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Observations on the First Amendment and the War on Terror

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SOME OBSERVATIONS ON THE FIRST AMENDMENT AND THE WAR ON TERROR*

Ofer Raban[†]

Freedom of speech has traditionally suffered at times of war, and the War on Terror—with its related wars in Iraq and Afghanistan—is no exception: since 9/11, formidable pressures have come to bear on the constitutional freedoms of speech and press. As this paper discusses, these pressures have come from all three branches of the federal government. They include increased executive enforcement of existing laws, new legislation targeting terrorism-related speech, and apparent judicial reluctance to vigorously enforce existing constitutional protections. Notably, these allegedly significant impingements on the freedom of speech were achieved without any apparent change in constitutional doctrine. With the War on Terror showing no signs of abating, and with Donald Trump in the White House, this is an opportune time to take stock of these recent impingements on the important freedoms of speech and press, and what we can learn from them.

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INTRODUCTION

Every major American conflict—including the Civil War, the two World Wars, the Korean War, the Vietnam War, and the “Cold War”—has been accompanied by attempts to recalibrate the balance between free speech and national security.¹ The present War on Terror, and its related wars in Iraq and Afghanistan, are no exception. Since 9/11, we have seen newfound enthusiasm for enforcing existing restrictions on speech, new legislation targeting terror-related speech, and judicial interpretations showing little enthusiasm for free speech protections. Together, these government actions amount to a substantial impingement on the freedom of speech.

I. GOVERNMENT LEAKERS AND JOURNALISTS

It is by now a common refrain that “[the Obama Administration] prosecuted more leakers of classified information than all previous administrations combined”² (eight, as compared with three³). These prosecutions charged leakers with violations of the Espionage Act—a draconian federal statute, originally enacted a century ago, that imposes heavy criminal penalties for the disclosure of classified information.⁴ Prosecuted individuals included John Kiriakou, a former Central Intelligence Agency (“CIA”) officer charged with leaking information about the CIA’s torture program;⁵ Jeffrey Sterling, another former CIA officer charged with leaking information about a botched CIA operation to a *New York Times* reporter;⁶ and Stephen Kim, a State Department analyst charged with giving classified information about North Korea’s nuclear program to a Fox News reporter.⁷ These three are typical of the recent prosecutions: two of the three leaks

1. See generally GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

2. Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221, 1225 (2015). See also LEONARD DOWNIE, JR., COMM. TO PROTECT JOURNALISTS, *THE OBAMA ADMINISTRATION AND THE PRESS: LEAK INVESTIGATIONS AND SURVEILLANCE IN POST-9/11 AMERICA* (2013), <https://www.cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php> (“Six government employees, plus two contractors including Edward Snowden, have been subjects of felony criminal prosecutions since 2009 under the 1917 Espionage Act, accused of leaking classified information to the press—compared with a total of three such prosecutions in all previous U.S. administrations. Still more criminal investigations into leaks are under way.”).

3. The eight leakers charged during the Obama administration are Thomas Drake, Shamai Leibowitz, Stephen Kim, Chelsea Manning, Donald Sachtleben, Jeffrey Sterling, John Kiriakou, and Edward Snowden. See Peter Sterne, *Obama Used the Espionage Act to Put a Record Number of Reporters’ Sources in Jail, and Trump Could Be Even Worse*, FREEDOM OF THE PRESS FOUND. (June 21, 2017), <https://freedom.press/news/obama-used-espionage-act-put-record-number-reporters-sources-jail-and-trump-could-be-even-worse>.

4. Elias Groll, *Meet the Seven Men Obama Considers Enemies of the State*, FOREIGN POL’Y (June 22, 2013, 8:00 PM), <http://foreignpolicy.com/2013/06/22/meet-the-seven-men-obama-considers-enemies-of-the-state>.

5. Criminal Complaint, *United States v. Kiriakou*, No. 1:12MJ33 (E.D. Va. Jan. 23, 2012), <https://www.justice.gov/archive/opa/documents/kiriakou-complaint.pdf>. See also Charlie Savage, *Ex-C.I.A. Officer Charged in Information Leak*, N.Y. TIMES (Jan. 23, 2012), <http://www.nytimes.com/2012/01/24/us/ex-cia-officer-john-kiriakou-accused-in-leak.html>.

6. Indictment, *United States v. Sterling*, No. 1:10CR485 (E.D. Va. Dec. 22, 2010), <https://www.documentcloud.org/documents/323711-sterling-indictment.html>. See also Greg Miller, *Former CIA Officer Jeffrey A. Sterling Charged in Leak Probe*, WASH. POST (Jan. 6, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604001.html>.

7. Indictment, *United States v. Kim*, No. 1:10CR10-25 (D.D.C. Aug. 19, 2010), <https://fas.org/sgp/jud/kim/indict.pdf>. See also Scott Shane, *U.S. Pressing Its Crackdown Against Leaks*, N.Y. TIMES (June 17, 2011),

involved allegations of government abuse and incompetence, while the third involved what seemed until then a routine exchange of information with a journalist; all three ended up serving substantial time in prison (Kiriakou received two and a half years, Sterling received three and a half years, and Kim received a year and a month); and two of the three prosecutions ensnared the journalists who received the leaked information.

In the course of Kim's investigation, the Federal Bureau of Investigation ("FBI") seized the phone records and emails of James Rosen, the Fox News reporter to whom Kim gave the information, and had tracked Rosen's comings and goings to and from the State Department.⁸ In order to get the search warrants targeting Rosen, the U.S. Department of Justice ("DOJ") claimed that Rosen was an aider and abettor and a co-conspirator in Espionage Act violations.⁹ In other words, according to the DOJ, a journalist who received classified information from a leaker was himself guilty of crimes whose punishment could amount to decades in prison. Attorney General Eric Holder personally signed off on the search warrant for Rosen, who was labeled a "flight-risk."¹⁰

Following a public outcry, the Obama administration disclaimed any intention to charge journalists as accessories or co-conspirators in Espionage Act violations; but it treated the decision as a mere matter of administrative discretion, rather than a legal or constitutional obligation.¹¹

To be sure, the Espionage Act, on its face, can be used to prosecute journalists *directly*, not only as aiders and abettors or co-conspirators: the Act draws no real distinction between government leakers and journalists who receive information and publish it. Among other things, the Act punishes:

Whoever knowingly and willfully . . . publishes or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information . . . concerning the communication intelligence activities of the United States;¹²

Whoever having unauthorized possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, [or] transmits . . . the same to any person not entitled to receive it;¹³

Whoever [with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation,] . . . obtains

<http://www.nytimes.com/2011/06/18/us/politics/18leak.html>.

