

# Freedom of Speech, The War on Terror, and What’s YouTube Got to Do with it: American Censorship During Times of Military Conflict

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	147
II.	BACKGROUND.....	149
	A. <i>There is a Growing Issue of Terrorist Speech on the Internet Due to the Viral Nature Internet-Based Speech.</i> .....	149
	B. <i>The United States Government Has Historically Censored Speech During Times of War.</i> .....	151
	C. <i>Despite This Historical Precedent, the First Amendment Permits Censorship of Speech Only in Limited Circumstances.</i> .....	155
III.	TERRORIST SPEECH ON THE INTERNET SHOULD BE CENSORABLE BY THE GOVERNMENT.....	159
	A. <i>Censoring Terrorist Speech Today is Consistent with the Tradition of Restrictions on Anti-Government Wartime Speech.</i> .....	159
	B. <i>Targeting Internet-Based Speech is Consistent with the Tradition of Restrictions on Uniquely Invasive Media.</i> .....	161
IV.	THE “STOP TERRORIST ORGANIZATIONS FROM PROMOTING INTERNET TRANSMISSIONS ACT” COULD PERMISSIBLY REGULATE TERRORIST SPEECH ONLINE. ....	164

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A.	<i>STOP IT: The Stop Terrorist Organizations from Promoting Internet Transmissions Act Would Give the FCC the Power to Regulate Terrorist Speech Online</i> .....	164
B.	<i>STOP IT Would Provide a Medium Through Which Censorship of Terrorist Speech Could be Narrowly Tailored to Meet Constitutional Muster</i> .....	166
C.	<i>If STOP IT Were to Fail Constitutional Muster, an Alternative to this Act Would be the Creation of a Uniform “Code of Ethics” for Major Social Media Sites</i> .....	170
V.	CONCLUSION.....	170

Our liberty depends on the freedom of the press and that cannot be limited without being lost.<sup>1</sup>

—Thomas Jefferson.

## I. INTRODUCTION

On August 19, 2014, the extremist group, Islamic State of Iraq and Syria (ISIS), uploaded the beheading of American journalist James Foley on YouTube captioned as, “A Message to America.”<sup>2</sup> The “Message” spread to other social media sites, including Twitter and Instagram, within minutes.<sup>3</sup> *New York Times* writer Hanna Kozłowska called the video a “modern guillotine execution spectacle.”<sup>4</sup> Following the upload, a user-based movement, #ISISMediaBlackout, swelled in an attempt to stop the circulation of the video.<sup>5</sup> Instead of uploading the video or screenshots from the video onto social media platforms, users were encouraged to post the #ISISMediaBlackout hashtag along with photographs of Foley.<sup>6</sup> Foley’s sister, Kelly Foley, tweeted in response to the video: “Please honor James Foley and respect my family’s privacy. Don’t watch the video. Don’t share it. That’s not how life should be.”<sup>7</sup> On August 20, 2014, YouTube and Twitter removed the gruesome video citing their corporate take-down policies.<sup>8</sup>

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1. Letter from Thomas Jefferson to James Currie (Jan. 28, 1786), *reprinted in* THE PAPERS OF THOMAS JEFFERSON 239, 239 (Julian P. Boyd ed., 1954), *in Developments in the Law: The Law of Media*, 120 HARV. L. REV 990, 990 (2007).

2. See Walter Reich, *Show the James Foley Beheading Video: A Lesson Drawn from the Holocaust*, WASH. POST (Aug. 29, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/29/why-facebook-and-youtube-should-show-the-james-foley-beheading-video/> [https://perma.cc/VC73-NDYD].

3. See James Foley, *How Social Media is Fighting Back Against ISIS Propaganda*, THE GUARDIAN (Aug. 20, 2014, 11:06 EDT), <https://www.theguardian.com/technology/2014/aug/20/james-foley-how-social-media-is-fighting-back-against-isis-propaganda> [https://perma.cc/75XW-4382].

4. Hanna Kozłowska, *Should We Be Seeing Gruesome Acts? And If So, Where?*, N.Y. TIMES: BLOG (Aug. 25, 2014, 5:30 AM), <http://op-talk.blogs.nytimes.com/2014/08/25/should-we-be-seeing-gruesome-acts-and-if-so-where/> [https://perma.cc/9KAW-RXGU].

5. See #isismediablackout, TWITTER (Aug. 19, 2014), <https://twitter.com/hashtag/isismediablackout> [https://perma.cc/F2LX-SRZY].

6. See, e.g., Tahar (@laseptiemwilay), TWITTER (Aug. 19, 2014, 4:35 PM), <https://twitter.com/laseptiemwilay/status/501875153006231553> [https://perma.cc/YFB2-EYRY].

7. Hannah Jane Parkinson, *James Foley: How Social Media is Fighting Back Against ISIS Propaganda*, THE GUARDIAN (Aug. 20, 2014), <http://www.theguardian.com/technology/2014/aug/20/james-foley-how-social-media-is-fighting-back-against-isis-propaganda> [https://perma.cc/L9W5-9VMU].

8. See E.W., *Twitter, Terror and Free Speech: Should Twitter Block Islamic Snuff Videos?*, THE ECONOMIST: BLOG (Aug. 21, 2014, 11:17 AM), <http://www.economist.com/blogs/democracyinamerica/2014/08/twitter-terror-and-free-speech> [https://perma.cc/62GK-W3UN].

The posting and subsequent removal of Foley's video implicates the age-old First Amendment debate on the scope of freedom of speech. To Thomas Jefferson, and those like him, freedom of speech was a uncompromising and universal democratic right.<sup>9</sup> It remains one of the greatest hallmarks of the Bill of Rights.<sup>10</sup> However, during times of war, military conflict, or prolonged hostilities, civil liberties, such as freedom of speech, rival the need for order and authority.<sup>11</sup> Fear of military defeat scales the balance towards order, resulting in the restriction of an individual's right to freedom of speech.<sup>12</sup> Today, this historical tension is further complicated by modern forms of media, and begs the question whether videos like the one posted about Foley should be considered censorable by the government or constitutionally protected free speech.<sup>13</sup>

This Note addresses the current wartime speech issue: terrorist speech on the Internet. First, Part II evaluates the historical practice of wartime censorship, tracing wartime censorship to two root causes: active anti-government speech and uniquely intrusive visual mediums. Second, Part II then analyzes the United States Supreme Court's reaction to restrictions on free speech, looking at its strict scrutiny test and the separate doctrine of incitement. Part III analyzes how this historical practice of censorship during times of war justifies a government-based censorship initiative of terrorist speech on the Internet.

Part IV proposes and analyzes a potential Act, Stop Terrorist Organizations from Promoting Internet Transmissions (STOP IT,) that would regulate terrorist speech on the Internet. The proposal in Part IV will address whether the Federal Communications Commission (FCC) could serve as an appropriate regulator of terrorist speech, assuming congressional support. It concludes by suggesting that the historical pattern of wartime censorship is unlikely to change, and that legislation empowering the FCC power to regulate certain forms of terrorist speech on the Internet would be a step in the right direction of matching the historical practice of censorship with the legal doctrine of free speech. If "STOP IT" were to fail constitutional scrutiny, an alternative tactic could involve developing a uniform "Code of Ethics" for all major social media sites that could be implemented on a voluntary basis to curb the influence of terrorist speech.

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9. See Letter from Thomas Jefferson to James Currie, *supra* note 1, at 239.

10. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1789 TO THE WAR ON TERRORISM* 5-7, 14 (2004).

