O'Mara pleaded guilty to charges of violating the statute, but reserved the right to challenge its constitutionality.⁴⁷ In Elliott's trial, the judge did not give an instruction on the statute's prima facie evidence provision. Ultimately, the Virginia Supreme Court held that the statute was unconstitutional on its face and that the prima facie evidence provision renders the statute overbroad.⁴⁸

Justice O'Connor, writing for the majority held that: (1) Virginia's ban on cross burning with intent to intimidate did not violate the First Amendment; and (2) the provision of the statute which stated that burning of a cross in public view "shall be prima facie evidence of an intent to

⁴⁴ See *Virginia v. Black*, 538 U.S. 343, 360 (2003).

⁴⁵ *Id.* at 348.

⁴⁶ *Id.* at 367-68.

⁴⁷ *Id.* at 350.

⁴⁸ *Id.* at 351.

intimidate,” was facially unconstitutional.⁴⁹ In the Opinion, Justice O’Connor states: “[b]urning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan, which following its formation in 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks [and] southern whites who disagreed with the Klan...”⁵⁰ Furthermore, the Klan has, through its history in the United States, “used cross burnings as a tool of intimidation and a threat of impending violence”; it is a powerful message of hate – regardless of whether the context of the message is political or meant to intimidate.⁵¹

Black bolsters and justifies US government attempts to restrict speech that it purports communicates a serious intent to commit unlawful violence. A cross-burning, like a beheading, seeks to express a real desire to commit a serious, violent act. Both the Ku Klux Klan and ISIS have imposed a reign of terror – which includes acts of murder, torture, and humiliation. Their symbolic acts are used as a tool to intimidate others. However, online videos of ISIS’ barbaric acts which aim to threaten and intimidate *all* who oppose them, (religiously, politically, morally, etc.) are directed toward a mass audience. This presents a challenge to the Court as it seeks to wrestle with the boundaries of First Amendment restrictions in the U.S. and abroad. Given the expanded reach of the Internet, a government justification for countering *True Threats* on the Internet is not only impracticable, but far-

⁴⁹ *Id.* at 367-68 (however, the Court held that juries could not be allowed to infer the intent to intimidate from the mere fact that a cross had been burned).

⁵⁰ *Id.* at 343.

⁵¹ *Id.*

reaching under such grounds.

IV. EXTRATERRITORIAL COMPLEXITIES AND PROSECUTORIAL CHALLENGES

In *Schenk v. United States*, Justice Holmes stated that “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic” and that “the character of every act depends upon the circumstances in which it is done.”⁵² Justice Holmes’ recognized early on, that First Amendment free speech protections are contextual.⁵³ Today, the Internet has complicated extraterritorial issues and prosecutions pertaining to speech. Speech, both domestic and abroad, can create powerful ripple effects across the world due to its magnification on the Internet – and the U.S. government’s ambiguous agenda to address such a challenge is stirring much First Amendment debate. For example, the U.S. born Muslim cleric, Anwar al-Awlaki, while living in Yemen, had posted videos on YouTube in which he continually praised and called for terrorist attacks targeted at the west. As a result of this threat, YouTube removed al-Awlaki’s videos, and the Obama administration targeted him for execution by a drone strike in Yemen.⁵⁴

Similarly, a cartoonist in the U.S. received foreign death threats after she created an online post urging people to partake in “Draw Muhammad Day.”⁵⁵ Developments such as these, even if they originate within a domestic domain, like the latter

⁵² *Schenk v. United States*, 249 U.S. 47, 52 (1919).

⁵³ See Zick, *supra* note 41, at 126.

⁵⁴ *Id.* at 127.

⁵⁵ *Id.* at 127.

example, can cross territorial borders and lead to a variety of national security dilemmas. These dilemmas could include violent uprisings, diplomatic strains, and increased support of adversaries and terror groups.⁵⁶

This recent paradigm raises important jurisprudential and law enforcement questions. The Court's broad national security justification in *Holder* demonstrates the likelihood that domestic and foreign prosecutions for inciting violence abroad are a foreseeable possibility. Another important question remains debatable: will U.S. citizens' First Amendment protections be maintained if they speak from abroad?

Governments across the world are struggling to control and regulate trans-border speech, and traditional measures, like revoking citizens' passports are not very effective at impeding the source of that speech. Newer measures, such as working with and pressuring Internet intermediaries to remove content, federal prosecutorial threats seeking indictments against domestic or foreign information distributors, and executive orders targeting citizens for Internet content advocating terrorism, are all emerging realities.⁵⁷ The Court's hardly robust decision in *Holder* validated the government's wide-latitude to carry out measures that seek to preserve safety and security. The global theater is altering the traditional framework, and courts and officials will seek to create less speech-protective incitement standards. Extremist rhetoric and advocacy could be restricted – especially if it poses harm to U.S. troops overseas.⁵⁸ The traditional

⁵⁶ *Id.* at 128.

⁵⁷ *Id.* at 134-38.