8. See Affidavit in Support of Application for Search Warrant ¶¶ 19–21, 30–32, No. 10-291-M-01 (D.D.C. Nov. 7, 2011), <http://apps.washingtonpost.com/g/page/local/affidavit-for-search-warrant/162>.

9. *Id.* ¶ 40.

10. See Michael Isikoff, *DOJ Confirms Holder OK'd Search Warrant for Fox News Reporter's Emails*, NBC NEWS (May 23, 2013, 2:16 PM), http://investigations.nbcnews.com/_news/2013/05/23/18451142-doj-confirms-holder-okd-search-warrant-for-fox-news-reporters-emails.

11. See Matt Apuzzo, *Holder Fortifies Protection of News Media's Phone Records, Notes or Emails*, N.Y. TIMES (Jan. 14, 2015), <https://www.nytimes.com/2015/01/15/us/politics/journalists-win-more-protection-from-government-prosecution.html>.

12. 18 U.S.C. § 798(a).

13. 18 U.S.C. § 793(e).

... any ... document, writing, or note of anything connected with the national defense ...¹⁴

Each violation of these provisions is punishable by up to ten years of imprisonment.¹⁵

Thus, the Espionage Act allowed the government to charge James Rosen and his employers at Fox News with serious felonies as *principals*—not only as aiders and abettors or as co-conspirators—so long as the government could prove that there was “reason to believe” that the published information “could be used to the injury of the United States.”¹⁶ Such a prosecution had been attempted before: in 1942, the Roosevelt administration tried to indict the *Chicago Tribune* under the Espionage Act for its publication of national security information.¹⁷ But the grand jury refused to indict (presumably because of the government’s reluctance to substantiate its claim with more classified information).¹⁸ Threats of Espionage Act prosecutions were also made by President Nixon’s Attorney General against the *New York Times* and the *Washington Post* during the newspapers’ publication of the *Pentagon Papers*.¹⁹ More recently, Alberto Gonzales, Attorney General under President George W. Bush, claimed that the *New York Times* and the *Washington Post* violated the Espionage Act in their disclosure of the National Security Agency’s (“NSA”) secret surveillance program, and the disclosure of the CIA’s secret prisons (the so-called “black sites”).²⁰

In short, the possibility of prosecuting journalists for Espionage Act violations is both real and substantial. In fact, it appears that the only reason WikiLeaks and its founder Julian Assange have so far escaped indictment for Espionage Act violations (assuming they have²¹) has to do with the fact that established media outlets like the *New York Times* published much of the same information—which is bound to further complicate things for the prosecution.²² Indeed, the constitutional status of such prosecutions is a matter of considerable controversy, and relevant Supreme Court precedent points in different directions.²³ But such a prosecution may yet take place under the Trump administration.

14. 18 U.S.C. § 793(b).

15. 18 U.S.C. § 793(f).

16. See *United States v. Morison*, 844 F.2d 1057, 1085–86 (4th Cir. 1988) (Phillips, J., concurring) (“[T]o avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact,” the government must prove that leaked classified information “was *in fact* potentially damaging . . . or useful.”).

17. Editorial, *Breaking the Code on a Chicago Mystery from WWII*, CHI. TRIB. (Nov. 21, 2014), <http://www.chicagotribune.com/news/opinion/editorials/ct-battle-midway-japanese-grand-jury-press-freedom-edit-20141121-story.html>.

18. *Id.*

19. David W. Dunlap, *1971: Supreme Court Allows Publication of Pentagon Papers*, N.Y. TIMES INSIDER (June 30, 2016), <https://www.nytimes.com/2016/06/30/insider/1971-supreme-court-allows-publication-of-pentagon-papers.html>. See *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

20. See Jeffrey Rosen, *Full Court Press*, NEW REPUBLIC (Nov. 12, 2016), <https://newrepublic.com/article/62760/new-york-times-alberto-gonzales-press-cia-valerie-plame>.

21. See Michael Hastings, *WikiLeaks Stratfor Emails: A Secret Indictment Against Julian Assange?*, ROLLING STONE (Feb. 28, 2012), <http://www.rollingstone.com/politics/news/wikileaks-stratfor-emails-a-secret-indictment-against-assange-20120228>.

22. See Evan Perez et al., *Sources: US Prepares Charges to Seek Arrest of WikiLeaks’ Julian Assange*, CNN (Apr. 20, 2017), <http://www.cnn.com/2017/04/20/politics/julian-assange-wikileaks-us-charges/index.html>.

23. In the *Pentagon Papers* case, a majority of justices stated that newspapers’ publication of classified national security documents could be criminally punished notwithstanding the First Amendment. See *N.Y. Times*

Around the same time it was prosecuting Stephen Kim, the DOJ conducted extensive secret surveillance of the Associated Press when investigating a leak of classified information about a failed Al-Qaeda plot originating in Yemen.²⁴ In the course of its investigation (which resulted in yet another Espionage Act prosecution), the DOJ secretly seized two months' worth of records from more than twenty telephone lines.²⁵ Up to one hundred journalists were using these phone lines, many of them working on stories about the government.²⁶

The prosecution of Jeffrey Sterling also had ominous spillover effects. Sterling had raised concerns about a failed CIA Iran operation with the Senate Intelligence Committee, and then leaked the information to *New York Times* reporter James Risen—who published it in his 2006 book, *State of War*.²⁷ During Sterling's trial, the government served a subpoena on Risen, ordering him to disclose his confidential source. Risen refused, arguing that the First Amendment protected him from such forced disclosure.²⁸ He challenged the subpoena in court, and a federal district court agreed: "A criminal trial subpoena is not a free pass for the government to rifle through a reporter's notebook," read the opinion.²⁹ The First Amendment allows the government to force a journalist to reveal his source only if the government can "establish that there is a compelling interest for the journalist's testimony, and that there are no other means for obtaining the equivalent of that testimony."³⁰ That, said the court, the government had so far failed to do.³¹

The government appealed the decision to the Fourth Circuit, which reversed by relying on a divided and confusing five to four Supreme Court opinion from 1972.³² The case, *Branzburg v. Hayes*, rejected the argument that the government could not force reporters to testify about their confidential sources "until and unless sufficient grounds are shown for believing . . . that the information the reporter has is unavailable from other

Co., 403 U.S. at 714. But in a *non*-national security case decided three decades later, the Court held that the First Amendment protected a radio station that aired a conversation obtained through unlawful electronic eavesdropping, even though the station knew, or had reason to know, it was an illegal intercept. *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *See also* *Near v. Minnesota*, 283 U.S. 697 (1931) ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."). *See* Devin Dwyer, *Espionage Act Presents Challenges for WikiLeaks Indictment*, ABC NEWS (Dec. 13, 2010), <http://abcnews.com/Politics/wikileaks-indictment-us-charge-julian-assange-espionage-act/story?id=12369173>; Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 249 (2008); Christina E. Wells, *Contextualizing Disclosure's Effects: WikiLeaks, Balancing and the First Amendment*, 97 IOWA L. REV. BULL. 51 (2012); David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. L. REV. 473, 473 (2013).