11. See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES DURING WARTIME* 218 (1998).

12. See DANIEL HALLIN, *THE UNCENSORED WAR: THE MEDIA AND VIETNAM* 215 (1986) (asserting that "[e]very society must maintain a balance between democracy and authority").

13. See generally Tom Hentoff, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1462 (1991).

## II. BACKGROUND

The Internet is the new frontier for First Amendment expression.<sup>14</sup> News can “go viral,” and be viewed by millions of people within hours.<sup>15</sup> This fast-paced, ubiquitous medium is now being used by terrorist groups to solicit members and inflict fear by sharing extremely violent videos.<sup>16</sup> In response to this trend, theorists have responded by testing ideas that either over or under regulate Internet speech.<sup>17</sup>

### *A. There is a Growing Issue of Terrorist Speech on the Internet Due to the Viral Nature Internet-Based Speech.*

Terrorist groups use the Internet to spread their messages quickly to large audiences by posting content that “goes viral,”<sup>18</sup> which results in videos, comments, and all types of expression appearing on peoples’ computer screens within minutes.<sup>19</sup> When a video goes viral, as a consequence of social network structures and “word of mouth pressure,”<sup>20</sup> Internet users view the material involuntarily through a whirlwind of headlines, video clips, and articles circulating on Facebook, on Twitter, through e-mail, on web browsers, and more.<sup>21</sup> This phenomenon of fast-paced viral media has led to terrorist organizations actively recruiting and spreading videos of violence, like Foley’s video, through mass media Internet sources.<sup>22</sup> In 2012, Al-Qaeda used Internet forums, such as the forum Shumukh al-Islam, to recruit people willing and able to perform terrorist attacks.<sup>23</sup> In 2014, ISIS managed to recruit over 6000 new members over the Internet in just one month.<sup>24</sup> ISIS, in

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14. See *Developments in the Law: The Law of Media*, 120 HARV. L. REV. 990, 996–97 (2007).

15. See Iris Mohr, *Going Viral: An Analysis of YouTube Videos*, 8 J. MARKETING DEV. & COMPETITIVENESS 43, 43–44 (2014) (comparing news media to an “infectious disease”).

16. See Hannah Jane Parkinson, *James Foley: How Social Media is Fighting Back Against ISIS Propaganda*, THE GUARDIAN (Aug. 20, 2014), <http://www.theguardian.com/technology/2014/aug/20/james-foley-how-social-media-is-fighting-back-against-isis-propaganda> [perma.cc/JLQ3-HMHQ].

17. See Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 4 UCLA J.L. & TECH 1, 1–5 (2004).

18. See Ryan Reilly, *If You’re Trying to Join ISIS Through Twitter, The FBI Probably Knows About It*, HUFFINGTON POST (July 9, 2015, 3:32 PM), [http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state\\_n\\_7763992.html](http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state_n_7763992.html) [https://perma.cc/ZQ9L-9SU7].

19. See Mohr, *supra* note 15.

20. *Id.* at 44.

21. See *id.* at 43.

22. See *FBI Issues Warning: ISIS Using Social Media to Recruit Young Americans*, CBS DC (Mar. 6, 2015, 11:35 AM), <http://washington.cbslocal.com/2015/03/06/fbi-issues-warning-isis-using-social-media-to-recruit-young-americans/> [https://perma.cc/AF5A-DL8Z].

23. See Diana Secara, *The Role of Social Networks in the Work of Terrorist Groups, The Case of ISIS and Al-Qaeda*, 3 RES. & SCIENCE TODAY 77, 81–82 (2015).

24. See Christopher J. Bolan, *Commentaries & Replies: On “Priming Strategic Communications: Countering the Appeal of ISIS,”* 44 PARAMETERS 141, 141 (2014).

particular, as acknowledged by former FBI Director James Comey, is “very effective in using Twitter and other social media to communicate with potential recruits and spread its message online.”<sup>25</sup> In response to ISIS’s campaign, the United Kingdom (UK) has responded with an Internet-based anti-terrorism initiative to report online terrorist communications.<sup>26</sup>

The UK’s Counter Terrorism Internet Referral Unit uses URL blocking to block website content that is deemed censorable by the current terrorist-based regulation: content that incites or glorifies terrorist actions.<sup>27</sup> Examples of content that satisfy this standard are: “articles, images, speeches or videos that promote terrorism; content encouraging people to commit acts of terrorism; websites made by terrorist organizations; and videos of terrorist attacks.”<sup>28</sup> These types of expression are deemed censorable because of their “extraordinary” effect on the public.<sup>29</sup> First, videos of terrorist attacks are easily and quickly sent around the Internet to glorify acts of violence.<sup>30</sup> Studies demonstrate that exposure to violence through mass media significantly increases aggressive behavior of adults and children.<sup>31</sup> Second, websites made by terrorist organizations and videos that promote terrorism have the real effect of glorifying acts of terror as well as recruiting members to their cause.<sup>32</sup>

Both the issues of violent videos and terrorist recruitment have been addressed by social media websites themselves.<sup>33</sup> Individual websites employ

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25. Ryan Reilly, *If You’re Trying to Join ISIS Through Twitter, The FBI Probably Knows About It*, HUFFINGTON POST (July 9, 2015), [http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state\\_n\\_7763992.html](http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state_n_7763992.html) [<https://perma.cc/4S5F-94T5>]. In order to combat information spreading on the Internet through censorship, the goals of openness, accountability, transparency, and narrowness are valuable. See Derek E. Bambauer, *Cybersieves*, 149 BOOKLYN L. SCH. LEGAL STUD. RES. PAPERS 1, 13–25 (2009).

26. See *Tackling Extremism in the UK: Report from the Prime Minister’s Task Force on Tackling Radicalization and Extremism*, H.M. GOVERNMENT 1, 1 (2013); *Report Online Terrorist Material: Reporting Crimes and Getting Compensation*, UK GOV., <https://www.gov.uk/report-terrorism> (last updated Sept. 23, 2016) [<https://perma.cc/3RTV-9BZL>].

27. See *Report Online Terrorist Material: Reporting Crimes and Getting Compensation*, UK GOV., <https://www.gov.uk/report-terrorism> (last updated Sept. 23, 2016) [<https://perma.cc/3RTV-9BZL>].

28. *Id.*

29. Ryan Reilly, *If You’re Trying to Join ISIS Through Twitter, The FBI Probably Knows About It*, HUFFINGTON POST (July 9, 2015), [http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state\\_n\\_7763992.html](http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state_n_7763992.html) [<https://perma.cc/7DWY-U93S>].

30. See *id.*

31. See L. Rowell Huesmann, *The Impact of Electronic Media Violence: Scientific Theory and Research*, 41 J. ADOLESCENT HEALTH, S1, S7 (2007).

32. *Compare Who Are Britain’s Jihadists?*, BBC NEWS (Oct. 10, 2016), <http://www.bbc.com/news/uk-32026985> [<https://perma.cc/9Y4F-ZGKS>], with Simone Molin Friis, ‘Beyond anything we have ever seen:’ beheading videos and the visibility of violence in the war against ISIS, 91 INT. AFF. 725, 737–38 (2015) (commenting on the UK’s reaction to ISIL videos and Prime Minister David Cameron’s “redoubling all efforts” against terrorist media).