⁵⁸ *Id.*

standard could evolve into a counter-terrorism measure in order to suppress potentially dangerous speech.⁵⁹

Nevertheless, courts must never abandon the traditional reasoning under *Brandenburg* – that it was created to protect a citizen who criticizes the government or advocates for unpopular viewpoints, especially during times of war. The broad nature of the national security justification breeds uncertainty in comparison to the *Brandenburg* test, which protected mere advocacy for unpopular views. Many scholars believe that the *Brandenburg* test should not be diluted, sidelined or replaced by the sweepingly broad national security justification under *Holder*.⁶⁰ The alternative would be that government should solely rely on other existing measures and prohibitions on harmful conduct, such as the federal espionage act, national security laws, and effective counter-terrorism and law enforcement strategies.⁶¹

Another complexity surrounding incitement involves the prosecution of the U.S. citizen, Anwar al-Awlaki, and the likelihood that he would have enjoyed some First Amendment protection. While a speaker located on U.S. soil will enjoy legal process, will an American citizen who is abroad?⁶² Al-Awlaki, who had dual U.S. and Yemeni citizenship, was targeted via executive order after posting YouTube videos advocating terrorism.⁶³ His father brought a lawsuit as next friend, asking the court to rule that in the absence of armed conflict, that the government can only target an American citizen as a

⁵⁹ *Id.* at 151.

⁶⁰ *See, e.g., id.* at 150.

⁶¹ *Id.*

⁶² *Id.* at 153.

⁶³ *Id.* at 152.

last resort to address an imminent threat to others.⁶⁴ The lawsuit also asked the court to order the government to disclose how exactly it places U.S. citizens on kill lists.⁶⁵ However, the court dismissed the lawsuit on justiciability grounds – that his father lacked standing.⁶⁶

Al-Awlaki's case raises obvious Fifth Amendment due process questions, as well as First Amendment free speech questions. In the released government memorandum outlining the legal justification for al-Awlaki's killing via a drone strike, the Office of Legal Counsel of the U.S. Justice Department detailed Fifth Amendment, Fourth Amendment, International law, and U.S. Patriot Act grounds for the extrajudicial killing.⁶⁷ However, it did not address al-Awlaki's First Amendment free speech rights. Thus, it is not clear to what extent al-Awlaki's incitement videos factored into the execution order decision. Furthermore, it is difficult to tell whether the extrajudicial execution order sets any precedent for future U.S. citizen speakers who render any tangible support to terrorists, or advocate on their behalf.

In light of the Supreme Court's decision in *Holder*, the government might claim that speech alone, if coordinated in some fashion with terrorists, constitutes adequate grounds for targeted execution.⁶⁸ Obviously, without some form of judicial review, we cannot know whether the speech

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Charlie Savage, *Justice Department Memo Approving Targeted Killing of Anwar Al-Awlaki*, N.Y. TIMES (June 23, 2014).

⁶⁸ Zick, *supra* note 41, at 153.

in question meets the incitement, material support, or any other legal standard.⁶⁹ It thus remains possible that the U.S. government may issue an order directing the killing of a U.S. citizen, whether living at home or abroad, for inciting violence through rhetoric posted on the Internet.⁷⁰ That would essentially nullify the First Amendment's broad protection for mere advocacy of unlawful action.⁷¹

The U.S. District Court for the District of Columbia, in its decision dismissing al-Awlaki's father's lawsuit, suggested that al-Awlaki might be permitted to appear via teleconference to contest the order, rather than enter the U.S. and risk arrest and detention.⁷² This would allow the target to contest the legality of the order, and while it does not resolve justiciability issues in all cases, it would allow the target to partake in a legal process. Despite this suggestion, the Justice Department stressed the importance of its order in its memorandum, raising the "wartime" powers of the President and "state secrets" privilege.⁷³ Nevertheless, the District Court's suggestion points to the types of complexities and solutions we can expect to encounter as the global theater continues to develop.

V. CONCLUSION

The evolution of the Internet creates emerging extraterritorial complexities and shadowy paradigms that complicate First Amendment free speech protections. The ripple effects caused by

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 152.

⁷³ Savage, *supra* note 67.

harmful domestic speech, and the intimidation tactics used by terrorists are daunting challenges for U.S. courts to tackle.

In general, traditional First Amendment standards can adequately address potentially harmful speech in the global theater. The traditional standards were intended to accommodate the evolving nature of speech publication. Despite the magnification of viewpoints and hate-speech, which reaches an increasingly expanding audience, speakers and government officials must be vigilant and always ready to clarify national security and diplomatic positions.⁷⁴ However, such traditional standards relating to offensive, inciting, violent, or potentially harmful speech need not be revised or replaced by the courts and broadened to give government unnecessarily wide latitude to address such issues. This could potentially lead to overreaching government surveillance and unfair prosecution.⁷⁵ Instead, government should rely on its other existing measures and prohibitions on harmful conduct, such as the federal espionage act, national security laws, and effective counter-terrorism and law enforcement strategies.

As the global theater continues to alter the First Amendment, extrajudicial, and prosecutorial framework, efforts to cooperate and associate with peacekeeping missions, foreign governments, enforcement agencies, and individuals abroad will become increasingly important. Multilateral collaboration between the world's most powerful countries and organizations will be essential in combatting the threat of terrorist activity on the

⁷⁴ Zick, *supra* note 41, at 133.

⁷⁵ *Id.*

Internet. Finally, the overwhelming majority of Muslims around the world are opposed to atrocities committed by violent extremists and brutal authoritarian regimes, and should be further emboldened within the public forum, especially through television, print, and Internet media. Through evolving means of communication and mass media, the international community will prevail in countering the threat of global terrorism if it remains committed to emboldening the very individuals and organizations which seek to further peace and stability.