24. Sari Horwitz & William Branigin, *Holder Recused Himself from Leak Investigation*, *Justice Department Says*, WASH. POST (May 14, 2013), https://www.washingtonpost.com/world/national-security/holder-recused-himself-from-leak-investigation-justice-department-says/2013/05/14/acf24cf8-bcb6-11e2-97d4-a479289a31f9_story.html?hpid=z1&tid=a_inl.

25. *Id.*

26. *Id.*

27. JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* (2006).

28. *United States v. Sterling*, 818 F. Supp. 2d 945, 948 (E.D. Va. 2011), *rev'd*, 724 F.3d 482 (4th Cir. 2013).

29. *Id.* at 960.

30. *Id.*

31. *Id.*

32. *United States v. Sterling*, 724 F.3d 482, 488 (4th Cir. 2013); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

sources, and that the need for the information is sufficiently compelling.”³³ But the decision had been compromised by a confusing concurring opinion authored by Justice Lewis F. Powell Jr. (whose vote was essential for the majority) who implied that, in fact, journalists may be entitled to precisely such a constitutional protection.³⁴ As a result—and also because they probably found the majority’s position unconvincing—lower federal courts often ignored the majority opinion.³⁵ As one federal judge put it, in the four decades since the decision was issued, “appellate courts have . . . hewed closer to Justice Powell’s concurrence—and Justice Stewart’s dissent—than to the majority opinion, and . . . recognized a qualified reporter’s privilege”³⁶

But by the time Risen was challenging his subpoena, the wind had changed. Following 9/11, some federal courts began to follow the previously spurned *Branzburg* majority position. In 2005, Judith Miller of the *New York Times* spent several months in jail for refusing to disclose a journalistic source.³⁷ (She was released after revealing her source’s identity, apparently with his consent.³⁸) And James Risen’s claim ultimately suffered a similar fate. The Fourth Circuit disputed the conventional interpretation of Justice Powell’s concurrence and held that Risen *could* be forced to reveal his source without any special showing by the government: “Justice Powell’s concurrence in *Branzburg* simply does not allow for the recognition of a First Amendment reporter’s privilege,” proclaimed the Fourth Circuit opinion; “The government need not make any special showing to obtain evidence of criminal conduct from a reporter in a criminal proceeding. The reporter must appear and give testimony just as every other citizen must. We are not at liberty to conclude otherwise.”³⁹ The Supreme Court refused to review the decision.⁴⁰

Risen had said he would go to prison rather than testify, and in the end the DOJ backed off. But the ability of the government to force reporters to disclose their confidential sources has been firmly reestablished.

Edward Snowden and Chelsea (formerly Bradley) Manning are the most famous

33. *Branzburg*, 408 U.S. at 680.

34. *Id.* at 710 (Powell, J., concurring) (“[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.”).

35. *See, e.g., In re Special Counsel Investigation*, 332 F. Supp. 2d 26 (D.D.C. 2004) (“It is true that some courts have chipped away at the holding of *Branzburg* by ruling that a court shall apply a qualified privilege in certain limited contexts.”). *See also* *United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972); *United States v. Hubbard*, 493 F. Supp. 202 (D.D.C. 1979).

36. *Sterling*, 724 F.3d at 523 (Gregory, J., dissenting).

37. *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1144, 1148 (D.C. Cir. 2005).

38. *See* Susan Schmidt & Jim VandeHei, N.Y. *Times Reporter Released from Jail*, WASH. POST (Sept. 30, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/19/AR2005101900795.html>.

39. *Sterling*, 724 F.3d at 496. *See also* Charlie Savage, *Court Tells Reporter to Testify in Case of Leaked C.I.A. Data*, N.Y. TIMES (July 20, 2013), <http://www.nytimes.com/2013/07/20/us/in-major-ruling-court-orders-times-reporter-to-testify.html>.

40. Adam Liptak, *Supreme Court Rejects Appeal from Times Reporter over Refusal to Identify Source*, N.Y. TIMES (June 2, 2014), <https://www.nytimes.com/2014/06/03/us/james-risen-faces-jail-time-for-refusing-to-identify-a-confidential-source.html>.

among those charged with Espionage Act violations. Snowden, a former NSA contractor, was charged in 2013 with theft of government property and several violations of the Espionage Act that, together, carry a penalty of thirty years in prison.⁴¹ Chelsea Manning was prosecuted, convicted, and sentenced to thirty-five years in prison for releasing secret military documents to WikiLeaks. President Obama commuted Manning's sentence in January 2017, after seven years of imprisonment.⁴²

Manning was prosecuted for various violations of the Espionage Act, as well as for "aiding the enemy"—a provision of the U.S. Code of Military Justice that carries the death penalty.⁴³ The aiding the enemy charge was based on the theory that Manning provided intelligence to the enemy "indirectly"—by giving the documents to WikiLeaks, which then posted them online, thereby making them accessible to the enemy. When the presiding judge asked the prosecutors whether the same charge would be appropriate were the information leaked to the *New York Times*, the response was affirmative.⁴⁴ Still, the judge rejected a defense motion that argued that the prosecution would have to prove intent to aid the enemy.⁴⁵ According to the judge's decision, mere knowledge that the leaked information would be accessed by the enemy was enough for conviction under this capital offense.⁴⁶

Although Manning was ultimately acquitted of the charge, the judge's decision further blurred the line—already blurred in the Espionage Act—between leakers and spies.⁴⁷ Aiding the enemy is one of three offenses under the U.S. Code of Military Justice that apply to "any person," rather than only to military personnel⁴⁸—which means that, theoretically speaking, civilians may also be subjected to such prosecutions (putting aside any constitutional difficulty with subjecting civilians to military rule).