33. See *Help Center: The Twitter Rules: Abusive Behavior Policy*, TWITTER, <https://support.twitter.com/articles/20169997> [<https://perma.cc/K5E8-M7S2>].

their own take-down policies to regulate forms of expression on their websites.<sup>34</sup> YouTube’s “Don’t Cross the Line Policy,” Facebook’s “Reporting Abuse Policy,” and Twitter’s “Abusive Behavior Policy” are examples of corporate policies that are regularly enforced to take down user content.<sup>35</sup> Facebook receives thousands of government requests to take down material.<sup>36</sup> Facebook publishes the number of government requests worldwide it receives on a semi-annual basis,<sup>37</sup> with government data requests “to restrict or pull content” climbing by eleven percent in their 2015 report.<sup>38</sup> Twitter recently announced that since the middle of 2015 over 125,000 accounts have been suspended due to promoting terrorism or extremist activities.<sup>39</sup> The company posted: “As the nature of the terrorist threat has changed, so has our ongoing work in this area.”<sup>40</sup> In other words, the threat of terrorist speech to the Internet is real.

*B. The United States Government Has Historically Censored Speech During Times of War.*

The United States is a nation founded upon freedom of speech and press, yet it is also a nation that has consistently restricted these rights.<sup>41</sup> During times of war, freedom of speech has been restricted through acts of federal authority, by the media, from citizens to other citizens, and even by self-censorship.<sup>42</sup> These forms of censorship have created a traceable historical practice of restricting certain types of speech during war: the furthering of perceived anti-government or anti-American ideas, and the visual indications of the woes of war—gruesome photographs of American war dead.

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34. See, e.g., *id.*

35. *Id.*; see also *Community Guidelines*, YOUTUBE, <http://www.youtube.com/yt/policyandsafety/communityguidelines.html> (last visited Mar. 31, 2017) [<https://perma.cc/R3D4-7P92>]; *Reporting Abuse*, Facebook, <https://www.facebook.com/help/1417189725200547/> [<https://perma.cc/3X5Z-HTM5>].

36. See Parmy Olson, *Facebook: Government Data Requests Still Climbing*, FORBES (Mar. 16, 2015), <http://www.forbes.com/sites/parmyolson/2015/03/16/facebook-government-data-requests-still-climbing/> [<https://perma.cc/PG54-AU4A>].

37. See *United States Law Enforcement Requests for Data, Jan. 2015- June 2015*, FACEBOOK, <https://govtrequests.facebook.com/country/United%20States/2015-H1/#> [<https://perma.cc/G39Y-UC6W>].

38. See Parmy Olson, *Facebook: Government Data Requests Still Climbing*, FORBES (Mar. 16, 2015), <http://www.forbes.com/sites/parmyolson/2015/03/16/facebook-government-data-requests-still-climbing/> [<https://perma.cc/QD5Q-HMF9>].

39. See Karl Stephan, *Twitter & Terrorism*, PDD (Feb. 9, 2016), <http://www.pddnet.com/blog/2016/02/twitter-terrorism> [<https://perma.cc/Y77X-MWCB>].

40. Twitter (@Twitter), *Combating Violent Extremism*, TWITTER (Feb. 5, 2015), <https://blog.twitter.com/2016/combating-violent-extremism> [<https://perma.cc/EW5Y-ZKVQ>].

41. See STONE, *supra* note 10, at 5.

42. See *id.* at 5, 12.

Media censorship has existed from the birth of the United States.<sup>43</sup> During the Revolutionary War, Patriots stole “Loyalist” and British newspapers such as the *New Hampshire Gazette* and *New York Packet*, while continuing the delivery of Patriot newspapers.<sup>44</sup> Fifteen years after the end of the Revolutionary War, the Sedition Act of 1798 was enacted to criminalize statements that were critical of the federal government.<sup>45</sup>

During the Civil War, the federal government imposed various measures to censor Confederate viewpoints and gruesome images of the exhausting four-year conflict.<sup>46</sup> United States Marshals seized Confederate and pro-Southern newspapers regularly.<sup>47</sup> President Abraham Lincoln ordered the “seiz[ure] of telegraph lines in the North.”<sup>48</sup> Sketches of Civil War artists were “toned down,” such as Alfred Waud’s sketches at the Battle of Antietam for bringing explicit images from the war to the home,<sup>49</sup> and editors of newspapers were arrested for the publications they issued.<sup>50</sup>

In World War I, wartime communications and photographs of Americans who died in the war continued to be censored.<sup>51</sup> During the first nineteen months of American involvement in World War I the federal government disallowed publication of all photographs of American war dead.<sup>52</sup> Press that followed American troops into the trenches of Europe, if given access to that front, were taken on specific tours or paired with an American serviceman at all times.<sup>53</sup> The Espionage Act of 1917 criminalized the intent to interfere, or actual interference, with operations of the United States Armed Forces and promoting the success of American enemies.<sup>54</sup> The Sedition Act of 1918, repealed two years later, extended the range of the Espionage Act by criminalizing “disloyal, profane, scurrilous, or abusive language” in relation to the United States government and troops.<sup>55</sup> As current events newsreels rose in popularity, members of the judiciary, such as Judge

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43. See MICHAEL LINFIELD, *FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR 15–16* (1990).

44. *Id.*

45. *Id.* at 16–17; Sedition Act of 1798, 50 U.S.C. §§ 21–24 (1798) (This Act was later repealed by President Thomas Jefferson).

46. Compare JOHN COOKE, *REPORTING THE WAR* 49, 49 (2007), with GEORGE H. ROEDER, JR., *THE CENSORED WAR* 29, 8 (1993).

47. COOKE, *supra* note 46, at 49–50.

48. MARY S. MANDER, *PEN AND SWORD: AMERICAN WAR CORRESPONDENTS, 1898–1975*, at 24 (2010).

49. See ROEDER, *supra* note 46, at 29.

50. See MANDER, *supra* note 50, at 24; see also Menahem Blondheim, “Public Sentiment Is Everything”: *The Union’s Public Communications Strategy and the Bogus Proclamation of 1864*, 89 J. AM. HIST. 869, 877 (2002).

51. See ROEDER, *supra* note 46, at 8. see also MANDER, *supra* note 50, at 46–49.

52. See *id.* (a result of the Committee of Public Information which controlled information that entered to and from the country).

53. See MANDER, *supra* note 50, at 42.

54. See Espionage Act of 1917, 18 U.S.C. § 792 (2012).

55. See Sedition Act of 1918, Pub. L. 65–150, 40 Stat. 553 (1918) (repealed 1920).



Hinman in New York, began to distinguish between censorship of film versus censorship of print because the impact of film far outweighed print media.<sup>56</sup>

In World War II, censorship of photographs, letters, and press coverage of the war increased significantly and became more strategic.<sup>57</sup> The Office of Censorship issued wartime practices to keep the press's access and content in check.<sup>58</sup> These voluntary guidelines requested that stateside press preserve the confidentiality of soldier "locations, strength, and destination[s]."<sup>59</sup> Other guidelines issued by the Supreme Headquarters, Allied Expeditionary Force (SHAEF) prohibited the release of photographs showing men in poor mental health or showcasing the "horrific nature" of the war.<sup>60</sup> Private letters sent home from those serving in the Navy were censored and "all news from the Southeast Pacific had to pass through General Douglas MacArthur's headquarters."<sup>61</sup>

During the Cold War, restrictions on press publications, and particularly visual forms of media, increased.<sup>62</sup> The Smith Act of 1940 and Communist Control Act of 1954 criminalized advocacy of "overthrowing" the United States government.<sup>63</sup> Television proliferated in the years following World War II.<sup>64</sup> American homes went from having 3.6 million television sets between 1941–49 to 67.1 million sets sold to date in 1959.<sup>65</sup> Despite this expanding media landscape, journalists did not report on the bombings of Cambodia or meetings between Henry Kissinger and Le Duc Tho.<sup>66</sup> Reporters had to sign government contracts as the Saigon Press Corps or receive Military Assistance Command, Vietnam (MACV) accreditation in order to report in Vietnam and travel with military units.<sup>67</sup>

After the Cold War, strict regulations for wartime correspondents continued, as did television media self-censorship.<sup>68</sup> During the Gulf War, CNN journalist Peter Arnett reported on the Iraqi government from Baghdad, "one of the few Western journalists" to do so, leading critics in the United

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56. See ROEDER, *supra* note 46, at 17 (citing *Pathe Exch., Inc. v. Cobb*, 202 App. Div. 450, 456 (N.Y. App. Div. 1922) ("But the moving picture attracts the attention so lacking with books or even newspapers, particularly so far as children and the illiterate are concerned, and carries its own interpretation.")).