The Trump administration recently announced its first prosecution of a leaker to the press under the Espionage Act. In June 2017, Reality Leigh Winner, a twenty-five-year-old intelligence contractor, was charged with sending a classified report to the media concerning Russia's interference in the 2016 election.⁴⁹

41. Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), https://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html. See also Criminal Complaint, United States v. Snowden, No. 1:13CR265 (E.D. Va. June 14, 2013), <http://apps.washingtonpost.com/g/documents/world/us-vs-edward-j-snowden-criminal-complaint/496>.

42. Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html>.

43. 10 U.S.C. § 904 (2012).

44. Bill Keller, Opinion, *Private Manning's Confidant*, N.Y. TIMES (Mar. 10, 2013), <http://www.nytimes.com/2013/03/11/opinion/keller-private-mannings-confidant.html>; Erin Banco, *Judge Upholds Charge Against Manning*, N.Y. TIMES (July 18, 2013), <http://www.nytimes.com/2013/07/19/us/judge-in-manning-case-allows-charge-of-aiding-the-enemy.html>.

45. Banco, *supra* note 44.

46. *Id.*

47. See Ed Pilkington, *Bradley Manning Verdict: Cleared of 'Aiding the Enemy' but Guilty of Other Charges*, GUARDIAN (July 31, 2013), <https://www.theguardian.com/world/2013/jul/30/bradley-manning-wikileaks-judge-verdict>.

48. See 10 U.S.C. § 904 (2012).

49. Charlie Savage, *Intelligence Contractor Is Charged in First Leak Case Under Trump*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/2017/06/05/us/politics/reality-winner-contractor-leaking-russia-nsa.html>.

In short, there has recently been an unprecedented number of prosecutions for leaking information to journalists, much of it concerning government incompetence and abuses of power. Convicted leakers have been sentenced to substantial prison sentences, and journalists have become ensnared in their investigations and trials: members of the press were subjected to surveillance, declared criminal suspects, had their personal records secretly searched, and were threatened with imprisonment (and at times imprisoned) for refusing to disclose confidential sources. And more of this is likely to come: President Trump has repeatedly called on the DOJ to investigate and prosecute “illegal leaks” of information to the press,⁵⁰ and in August 2017, Attorney General Jeff Sessions announced that leak investigations have tripled under the Trump administration.⁵¹

The impact of these government prosecutions and investigations has been profound. *New York Times* reporter Charlie Savage, in his book, *Power Wars: Inside Obama’s Post-9/11 Presidency*, described their effects:

Overnight, the rules changed. People were going to prison. The crackdown sent fear throughout the national security establishment. The result was that the normal give-and-take, even discussing routine things on background to make sure reporters understood them, became much more difficult. . . . Ordinary national security investigative journalism . . . was placed into a deep chill.⁵²

It is worth remembering that some of the biggest scandals in the War on Terror—including the sweeping scope of the NSA’s secret surveillance program (which many legal experts believe to be unconstitutional), the CIA’s use of torture, and the CIA’s use of “black sites”—were exposed only thanks to confidential journalistic sources leaking classified information.⁵³ It is also worth remembering that the government is engaged in selective enforcement of anti-disclosure laws—ignoring some leaks altogether while showing remarkable leniency in regard to others (as in its plea agreement with retired General David Petraeus, who leaked highly classified materials to his designated biographer and ended up pleading guilty to a misdemeanor carrying no prison time).⁵⁴ Needless to say, selective enforcement raises its own serious First Amendment concerns.⁵⁵

Finally, I would be remiss not to mention cyber technology as an additional factor driving the recent crackdown. The DOJ could not have failed to notice the mind-boggling amount of information a leaker could disclose nowadays. We are truly in a brave new

50. Charlie Savage & Eric Lichtblau, *Trump Directs Justice Department to Investigate ‘Criminal’ Leaks*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/us/politics/justice-department-leak-investigation-trump.html>.

51. Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump*, N.Y. TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/us/politics/jeff-sessions-trump-leaks-attorney-general.html>.

52. CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 359 (2015).

53. See, e.g., *What You Need to Know About the NSA’s Surveillance Programs*, PROPUBLICA (Aug. 5, 2013, 3:20 PM), <https://www.propublica.org/article/nsa-data-collection-faq> (describing how the information Edward Snowden leaked revealed the “massive amount of data” being collected by secret NSA surveillance programs).

54. See Peter Maass, *Lawyers for CIA Leaker Cite Selective Prosecution After Petraeus Plea Deal*, INTERCEPT (Mar. 20, 2015, 10:52 AM), <https://theintercept.com/2015/03/20/lawyer-cia-leaker-cites-selective-prosecution-petraeus-plea>. See also Evan Perez, *Holder Puts Top Prosecutors on Leak Probe*, WALL ST. J. (June 8, 2012, 8:06 PM), <https://www.wsj.com/articles/SB10001424052702303296604577455021987875122> (reporting allegations that the Obama administration leaked classified information in order to enhance the president’s re-election prospects).

55. See *Wayte v. United States*, 470 U.S. 598, 613–17 (1985).

world: consider Daniel Ellsberg's 1971 weeks-long, page-by-page photocopying of the 3000-page *Pentagon Papers* and its 4000 pages of supporting documents, in comparison with Manning's leak of hundreds of thousands of documents with a few strokes of the keyboard; or Snowden's leak of more than a million intelligence files. Cyber technology may have also enhanced the government's ability to track journalistic sources. Today's investigators may enjoy wide access to people's electronic communications—from emails to web searches to telephonic metadata (including location and interlocutors) to video footage with virtually unlimited storage from innumerable cameras in government buildings and public spaces. Modern technology has made it easier to leak enormously more information and may have also made it easier to identify those leakers and collect the evidence to prosecute them. Still, it is the War on Terror that created the political conditions for these criminal investigations and prosecutions.

II. SECRET SURVEILLANCE AND THE STANDING REQUIREMENT

Shortly after 9/11, the NSA launched a secret surveillance program of electronic communications. The existence of the program was publicly disclosed in 2005 by the *New York Times*.⁵⁶ (The newspaper sat on the story for an entire year before finally publishing it—after one of the journalists who wrote it announced his plans to disclose the existence of the program in a book.⁵⁷) The Bush administration threatened the *Times* with criminal prosecution, and also established a DOJ taskforce to examine leaks of classified information. And while the threatened prosecution of the *New York Times* never materialized, most of the prosecutions mentioned above were started by that taskforce.⁵⁸

The disclosure of the secret surveillance program brought a flurry of lawsuits challenging its legality. In 2006, a federal district court found that the program violated several constitutional provisions, including the First Amendment, because the surveillance had a chilling effect on protected speech: people were chilled from expressing themselves over the telephone or over email for fear that everything they said or wrote was captured by the government.⁵⁹ But in 2007 the Sixth Circuit reversed the district court after finding that the plaintiffs lacked standing because their alleged injuries were overly speculative.⁶⁰ The doctrine of standing requires that plaintiffs filing a federal lawsuit demonstrate that they suffered some actual injury, not merely a hypothetical or overly speculative one (principally on the theory that in the absence of a concrete injury, judicial decisions may themselves be too speculative or ungrounded).⁶¹

The claim that the secret surveillance program is in violation of the freedom of

56. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

57. The delay was a result of the Bush administration's claim that publication would endanger ongoing terrorism investigations. See James Rainey, *Critics Question Timing of Surveillance Story*, L.A. TIMES (Dec. 5, 2005), <http://articles.latimes.com/2005/dec/20/nation/na-media20>.

58. See generally SAVAGE, *supra* note 52.

59. *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 773–78 (E.D. Mich. 2006), *rev'd*, 493 F.3d 644 (6th Cir. 2007). The district court also held that the program violated plaintiffs' reasonable expectations of privacy under the Fourth Amendment, as well as the separation of powers doctrine. *Id.* at 774–78.

60. *ACLU*, 493 F.3d at 648.

61. See generally Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

speech and the press also figured in another lawsuit filed by lawyers, activists, and journalists, who alleged, *inter alia*, that the surveillance of their international electronic communications hampered their ability to gather and report news.⁶² But that lawsuit, too, was dismissed for lack of standing—this time by the Supreme Court.⁶³ The Court, in a five to four decision, dismissed the lawsuit on the grounds that no actual injury had been demonstrated, since the plaintiffs could not prove that they were actually subjected to surveillance.⁶⁴ Whether they were or were not subjected to surveillance remained unknown: the government did not deny that it was spying on the plaintiffs; it merely refused to disclose whether it did. But instead of holding this failure to disclose against the government, the Court used it against those challenging the program.

The dissenters in the case argued that there was a “very high likelihood” that the government was intercepting the plaintiffs’ communications: “we need only assume that the Government is doing its job,” they wrote.⁶⁵ But the majority demurred, and the case was dismissed—reversing a Second Circuit decision that found standing by noting that a more lenient standing requirement prevails in cases where free expression is at risk.⁶⁶ The decision—like the earlier Sixth Circuit case—therefore insulated from scrutiny a vast surveillance program found to be in violation of several statutory and constitutional provisions.

In June 2013, several months after the Supreme Court dismissed the journalists’ suit, documents leaked by Edward Snowden showed that it was indeed very likely that the NSA was intercepting the electronic communications of those plaintiffs—by showing that it was very likely that the NSA was intercepting everyone’s electronic communications. In May 2015, ruling on a separate suit brought against the NSA, the Second Circuit affirmed a district court determination that Snowden’s revelations allowed plaintiffs to establish standing when challenging the legality of the surveillance program.⁶⁷ But so far we have

62. *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009), *vacated, rev’d sub nom. Amnesty Int’l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011), *rev’d*, 568 U.S. 398 (2013) [hereinafter *Amnesty Int’l USA*]. The lawsuit, which ultimately reached the Supreme Court, challenged, among other things, the constitutionality of the FISA Amendments Act of 2008, 50 U.S.C. § 1801, which sought to extend statutory authorization to the ongoing program.

63. *Amnesty Int’l USA*, 568 U.S. at 408.

64. *Id.* at 402.

65. *Id.* at 427, 431 (Breyer, J., dissenting).

66. *See Amnesty Int’l USA*, 638 F.3d 118, 135 (2d Cir. 2011), *rev’d*, 568 U.S. 398 (2013) (“The government argues that the plaintiffs can obtain standing only by showing either that they have been monitored or that it is ‘effectively certain’ that they will be monitored. The plaintiffs fall short of this standard, according to the government, because they ‘simply speculate that they will be subjected to governmental action taken pursuant to [the FISA Amendments Act of 2008 (“FAA”)].’ But the government overstates the standard for determining when a present injury linked to a contingent future injury can support standing. The plaintiffs have demonstrated that they suffered present injuries in fact—concrete economic and professional harms—that are fairly traceable to the FAA and redressable by a favorable judgment. The plaintiffs need not show that they have been or certainly will be monitored. Indeed, even in cases where plaintiffs allege an injury based solely on prospective government action, they need only show a ‘realistic danger’ of ‘direct injury’; and where they allege a prospective injury to First Amendment rights, they must show only ‘an actual and well-founded fear’ of injury, an arguably less demanding standard.”)

67. *ACLU v. Clapper*, 959 F. Supp. 2d 724, 733, 738 (S.D.N.Y. 2013), *aff’d in part and vacated in part*, 785 F.3d 787 (2d Cir. 2015) [hereinafter *Clapper*] (“On June 5, 2013, *The Guardian* published a then-classified [Foreign Intelligence Surveillance Court] ‘Secondary Order’ directing Verizon Business Network Services to provide the NSA on an ongoing daily basis . . . all call detail records or ‘telephony metadata’ for all telephone

not seen a repeat of the dramatic decisions holding the program unconstitutional, and the program remains in operation.⁶⁸ In fact, as of the writing of these lines, Congress has just reauthorized the program for an additional six years with only minor changes and few of the safeguards demanded by privacy advocates.⁶⁹

III. JIHADIST PROPAGANDA AND THE DEFINITION OF INCITEMENT

One of the most important and contentious free speech issues to have emerged from the War on Terror concerns the dissemination of jihadist propaganda. Many countries forbid such speech outright. In response to the 2005 bombing in London, for example, Britain enacted the 2006 Terrorism Act, which makes it a crime to, inter alia, recklessly or intentionally publish “a statement that is likely to be understood . . . as . . . encouragement or other inducement to . . . the commission, preparation or instigation of acts of terrorism,” including statements “glorif[y]ing the commission or preparation . . . of such acts”⁷⁰

Such a statute, however, would be unconstitutional in the United States. In a 1969 landmark decision, *Brandenburg v. Ohio*, the Supreme Court declared:

[T]he constitutional guarantees of free speech and free press do not permit [the government] to forbid or proscribe advocacy of the use of force or of law violation

calls on its network from April 25, 2013 to July 19, 2013. . . . Here, there is no dispute the Government collected telephony metadata related to the ACLU’s telephone calls. Thus, the standing requirement is satisfied.”). *See also* *Obama v. Klayman*, 800 F.3d 559, 563–64 (D.C. Cir. 2015) (Brown, J., concurring) (“The *Clapper* plaintiffs had ‘no actual knowledge of the Government’s § 1881a targeting practices’ nor could they even show that the surveillance program they were challenging even existed. . . . By contrast, here, plaintiffs have set forth specific evidence showing that the government operates a bulk-telephony metadata program that collects subscriber information from domestic telecommunications providers.”). That “specific evidence” was leaked by Edward Snowden. *See Klayman v. Obama*, 957 F. Supp. 2d 1, 26–29 (D.D.C. 2013), *vacated and remanded*, 800 F.3d 559, (D.C. Cir. 2015) (finding standing and distinguishing *Clapper* based on Edward Snowden’s leaked documents).