57. See MANDER, *supra* note 50, at 55; See also ROEDER, *supra* note 46, at 15–16.

58. See MANDER, *supra* note 50, at 58.

59. *Id.*

60. ROEDER, *supra* note 46, at 16.

61. MANDER, *supra* note 50, at 61–62.

62. Compare HALLIN, *supra* note 12, at 106–09 with NANCY E. BERNHARD, U.S. TELEVISION NEWS & COLD WAR PROPAGANDA, 1947–60, at 47 (1999).

63. See Smith Act of 1940, 18 U.S.C. § 2385; Communist Control Act of 1954 §§ 841–844 (2012).

64. See BERNHARD, *supra* note 62, at 47.

65. See *id.*

66. See HALLIN, *supra* note 12, at 211–12.

67. See MANDER, *supra* note 50, at 66–67.

68. See generally COL. JAMES P. TERRY, THE WAR ON TERROR: THE LEGAL DIMENSION 178 (2013).

States to nickname CNN, “Saddam Network News.”<sup>69</sup> Both Operations Enduring Freedom and Operation Iraqi Freedom had “embedded and unilateral journalists.”<sup>70</sup> Embedded journalists received access to everything the unit they were with received, but little access to anything else, while unilateral journalists were able to question Iraqi citizens and get a wider scope of the war, but little combat exposure.<sup>71</sup>

The War on Terror has ushered in a new wave of regulations on First Amendment freedoms.<sup>72</sup> President George W. Bush addressed the nation in 2001, claiming “you are with us or with the terrorists” regarding the quick passage of the USA PATRIOT ACT (Patriot Act) which gives greater investigatory powers to the federal government and its agencies.<sup>73</sup> Since 2001, the definition of “war” to the American public has evolved from a conflict between two sovereigns on a battlefield to a broader conflict, rooted in ideology, against diverse, loosely aligned enemies and even targeting civilian populations.<sup>74</sup>

Formally, the United States could only declare war through congressional action.<sup>75</sup> However, this constitutional authority has not been exercised since World War II.<sup>76</sup> In the 1960s and 1970s, the chambers of Congress did not declare war against Vietnam; however, massive troops were deployed across South East Asia.<sup>77</sup> In the 1990s, Congress did not declare war on Iraq, but American troops saturated Kuwait and Saudi Arabia in the Persian Gulf.<sup>78</sup> Today, with the War on Terror, we live in a world where war “last[s] indefinitely.”<sup>79</sup> Defining wartime in 2017 requires also defining terrorism. International terrorism refers to activities that meet three key characteristics:

(A) Involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any state; or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended-- (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass

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69. W. LANCE BENNETT & DAVID L. PALETZ, *TAKEN BY STORM: THE MEDIA, PUBLIC OPINION, AND U.S. FOREIGN POLICY IN THE GULF WAR* 5 (1994).

70. *Id.*

71. *Id.*

72. *See* STONE, *supra* note 10, at 554.

73. *Id.* at 551.

74. *See generally* RALPH STEINHARDT ET AL., *INTERNATIONAL HUMAN RIGHTS LAWYERING* 1065 (2008).

75. U.S. CONST. art. I, § 8, cl. 11.

76. *See* REHNQUIST, *supra* note 11, at 218.

77. *Id.*

78. *See* BENNETT & PALETZ, *supra* note 69, at xi; *See also* REHNQUIST, *supra* note 11, at 218.

79. STONE, *supra* note 10, at 554 (quoting former President George W. Bush).

destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States . . . .<sup>80</sup>

This Note assumes a more contemporary definition of war, which extends beyond congressionally declared war to militant, hostile situations such as the Vietnam War, and to all armed conflicts against terrorist entities, such as the War on Terror.

*C. Despite This Historical Precedent, the First Amendment Permits Censorship of Speech Only in Limited Circumstances.*

An American's right to freedom of speech is not absolute.<sup>81</sup> The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>82</sup> These words, although broad, are understood by the United States Supreme Court to exclude certain types of speech.<sup>83</sup> In *Chaplinsky v. New Hampshire*, the Court held that there are certain types of speech that the Constitution does not have a legitimate interest in protecting.<sup>84</sup> Justice Frank Murphy asserted "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem."<sup>85</sup> In practice, however, the Court has struggled to define what categories of speech are unprotected, how a form of speech even receives entry into that category, and what level of scrutiny applies to each category.<sup>86</sup>

To determine whether an individual's right to freedom of speech has been infringed upon due to the speech's specific content the Supreme Court generally applies a strict scrutiny test.<sup>87</sup> Strict scrutiny requires that any such law be "narrowly tailored to serve a compelling state interest."<sup>88</sup> In determining whether such state action is constitutional, the Court applies this high standard as a two-part test to inquire: (1) whether the act is narrowly tailored, and (2) whether the act serves a compelling state interest.<sup>89</sup> The Court first analyzes whether the government interest at issue is compelling, stating in *Holder v. Humanitarian Law Project* that national security and

80. 18 U.S.C. § 2331(1) (2012).

81. See, e.g., *Virginia v. Black*, 538 U.S. 343, 358 (2003); See also GREGORY MAGGS & PETER SMITH, CONSTITUTIONAL LAW, A CONTEMPORARY APPROACH 860 (2d ed. 2011).

82. U.S. CONST. amend. I, § 1.

83. *Chaplinsky v. New Hampshire*, 315 U.S. at 571–72.

84. *Id.* at 572–73.

85. *Id.* at 571–72.

86. See Maggs, *supra* note 81, at 860–65.

87. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1304 (2007) (quoting Gerald Gunther's epic "'strict' in theory and fatal in fact.>").

88. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990)).

89. See *id.*

foreign affairs satisfy this high bar.<sup>90</sup> While it is often easier for the Supreme Court to identify a compelling state interest, “[m]ost cases striking down speech restrictions . . . rely primarily on the narrow tailoring prong.”<sup>91</sup> A law is narrowly tailored if it *actually* advances a compelling state interest, is not over or under-inclusive, and demonstrates the least-restrictive government alternative possible.<sup>92</sup>

Examples of acts that have failed to meet this test are the Communications Decency Act (CDA) and the Child Online Protection Act (COPA). Both acts target minors’ access to pornography on the Internet.<sup>93</sup> The CDA imposed criminal liability for a child’s exposure to indecent or obscene materials on the Internet, and COPA required commercial distributors to restrict access to their sites by minors.<sup>94</sup> These acts, however, failed to meet the narrowly tailored prong of the strict scrutiny test because they targeted all Internet users in order to protect children, making them over inclusive and discriminatory towards adults.<sup>95</sup> A similar act, the Children’s Internet Protection Act (CIPA), passed constitutional muster because it specified a ban on certain Internet sites in K-12 schools and libraries.<sup>96</sup> The Court held this was limited enough in scope to be considered narrowly tailored.<sup>97</sup>

While strict scrutiny disfavors content-based speech restrictions, the Supreme Court has created other tests for other forms of content-neutral speech and content-based “low-value speech.”<sup>98</sup> One of those unprotected content-based speech categories is incitement, formerly known as “clear and present danger.”<sup>99</sup> Many of the early cases applying the clear and present danger doctrine dealt with wartime speech.<sup>100</sup> A former test for clear and

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90. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) (“Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups . . .”).