68. The Second Circuit did, however, hold that some aspects of the NSA surveillance program exceeded the program’s statutory authority. *Clapper*, 785 F.3d at 821.

69. Charlie Savage, *Congress Approves Six-Year Extension of Surveillance Law*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/surveillance-congress-snowden-privacy.html>.

70. Terrorism Act 2006, ch. 11, pt. I, §§ (1), (3)(a) (U.K.).

(1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.

(2) A person commits an offence if—

(a) he publishes a statement to which this section applies or causes another to publish such a statement; and

(b) at the time he publishes it or causes it to be published, he—

(i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or

(ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.

(3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

Id. §§ (1)–(3).

except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁷¹

Hence the British Terrorism Act is inconsistent with *Brandenburg* since it punishes speech that is not likely to lead to imminent violent action, or speech that is uttered recklessly but without the intent that violent action actually ensue.

Brandenburg came after long decades of American courts imprisoning people engaged in essentially political speech (often anti-war protestors or socialists) with the approval of the Supreme Court.⁷² *Brandenburg* was decided in 1969, against the background of the civil rights and Vietnam War protests—a time when activists seeking greater racial equality, and an end to a costly and hopeless war, regularly bolstered their advocacy with calls for civil disobedience. The *Brandenburg* decision came to provide constitutional protections for such expression, which many considered to be perfectly legitimate political speech. *Brandenburg* remains the authoritative Supreme Court case on the constitutionality of suppressing speech advocating for unlawful action—which means that the outright criminalization of jihadist speech conflicts with existing constitutional doctrine.

Unsurprisingly, the War on Terror brought some understandable calls for a relaxation of the *Brandenburg* standard.⁷³ But there is strong resistance to these calls—especially in light of the sorry history leading to the decision, with its long decades of inadequate protections for controversial political speech.⁷⁴ Accordingly, some have suggested that the *Brandenburg* standard should be relaxed solely in relation to the Internet, which has proven a particularly potent medium for terrorist recruitment.⁷⁵ But this suggestion runs head-on into a 1997 Supreme Court case which rejected a similar claim in the context of sexually explicit materials: “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium,” declared the Court.⁷⁶ (In fact, one of the federal judges who decided the case in the lower courts thought that “[a]s the most participatory form of mass speech yet developed, the

71. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

72. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Gitlow v. New York*, 268 U.S. 652 (1925); *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

73. See, e.g., Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html (“It’s common sense that when a country is embroiled in a war, it should counter propaganda that could populate a fifth column with recruits. The pattern in American history—and, in the other democracies as well, even today—is that during times of national emergency, certain limits on speech will be tolerated.”). See also Erik Eckholm, *ISIS Influence on Web Prompts Second Thoughts on First Amendment*, N.Y. TIMES (Dec. 27, 2015), <http://www.nytimes.com/2015/12/28/us/isis-influence-on-web-prompts-second-thoughts-on-first-amendment.html>. But see Glenn Greenwald, *Those Demanding Free Speech Limits to Fight ISIS Pose a Greater Threat to U.S. than ISIS*, INTERCEPT (Dec. 29, 2015), <https://theintercept.com/2015/12/29/those-demanding-free-speech-limits-to-fight-isis-pose-a-greater-threat-to-u-s-than-isis>.

74. See David Post, *Protecting the First Amendment in the Internet Age*, WASH. POST (Dec. 21, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/21/protecting-the-first-amendment-in-the-internet-age>.

75. Posner, *supra* note 73; Eckholm, *supra* note 73.

76. *Reno v. ACLU*, 521 U.S. 844, 850, 870 (1997).

Internet deserves the highest protection from governmental intrusion.”⁷⁷) The dangers of terrorism are, of course, markedly different than those involved in pornography; but the likelihood that courts will adopt less protective standards for the Internet remains small.

Nevertheless, there are signs that the *Brandenburg* standard is giving way—albeit informally. Soon after the 9/11 attacks, as it became increasingly clear that the United States would invade Afghanistan, an American Muslim cleric named Ali al-Timimi told some followers they should join the mujahedeen in Afghanistan in the fight against the enemies of Islam. Four of these men flew to Pakistan and trained with a terrorist organization, although all abandoned their plan to fight American forces when Pakistan closed its border with Afghanistan.⁷⁸ An investigation led to the prosecution of al-Timimi, and in 2005 he was convicted of, inter alia, soliciting others to wage war against the United States; counseling others to engage in a conspiracy to levy war against the United States; attempting to aid the Taliban; counseling others to attempt to aid the Taliban; and counseling others to use firearms and explosives in furtherance of crimes of violence.⁷⁹ Al-Timimi was subsequently sentenced to life in prison plus seventy years for his speeches.⁸⁰

At the trial, al-Timimi’s lawyers asked the judge to instruct the jury on the *Brandenburg* standard, and the judge did (although, allegedly, with little to say about its importance).⁸¹ Following the guilty verdict, the lawyers filed a motion asking the judge to reverse the conviction on the grounds that it failed to comply with *Brandenburg* and was in violation of the First Amendment. The judge rejected the request by stating: “This [is] not a case about speech”⁸² And yet this was a case about speech: al-Timimi was charged and convicted based on his advocacy of the use of force against American troops. And some believe that, in fact, al-Timimi’s advocacy fell squarely within the constitutional protections of *Brandenburg*:

[T]here was nothing to suggest that al-Timimi’s speech was directed to inciting *imminent* lawless conduct. It amounted to nothing more than advocacy of illegal action at some indefinite future time [U]nder a careful application of *Brandenburg*, al-Timimi’s speech should have been protected. And yet a federal judge rejected his free speech claim without even writing an opinion [The] case at least demonstrates that *Brandenburg* is subject to backsliding during times of crisis and insecurity. Prosecutors played heavily on fears of terrorism throughout

77. *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J., supporting opinion), *aff’d*, 521 U.S. 844 (1997).