91. *Volokh*, *supra* note 88, at 2421.

92. *See id.* at 2422–23.

93. *See generally* Communications Decency Act of 1996, 47 U.S.C. § 230 (2012); Child Online Protection Act, 47 U.S.C. § 231 (2012).

94. *See* 47 U.S.C. § 223(d) (2012); *See also* Child Online Protection Act § 231.

95. *Compare* *Reno v. American Civil Liberties Union*, 521 U.S. 844, 882 (1997) (ruling the Communications Decency Act § 223 unconstitutional), *with* *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 585 (2002) (ruling the reliance on community standards by Child Online Protection Act § 231 to identify what material “is harmful to minors” does not by itself make the statute substantially overbroad).

96. *See* Children’s Internet Protection Act, Pub. L. 106–554, Title XVII, §§ 1701–1741; *cf.* *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 195 (2003).

97. *See id.*

98. *See* Tom Hentoff, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1456–59 (1991); *see also* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942); *FCC v. Pacifica Found. (Pacifica)*, 438 U.S. 726, 726 (1978).

99. *See* Tom Hentoff, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1457 (1991).

100. *See* *Schenck v. United States*, 249 U.S. 47, 52 (1919).

present danger “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger.”<sup>101</sup> This test, as quoted in *Dennis v. United States*, was used to uphold the conviction of USA Communist General Secretary Eugene Dennis for violating the anti-Communist Smith Act.<sup>102</sup>

The clear and present danger exception to the First Amendment referred to direct, active wartime speech, not passive anti-government speech.<sup>103</sup> The defendants in *Schenck v. United States* met this active speech requirement when they publicly distributed anti-World War I leaflets because it could presently incite illegal behaviors of draft-age men.<sup>104</sup> Justice Oliver Wendell Holmes wrote “when a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.”<sup>105</sup> However, the defendants in *Yates v. United States*, USA Communist Party members who violated the Smith Act, did not meet the clear and present danger test because of the difference between *direct* advocacy dedicated to overthrow the government, and the *abstract* idea of overthrowing the government.<sup>106</sup> The former is potentially unprotected speech, while the latter is generally protected.<sup>107</sup>

In *Brandenburg v. Ohio* the Court refined the clear and present danger test to its present form – incitement.<sup>108</sup> The current test for incitement bars states or the federal government from “forbid[ding] or proscrib[ing] advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action.”<sup>109</sup> Although not expressly defined, “lawless action” refers to serious crimes.<sup>110</sup> “Imminent,” although not formally defined by the Supreme Court, refers to the timeline of the crime.<sup>111</sup> For example, mail fraud is a slow-results producing crime and does

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101. *Dennis v. United States*, 341 U.S. 494, 510 (1951) (citing *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

102. *Id.* at 517.

103. See *Yates v. United States*, 354 U.S. 300, 324–26 (1957).

104. See *Schenck*, 249 U.S. at 52.

105. *Id.*

106. *Id.*

107. *Id.*

108. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969). The Court a few years later would also hand down a stricter version in another doctrinal test, fighting words, in *Cohen v. California*, 403 U.S. 15, 16 (1971), where the Court held the ability of the public to shield their faces when Cohen walked by in a jacket that said “Fuck the Draft” was important in determining the jacket was protected under the First Amendment.

109. *Id.*

110. The Supreme Court has not officially held seriousness as a requirement, but it is an assumed remnant of the Court’s test in *Dennis v. United States*. See Bradley Pew, *How to Incite Crime with Words: Clarifying Brandenburg’s Incitement Test with Speech Act Theory*, 2015 BYU L. REV. 1104 (2015).

111. See *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (holding that “advocacy of illegal action at some indefinite future time” does not meet the standard of imminent under the incitement doctrine); see also Pew, *supra* note 110, at 1088–89.

not meet the imminent requirement for incitement.<sup>112</sup> In their incitement doctrine, the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) highlighted the importance of the publicity of the activity, finding that “[t]he root of incitement theory appears to have been grounded in concern over crowd behavior.”<sup>113</sup> The Supreme Court after the *Brandenburg* decision has yet to invoke the doctrine in favor of restricting speech.<sup>114</sup> The Court has, however, restricted speech in contexts where incitement may have applied, but the Court declared the speech to be unprotected without invoking a formal test.<sup>115</sup>

Another content-based restriction on speech outside of the Supreme Court’s strict scrutiny test is broadcast obscenity under 18 U.S.C. § 1464.<sup>116</sup> Section 1464 regulates language on broadcast radio and television, namely criminalizing the utterance of obscene, indecent, or profane language.<sup>117</sup> This Act was held to be constitutional in *FCC v. Pacifica Foundation* when applied to broadcast television.<sup>118</sup> *Pacifica* affirmed the FCC’s authority to regulate indecent material over broadcast because the Act specified that it was limiting indecent material to times when children were more likely to be in the broadcast audience.<sup>119</sup> The Court commented on the importance of broadcast media while making this decision, stating that “broadcast media ha[s] established a uniquely pervasive presence in the lives of all Americans. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”<sup>120</sup>

The Supreme Court echoed this language in *Red Lion Broadcasting Co. v. FCC* calling broadcast media unique in that it invades the privacy of the home and is particularly accessible to children.<sup>121</sup> The *Pacifica* view of the media has been critiqued in the years after the decision, but has not been overturned.<sup>122</sup> One such critique is that broadcast media, in part due to the

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112. See *Brandenburg*, 395 U.S. at 447; *United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990).

113. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987).

114. See Tom Hentoff, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1456–59 (1991).

115. *Id.*; see also *United States v. Williams*, 553 U.S. 285, 288 (2008).

116. 18 U.S.C. § 1464. (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”) The test was developed by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973).

117. *Id.*

118. See *FCC v. Pacifica Found. (Pacifica)*, 438 U.S. 726, 748 (1978).

119. *Id.*

120. *Id.*

121. See *Red Lion Broadcasting Co. v. FCC (Red Lion)*, 395 U.S. 367, 390 (1969).

122. See Lili Levi, *The FCC’s Regulation of Indecency*, 7 FIRST AMEND. CTR. 1, 1–10 (2008); see also Leslie Kendrick, G. Edward White, Frederick Schauer, *Is It Legal? The FCC’s Authority to Regulate Broadcast Indecency*, UVA LAW (Jan. 10, 2012), [http://www.law.virginia.edu/html/news/2012\\_spr/fcc\\_indecency.htm](http://www.law.virginia.edu/html/news/2012_spr/fcc_indecency.htm) [<https://perma.cc/93UY-YE99>].

rise of cable television, is no longer uniquely “pervasive,” and that the Internet should now carry this burden.<sup>123</sup>

### III. TERRORIST SPEECH ON THE INTERNET SHOULD BE CENSORABLE BY THE GOVERNMENT.

Through acts of Congress, executive orders, judicial rulings, and the decisions of private citizens, the censorship of certain materials during wartime is consistent. As previously discussed, this censorship has taken two main forms: first, the censoring of speech relating either to government opposition or to allegedly anti-American doctrines; and second, the censorship of the most visually intrusive forms of media as they showcase the grislier aspects of war.<sup>124</sup> Because the Internet is now one of the most prominent mass media channels for visual forms of terrorist speech, the United States is justified in censoring online terrorist speech.<sup>125</sup>

#### A. *Censoring Terrorist Speech Today is Consistent with the Tradition of Restrictions on Anti-Government Wartime Speech.*

Speech associated with anti-government positions has traditionally been subject to heightened governmental censorship in times of war, despite constitutional protection for free speech.<sup>126</sup> Whether this censorship is confiscating enemy-sympathizing publications, such as the *New Hampshire Gazette* during the American Revolution,<sup>127</sup> or restricting information from the front lines, such as the government-registered press in World War I, II, and Vietnam,<sup>128</sup> censorship of perceived anti-government speech is consistent and predictable throughout American history. These types of restrictions have also been present in congressional acts (and judicial opinions interpreting them), ranging from the Sedition Act of 1789 to the Communist Control Act of 1954.<sup>129</sup>

Given this historical practice, the Supreme Court has established First Amendment doctrine to identify contexts for protecting certain categories of

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123. See Leslie Kendrick, G. Edward White, Frederick Schauer, *Is It Legal? The FCC's Authority to Regulate Broadcast Indecency*, UVA LAW (Jan. 10, 2012), [http://www.law.virginia.edu/html/news/2012\\_spr/fcc\\_indecency.htm](http://www.law.virginia.edu/html/news/2012_spr/fcc_indecency.htm) [<https://perma.cc/BSY8-5P5J>].

The FCC indicated their interest in the Internet as well in: *In the Matter of Protecting and Promoting the Open Internet*, FCC (Feb. 26, 2015), ¶1–6 and *Universal Service*, FCC, <https://www.fcc.gov/general/universal-service>.

124. See discussion *supra* Section II(B).

125. See Mohr, *supra* note 15, at 43.

126. See discussion *supra* Section II(B).

127. See LINFIELD, *supra* note 43, at 15.

128. See MANDER, *supra* note 48, at 45, 61, 67.

129. See generally Sedition Act of 1789, 50 U.S.C. §§ 21–24 (2012); Communist Control Act of 1954, 50 U.S.C. §§ 841–844 (2012); see also Espionage Act of 1917, 18 U.S.C. § 792 (2012); Sedition Act of 1918, Pub. L. 65–150 § 3 (1918); Smith Act of 1940, 18 U.S.C. § 2385 (2012).

speech.<sup>130</sup> As a legal trend, the Court has moved away from “overreactions” during wartime hostilities, such as the harsh Communist Control Act of 1954, and has invalidated acts of censorship that it deems to be excessive.<sup>131</sup> As a historical trend, however, censorship is pervasive. As recent as the Operation Enduring Freedom in Iraq, American communications on the warfront were plagued by press restriction.<sup>132</sup> The Patriot Act continues to criminalize speech that is anti-American.<sup>133</sup> The War on Terror presents another time in American history where anti-United States government, anti-American interests are at issue.<sup>134</sup>

Censorship restricting terrorist speech for the War on Terror is consistent with the doctrine of censoring active anti-government speech because active terrorist speech is akin to anti-government wartime speech. Beyond falling within the category of anti-government wartime speech, terrorist speech is a more refined, narrower category than previous, broader forms of wartime censorship, such as under the Office of Censorship in World War II.<sup>135</sup> Under the Office of Censorship, wartime speech was broadly defined as encompassing soldier locations, military resources, and destination of any armed forces.<sup>136</sup> Terrorist speech refers to actual acts of terrorism online, videos of terrorist activities, or active recruitment to terrorist organizations.<sup>137</sup> It is doctrinally distinct from constitutionally protected discussions and opinions on terrorism and the War on Terror. Like the Court’s distinction regarding the Smith Act of 1940, where the Court refused to invalidate all communist forms of speech, but asserted a difference between communist speech discussing overthrowing the government and an active communist plot to overthrow the government, there is a difference between discussions of acts of terror and speech inciting the acts themselves.<sup>138</sup>

The former, voices of opposition, emerging from the press and public alike, have historically contributed to a valuable national discourse.<sup>139</sup> Given the political environment in the United States in 2017, these voices are imperative. However, this is not the type of speech currently at issue. Videos of torture do not spark significant contributions to the marketplace of ideas where constitutionally protected speech thrives, because their purpose is to terrorize and, by definition, to intimidate.<sup>140</sup> Intimidation and cruelty are not

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130. See discussion *supra* Section II (C).

131. See generally *Snyder v. Phelps*, 562 U.S. 443 (2011); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

132. See *Terry*, *supra* note 68, at 178.

133. See 18 U.S.C. § 2339A (2012); see also *STONE*, *supra* note 10, at 551.

134. This Note does not condone all of the censorship practices of the United States government, nor does it assert they all have been legally accomplished. Rather, it asserts that given the widespread practice of government censorship in the two outlined categories, measures should be taken to hold the government accountable for the materials they censor.

135. See *MANDER*, *supra* note 48, at 58.

136. *Id.*

137. *Infra* at Section IV(A).

138. See *Dennis v. United States*, 341 U.S. 494, 510 (1951).

139. *Id.* at 9 (discussing the First Amendment’s purpose in the marketplace of ideas).

140. See *Friis*, *supra* note 32, at 729.



introduced into the marketplace to spark knowledge, nor does this form of mass media result in a productive conversation on terrorism.<sup>141</sup> Instead, it produces grieving families, like James Foley's, and exposes vulnerable families across the United States whose lives are impacted by terrorist organizations.<sup>142</sup>

Terrorism also presents new challenges deviating from this typical model of anti-government wartime censorship because it implicates the abstract territory of the Internet. The War on Terror is not only being fought on a physical battlefield, where the government can limit press access, it is being fought online.<sup>143</sup> On the Internet, one cannot always avert their eyes from the information displayed on their screen (such as viral news video, an advertisement or a pop-up) in the way a passerby could avert their eyes from Cohen's jacket which read "Fuck the Draft."<sup>144</sup> Employing a censorship model based on the Saigon Press Corps would not be an effective means for the government to control information online.<sup>145</sup> When a decapitation video is posted online, it is infeasible to criminalize the reposting of the link in the same manner that the Sedition Act of 1918 criminalized anti-government speech. Because the Internet is an intrusive medium and is less censorable than a print newspaper,<sup>146</sup> the War on Terror cannot rely on historical models for censoring anti-government speech.

### *B. Targeting Internet-Based Speech is Consistent with the Tradition of Restrictions on Uniquely Invasive Media.*

Visual forms of media are censored more frequently than other types of media because they expose the most shocking aspects of war to the American public.<sup>147</sup> How Americans receive their news and the type of speech at issue are significant factors in determining the level of censorship to be applied.<sup>148</sup> During the American Revolution, print newspapers like the *New Hampshire Gazette* were routinely censored as the dominant form of media, despite being relatively noninvasive.<sup>149</sup> By the time of the Civil War, sketch artists like Alfred Waud experienced censorship because he showed the more visual

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141. *Id.*

142. See Hannah Jane Parkinson, *James Foley: How Social Media is Fighting Back Against Isis Propaganda*, THE GUARDIAN (Aug. 20, 2014, 11:06 AM EDT), <http://www.theguardian.com/technology/2014/aug/20/james-foley-how-social-media-is-fighting-back-against-isis-propaganda> [https://perma.cc/JLQ3-HMHQ].

143. See *Report Online Terrorist Material: Reporting Crimes and Getting Compensation*, UK Gov., <https://www.gov.uk/report-terrorism> (last Accessed Aug. 10, 2015) [https://perma.cc/3RTV-9BZL].