78. *See United States v. Khan*, 309 F. Supp. 2d 789, 811–12 (E.D. Va. 2004) (indicting the four al-Timimi followers who traveled to Pakistan for, inter alia, conspiracy to provide material support to Al-Qaeda). *See also* Milton Viorst, *The Education of Ali Al-Timimi*, ATLANTIC, June 2006, at 69, 77–78.

79. Indictment at 4–5, 11–13, *United States v. Al-Timimi*, No. 1:04cr (E.D. Va. Sept. 23, 2004), https://www.investigativeproject.org/documents/case_docs/72.pdf.

80. Judgment at 3, *United States v. Al-Timimi*, No. 1:04CR00385-001 (E.D. Va. July 13, 2005), https://www.investigativeproject.org/documents/case_docs/1342.pdf.

81. *See* Tim Davis, *The Suffocation of Free Speech Due to the “Gravity of Danger” of Terrorism*, MOD. AM., Fall 2006, at 3, 3 (“On April 18, 2005, jury deliberations began, and buried in nearly 200 pages of jury instructions, was a single paragraph that unceremoniously described the law of protected speech under *Brandenburg v. Ohio*.”).

82. Eric Lichtblau, *Scholar Is Given Life Sentence in ‘Virginia Jihad’ Case*, N.Y. TIMES (July 14, 2005), <http://www.nytimes.com/2005/07/14/us/scholar-is-given-life-sentence-in-virginia-jihad-case.html>.

the trial, comparing al-Timimi to Osama bin Laden. The judge should have ignored such rhetoric and focused on the facts and law, but it would not be surprising if she succumbed to the same fears that have gripped much of the country over the past seven years.⁸³

At the very least, the court's summary oral dismissal of al-Timimi's arguments evidenced judicial reluctance to grapple seriously with that constitutional question; at worst, it evidenced judicial reluctance to enforce existing constitutional protections.⁸⁴

IV. JIHADIST PROPAGANDA AND MATERIAL SUPPORT FOR TERRORISM

There are more examples of the weakening of the *Brandenburg* test. After 9/11, Congress amended a terror-related statute so as to make it a federal felony punishable by fifteen years of imprisonment to "knowingly provide material support or resources to a foreign terrorist organization," including support in the form of speech.⁸⁵ The Supreme Court upheld the statute against a First Amendment challenge in *Holder v. Humanitarian Law Project*.⁸⁶

Humanitarian Law Project involved American non-profit organizations that counseled the Partiya Karkeran Kurdistan ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE")—groups dedicated to establishing independent states for Kurds in Turkey and for Tamils in Sri Lanka—on how to advance their causes by peaceful means, including by petitioning the United Nations and using international law. Both the PKK and the LTTE were declared "terrorist organizations" by the U.S. Secretary of State. Following the enactment of the statutory amendment, these non-governmental organizations asked the courts for declaratory judgments making clear that their counseling activities were lawful. The Supreme Court ruled against the organizations and held that the counseling would violate the statute, and that the statute did not violate the First Amendment.⁸⁷

Even though the statute restricted admittedly political speech, the Supreme Court refused to subject the statute to the *Brandenburg* standard.⁸⁸ Instead, the Court upheld the statute by stating that it did not criminalize the mere expression of political ideas, but only expression performed "in coordination" with a foreign terrorist organization:

The statute does not prohibit independent advocacy or expression of any kind Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist

83. Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 679–81 (2009).

84. In the most recent development in al-Timimi's case, the Fourth Circuit remanded the case back to district court over evidentiary issues. See Jonathan Turley, *Fourth Circuit Remands Al-Timimi Case in Light of New Evidence*, JONATHAN TURLEY BLOG (Aug. 4, 2015), <https://jonathanturley.org/2015/08/04/fourth-circuit-remands-al-timimi-case-for-second-time>.

85. 18 U.S.C. §§ 2339B(a)(1), 2339A(b)(3) (2012).

86. 561 U.S. 1 (2010).

87. *Id.* at 8.

88. *Id.* at 44 (Breyer, J., dissenting) ("No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*.").

organizations.⁸⁹

The dissenters refused to find comfort in the “under the direction of, or in coordination with” requirement. Justice Breyer’s dissenting opinion, joined by Justices Ginsburg and Sotomayor, explained:

I am not aware of any form of words that might be used to describe “coordination” that would not, at a minimum, seriously chill not only the kind of activities the plaintiffs raise before us, but also the “independent advocacy” the Government purports to permit.⁹⁰

Two years later, a case from Massachusetts appeared to vindicate Breyer’s position.

Tarek Mehanna, an American pharmacist, was convicted of “knowingly provid[ing] material support” to Al-Qaeda for activities that included translating Arab-language jihadist materials into English and posting the translations on a jihadist website.⁹¹ He was sentenced to seventeen years in federal prison.⁹²

The only evidence of coordination between Mehanna and a terrorist organization consisted in the fact that the jihadist internet site on which he posted his translations was also used for recruitment by Al-Qaeda; and also in some short and inconclusive communication between Mehanna and the site operator, who was himself later convicted of helping Al-Qaeda.⁹³ Mehanna’s lawyers argued that the evidence was constitutionally insufficient, since “coordination” (the presence of which dispenses with the *Brandenburg* test) must consist in some kind of “direct connection” to a terrorist organization, or in “working directly” with such an organization, and there was no evidence of such direct connection between Mehanna and Al-Qaeda.⁹⁴ But the trial court rejected that claim, and instead instructed the jury that Mehanna could be convicted unless he “act[ed] entirely independently of a foreign terrorist organization.”⁹⁵ A federal court of appeals later affirmed the jury conviction, agreeing with the trial court that there was no requirement of any “direct connection” with the foreign terrorist group.⁹⁶ (Thus the government was not obligated to offer any proof that the translated materials were “directed to inciting or producing imminent lawless action and [were] likely to incite or produce such action.”⁹⁷)

Few of us shed tears for this jihadist sympathizer—who had actually traveled to Yemen in search of a terrorist training camp (which he had failed to find).⁹⁸ But if the

89. *Id.* at 26.

90. *Id.* at 51–52 (Breyer, J., dissenting).

91. Verdict, *United States v. Mehanna*, No. 1:09-cr-10017 (D. Mass. Dec. 20, 2011) (citing 18 U.S.C. § 2339B(a)(1) (2012)), *aff’d*, 735 F.3d 32, 41 (1st Cir. 2013), *cert. denied*, 135 S. Ct. 49 (2014).

92. Judgment at 3, *United States v. Mehanna*, No. 1:09-cr-10017 (D. Mass. Apr. 12, 2012).

93. Petition for Writ of Certiorari at 2–5, *Mehanna v. United States*, 735 F.3d 32 (No. 13-1125), 2014 WL 1090039.

94. *Id.* at 7–16.

95. *See United States v. Mehanna*, 735 F.3d 32, 48 (1st Cir. 2013), *cert. denied*, 135 S. Ct. 49 (2014).

96. *Mehanna*, 735 F.3d at 49–51. The First Circuit also affirmed the sufficiency of the evidence by stating that Mehanna’s trip to Yemen provided an alternative ground for the verdict, even if—a determination the court felt it need not make—there was insufficient evidence of even “indirect” coordination regarding the translations. *Id.* at 50–51. The Supreme Court subsequently denied review. *Mehanna v. United States*, 135 S. Ct. 49 (2014) (denying certiorari).

97. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

98. *Mehanna*, 735 F.3d at 41.

government can criminalize the advocacy of a political ideology on such flimsy evidence of “coordination with a foreign terror group,” and if the question of coordination is left to the jury (rather than to a judge)—as in Mehanna’s case—then the government can come very close to punishing the mere advocacy of jihadist ideas, notwithstanding the seemingly intact *Brandenburg* doctrine.⁹⁹

CONCLUSION

Times of war are often accompanied by attempts to recalibrate the balance between liberty and security. It is unsurprising, then, that the War on Terror has been accompanied by various violations of constitutionally protected freedoms—most notoriously, indefinite detentions without adequate judicial process and the use of torture. As to be expected, the freedoms of speech and the press were not left unscathed. We have seen an unprecedented number of investigations and prosecutions of government leakers of classified information; surveillance of journalists and threats of criminal liability directed at the press; judicial decisions placing dubious procedural hurdles in the way of those seeking to vindicate their First Amendment rights; new legislation targeting terror-related speech; and judicial reluctance to vigorously enforce existing free speech protections.

Notably, these alleged curtailments of the freedom of speech and the press took place without any apparent shift in constitutional doctrine. Instead, we have seen relatively subtle adjustments of executive, legislative, and judicial positions so as to impose or accommodate new restrictions on speech. The crucial question, of course, is how far can such relatively subtle modifications go in reducing constitutional freedoms. My own estimation is that they can go far: unsensational measures that appear to leave existing constitutional protections in place may nevertheless considerably shrink constitutional rights and liberties.

99. It should be noted that statutes criminalizing material support for terrorism—conviction for which need not comply with the *Brandenburg* standard—may also be used to prosecute social media companies and internet service providers that host terrorism-related accounts. The statutory question in such cases is whether, say, Facebook or Twitter engaged in (indirect) coordination with foreign terrorist organizations by hosting jihadist Facebook and Twitter accounts. See 18 U.S.C. § 2339B. Federal prosecutors also have at their disposal a “material support” standard that is not restricted to designated terror organizations and does not require any coordination with a terrorist group, but only requires that material support or resources be provided “knowing[ly] or intending that they are to be used in preparation for [or] in carrying out” an act of terrorism. 18 U.S.C. § 2339A(a). Here, too, internet service providers and social media companies may be on the hook, so long as they “know” the accounts they host are used in “preparation for [or] in carrying out” acts of terror. *Id.* § 2339A(a). To date, the DOJ has yet to charge any such company with violation of these statutes. But a number of civil lawsuits have been filed seeking damages from social media companies for playing host to terrorism-related speech. See, e.g., *Fields v. Twitter*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016); *Cohen v. Facebook*, No. 16-CV-4453, 2017 WL 2192621, at *12, *13 (E.D.N.Y. May 18, 2017). See also KATHLEEN ANN RUANE, CONG. RES. SERV., R44626, THE ADVOCACY OF TERRORISM ON THE INTERNET: FREEDOM OF SPEECH ISSUES AND THE MATERIAL SUPPORT STATUTES 50 (2016), <https://fas.org/sgp/crs/terror/R44626.pdf>; Jacob Bogage, *Family of ISIS Paris Attack Victim Sues Google, Facebook, and Twitter*, WASH. POST (June 16, 2016), <https://www.washingtonpost.com/news/the-switch/wp/2016/06/16/family-of-isis-paris-attack-victim-sues-google-facebook-and-twitter>. So far courts have dismissed these lawsuits by relying on Section 230 of the Communications Decency Act of 1996, which provides immunity from liability for internet service providers who publish content provided by others. 47 U.S.C. § 230(c)(1). See *Fields*, 217 F. Supp. 3d at 1118. Needless to say, the constitutionality of these lawsuits, like the constitutionality of criminal prosecutions of such companies, remains in doubt. See generally Benjamin Wittes & Zoe Bedell, *Tweeting Terrorists, Part II: Does It Violate the Law for Twitter to Let Terrorist Groups Have Accounts?*, LAWFARE (Feb. 14, 2016), <https://www.lawfareblog.com/tweeting-terrorists-part-ii-does-it-violate-law-twitter-let-terrorist-groups-have-accounts>.

This, it seems to me, is the important lesson of this survey. And it is a lesson that is especially relevant for us today. First, while there is nothing unusual in wartime attempts to readjust the equilibrium between liberty and security, the War on Terror is different in that it appears to be a war with no end. Second, that war is now being prosecuted by a president who is uniquely adept at stoking fear and particularly blasé about free speech protections. Among other things, Donald Trump called the news media “enemy of the American people,”¹⁰⁰ has called for radical restrictions of speech on the internet,¹⁰¹ opined that it should be easier to sue the media for alleged libel,¹⁰² stated that those who burn the American flag should be jailed and stripped of their citizenship,¹⁰³ ruminated about revoking a license to an unfriendly news network,¹⁰⁴ and had his lawyers issue threatening and constitutionally dubious cease-and-desist letters to the author and publisher of a book critical of his presidency.¹⁰⁵ This alarming attitude toward the freedom of speech, combined with a perpetual war and the potential for under-the-radar restrictions of constitutional freedoms, make for a dangerous cocktail.

100. Michael M. Grynbaum, *Trump Calls the News Media the Enemy of the American People*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html>.

101. See Nitya Rajan, *Donald Trump Wants Bill Gates to Close That Internet up*, HUFFINGTON POST (Nov. 12, 2015, 10:10 PM), http://www.huffingtonpost.co.uk/2015/12/11/donald-trump-wants-bill-gates-to-close-that-internet-up_n_8780686.html.

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