144. See *Cohen v. California*, 403 U.S. 15, 21 (1971).

145. See MANDER, *supra* note 48, at 65.

146. See Philip Bennett & Moises Naim, *21st-Century Censorship*, COLUM. JOURNALISM REV. (Jan. 22, 2017, 3:52 PM), [http://www.cjr.org/cover\\_story/21st\\_century\\_censorship.php](http://www.cjr.org/cover_story/21st_century_censorship.php) [https://perma.cc/5GRU-S623].

147. See *FCC v. Pacifica Found. (Pacifica)*, 438 U.S. 726, 748 (1978).

148. *Id.*

149. See LINFIELD, *supra* note 43, at 15–17.

aspects of the war—the dead, the fallen, and the disgraced.<sup>150</sup> This trend continued when radios, television, and movies came into existence and grew in popularity.<sup>151</sup>

Television and current events newsreels during World War I and World War II became the most visual and popular forms of media and therefore were subject to widespread censorship.<sup>152</sup> They invaded the minds and eyes of Americans in a way print newspapers could not.<sup>153</sup> By 1959 television news programs had progressed significantly in the homes of the average American, as 43.9 million American families owned television sets as opposed to 3.6 million just ten years earlier.<sup>154</sup> In response to the growing trend of broadcast television, censorship of non-wartime speech increased as well.<sup>155</sup> It is not surprising that only five years after the United States left Vietnam, the Supreme Court upheld the FCC's indecency speech restrictions, finding that “broadcasting is uniquely intrusive, and that viewers or listeners would have no way of avoiding in advance the language or images that might offend them.”<sup>156</sup> This theme of unavoidability is now more relevant for viral media forms on the Internet. Today, viral social media exhibits the same characteristics of television that the Court observed in *Pacifica*.<sup>157</sup>

Although television remains an important source for news, a majority of people use the Internet and social media to serve this function.<sup>158</sup> The ability of news to “go viral” and be shared millions of times with people around the world has made the Internet as uniquely intrusive as the Supreme Court found broadcast media to be in *Pacifica*.<sup>159</sup> In 1978, the Court held in *Pacifica* that broadcasting is uniquely intrusive.<sup>160</sup> In the 1970s, broadcast media was becoming increasingly popular, especially after the Vietnam War.<sup>161</sup> The Court in *Pacifica* understood that these new forms of technology presented a different beast than print media proposed.<sup>162</sup> This view of the uniqueness of broadcast media invading the home and the lifestyles of Americans was presented to the Court in *Red Lion* almost a decade earlier.<sup>163</sup>

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150. See ROEDER, *supra* note 46, at 29.

151. See BERNHARD, *supra* note 62, at 46.

152. See ROEDER, *supra* note 46, at 17; BERNHARD, *supra* note 62, at 47.

153. See ROEDER, *supra* note 46, at 17 (citing *Pathe Exch., Inc. v. Cobb*, 202 App. Div. 450, 456 (N.Y. App. Div. 1922)).

154. See BERNHARD, *supra* note 62, at 47.

155. See *FCC v. Pacifica Found. (Pacifica)*, 438 U.S. 726, 748 (1978); *Red Lion Broadcasting Co. v. FCC (Red Lion)*, 395 U.S. at 390.

156. Brian McNeill, *The FCC's Authority to Regulate Broadcast Indecency*, UVA LAW (Jan. 10, 2012), [http://content.law.virginia.edu/news/2012\\_spr/fcc\\_indecency.htm](http://content.law.virginia.edu/news/2012_spr/fcc_indecency.htm) [https://perma.cc/K2MK-WHVF].

157. See generally *Pacifica*, 438 U.S. at 748.

158. Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/> [https://perma.cc/Z9H9-JRU2].

159. See *Pacifica*, 438 U.S. at 748.

160. See *id.*

161. See BERNHARD, *supra* note 62, at 47.

162. See *Pacifica*, 438 U.S. at 748.

163. See *Red Lion Broadcasting Co. v. FCC (Red Lion)*, 395 U.S. 367, 386–88 (1969).

This same reasoning from *Red Lion* and *Pacifica* is now applicable to the Internet, which poses an analogous threat of transmitting graphic videos and other forms of terrorist propaganda into American households without the consent of viewers.<sup>164</sup>

When a video goes viral, clips of its content appear everywhere: shared by friends on Facebook, posted on online news sites, and shared in emails.<sup>165</sup> This mass media effect cannot be contained by the same means employed in the Civil War, when President Lincoln ordered the seizure of telegraph wires to inhibit the transmission of Confederate communications and news.<sup>166</sup> President Lincoln was successful because alternative routes of information—such as horseback, train, or on foot—were inherently slower and less reliable.<sup>167</sup> Here, we are dealing with mass media as opposed to horseback.<sup>168</sup> One of the modern critiques of the *Pacifica* decision is that broadcast media no longer represents a unique form of communication, given the influence of the Internet.<sup>169</sup> This supports, then, that the Internet has filled this gap and should be given extra consideration as this pervasive type of media.<sup>170</sup> Social media, in particular, presents an exceptional situation.<sup>171</sup> In her article about ISIS's online media presence, Simon Molin Friis explains that “transformations in the way in which images can be produced and circulated increase visual interconnectivity across borders and facilitate new ways of communicating the horrors of war.”<sup>172</sup>

Therefore, while specific media technologies have changed over time, censorship restrictions that shield the gruesome nature of warfare or certain forms of anti-government speech have survived. At every stage of America's wartime history, freedom of speech was never truly free.<sup>173</sup> Today, America is engaged in a War on Terror of “indefinite” duration.<sup>174</sup> This war is being waged in person, but also electronically.<sup>175</sup> The number of government data requests in 2015 rose eleven percent.<sup>176</sup> Meanwhile, “ISIS has managed to recruit [over] 6000 new members in June of 2014 alone.”<sup>177</sup> The problem is not going away. Mass media sites featuring videos like James Foley's

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164. See Friis, *supra* note 32, at 729.

165. See generally Mohr, *supra* note 15, at 43.

166. See MANDER, *supra* note 48, at 24.

167. *Id.*

168. Mohr, *supra* note 15 at 43.

169. FCC v. *Pacifica Found.* (*Pacifica*), 438 U.S. 726, 748 (1978).

170. *Id.*

171. See generally Leslie Kendrick, G. Edward White & Frederick Schauer, *Is It Legal? The FCC's Authority to Regulate Broadcast Indecency*, UVA LAW (Jan. 10, 2012) [http://www.law.virginia.edu/html/news/2012\\_spr/fcc\\_indecency.htm](http://www.law.virginia.edu/html/news/2012_spr/fcc_indecency.htm) [<https://perma.cc/HN4D-N5MM>].

172. See Friis, *supra* note 32, at 726.

173. See STONE, *supra* note 10, at 12–13.

174. See STONE, *supra* note 10, at 554 (quoting former President George W. Bush).

175. See Mohr, *supra* note 15, at 43.

176. See *United States Law Enforcement Requests for Data, Jan. 2015- June 2015*, FACEBOOK, <https://govtrequests.facebook.com/country/United%20States/2015-H1/#> (last visited Mar. 27, 2017) [<https://perma.cc/Y5PC-RW24>].

177. Bolan, *supra* note 24, at 141.

penetrate computer screens across the nation, achieving ubiquity at the expense of shocked audiences.<sup>178</sup> Now is the time for the legal, formalized practice of wartime censorship. Regulating terrorist speech online—speech that expressly represents an act of terror, such as the beheading of an American national or the recruitment of American citizens to terrorist forces—should be within the discretion of the United States government to regulate.<sup>179</sup> The political waltz between the past actions of the federal government and the unfulfilled promises of the First Amendment needs to step in a new direction to combat the sinister issue of terrorist speech on the Internet.

#### IV. THE “STOP TERRORIST ORGANIZATIONS FROM PROMOTING INTERNET TRANSMISSIONS ACT” COULD PERMISSIBLY REGULATE TERRORIST SPEECH ONLINE.

The most effective measure for regulating terrorist speech on the Internet would be through congressional action, granting a body, such as the FCC, the power to order removal of online terrorist speech. However, if legislative actions fail to materialize, another option could be to establish a uniform “Code of Ethics” agreed upon by owners of mass media sites.

##### A. *STOP IT: The Stop Terrorist Organizations from Promoting Internet Transmissions Act Would Give the FCC the Power to Regulate Terrorist Speech Online.*

The proposal for the “Stop Terrorist Organizations from Promoting Internet Transmissions Act” (STOP IT) would specifically define the bodies implementing the Act, the speech covered under the Act, and the technological methods the Act would use.<sup>180</sup> The proposed body for STOP IT’s implementation would be the FCC, the definition of covered terrorist speech would derive from the United State Code’s definition of terrorism, and URL blocking would likely be the most effective method of enforcement.

For the FCC to censor terrorist speech, Congress would need to pass legislation (i.e., the STOP IT Act) to give the FCC express authority to regulate expressions of terror, or terrorist speech, present on the Internet.<sup>181</sup> The definition of terrorist speech would derive from the codified definitions of international and national terrorism.<sup>182</sup> Those definitions depart with regard to territoriality, but the three shared characteristics that constitute terrorist speech are acts “(i) to intimidate or coerce a civilian population; (ii)

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178. See Reich, *supra* note 2.

179. See Reich, *supra* note 2.

180. See generally Bambauer, *supra* note 25, at 390–400 (discussing “openness, transparency, narrowness, and accountability” as the primary factors in evaluating a country’s Internet filtering practices).

181. Cf. *id.*

182. 18 U.S.C. § 2331(1) (2012).

to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>183</sup> Given this definition, STOP IT would cover acts that “depict or advocate for violent acts, or acts dangerous to human life, by use of the unique, visual influence of mass media.” Video and photographic representations of acts of terrorism and active recruitment postings, according to these definitions, would be censorable by the FCC to combat against the “going viral” effect.<sup>184</sup>

To combat the viral nature of content on the Internet, STOP IT could model the UK’s Counter Terrorism Internet Referral Unit’s strategy of having members of the public flag what they view as posts and videos that showcase acts of terror in addition to having a federal bureau with the ability to flag and remove the source of terror from the Internet.<sup>185</sup> A federal bureau devoted to national security and cybersecurity threats would be an asset to STOP IT as they would be able to offer their expertise regarding what information to flag. First, members of the public would flag the materials; second, the appropriate federal bureau would review what the public has flagged in addition to being able to flag material itself; and third, the FCC would decide whether to remove the flagged materials, or reject the removal of the website, post, or video, and let it remain in the public’s eye.

The FCC is an appropriate body to take this course of action because STOP IT would mirror the FCC’s responsibilities in its obscenity regulations.<sup>186</sup> It would be natural for the FCC to step into this type of role, given the interpretative powers the FCC employs under the obscenity and indecency regulations. Despite modern criticisms of the *Pacifica* doctrine, the FCC has continued to regulate profanity, indecency, and obscenity in broadcast, and the agency has expressed its willingness to engage in the regulation of the Internet through net neutrality and Internet subsidy plans.<sup>187</sup> Under STOP IT, every website, post, or video flagged would be collected and stored in a database and remain confidential unless the censorship became an issue of a law suit. This would create an internal record of the websites that are being censored; a record which could contribute to a greater

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183. *Id.*

184. See Mohr, *supra* note 15 at 43.; CBS DC, *supra* note 22.

185. See *Tackling Extremism in the UK: Report from the Prime Minister’s Task Force on Tackling Radicalisation and Extremism*, H.M. GOVERNMENT 1, 3 (2013); *Report Online Terrorist Material: Reporting Crimes and Getting Compensation*, UK Gov., <https://www.gov.uk/report-terrorism> (last updated Sep. 23, 2016) [<https://perma.cc/8VDR-6L2V>].

186. See generally 18 U.S.C. § 1464 (2012).

187. See, e.g., Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5603–04 (2015); *Universal Service*, FCC, <https://www.fcc.gov/general/universal-service> (last visited May 28, 2017) [<https://perma.cc/AG6X-XDEV>]; *Regulation of Obscenity, Indecency and Profanity*, FCC, <https://www.fcc.gov/general/regulation-obscenity-indecency-and-profanity> (last visited May 28, 2017) [<https://perma.cc/T9P4-CMM5>]. The FCC is showing increased willingness to engage in conversations outside of radio and broadcasting into Internet services.

understanding of terrorist enemies.<sup>188</sup> More information on the terrorist usage of social media would be helpful considering the new body of scholarship pointing to the increased significance of social media as a multi-use tool for terrorist organizations.<sup>189</sup>

STOP IT would confer standing to appeal a censorship decision to owners of sites with removed data or account owners of an affected social media account. This would create transparency and incentivize the FCC to regulate as they deem fit, but not give them unlimited power without a proper constitutional check.<sup>190</sup> Having a standing-to-sue based policy would also promote government legitimacy.<sup>191</sup> Similar to the UK's Initiative, the tactical form of blocking employed under STOP IT would likely be URL blocking for the ease of the public and federal bureau to flag materials and the FCC to block specific URLs.<sup>192</sup> If a video, such as the James Foley video, went viral and was posted on a variety of websites, URL blocking for each would be harder to track, but with three levels of website flagging, and the general knowledge of a viral video circulating, URL blocking should not create a legitimate enforcement issue. STOP IT would also stipulate review of the success of the project in a quantifiable deadline, potentially five years after implementation. The specifics of STOP IT's constitutionality is the most pressing issue for its creation.

*B. STOP IT Would Provide a Medium Through Which Censorship of Terrorist Speech Could be Narrowly Tailored to Meet Constitutional Muster.*

There are two potential avenues STOP IT could be analyzed under the First Amendment: strict scrutiny or incitement, depending on the Supreme Court's application of the scope of the act.<sup>193</sup> If STOP IT is considered to cover only incitement-based speech, it would not afford any First Amendment protections, however if STOP IT covers content-based speech outside of incitement doctrine, a strict scrutiny test would be employed to the speech at issue. STOP IT would have a difficult time meeting the requirements of either strict scrutiny or incitement, but could satisfy strict scrutiny more easily than incitement given a flexible Supreme Court bench.

First, STOP IT could be viewed solely through the doctrine of incitement. If viewed as incitement, the test would be whether the speech prohibited by the government is "directed [at] inciting or producing imminent

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188. See Bambauer, *supra* note 25, at 393 .

189. See Secara, *supra* note 23, at 79–81 .

190. See Bambauer, *supra* note 25, at 394–95.

191. *Id.* at 408.

192. See Carlo Davis, *UK 'Porn' Filter Will Also Block Violence, Alcohol, Terrorism, Smoking, And 'Esoteric Material'*, (Jul. 29, 2013, 11:40 AM), [http://www.huffingtonpost.com/2013/07/29/uk-internet-filter-block-more-than-porn\\_n\\_3670771.html](http://www.huffingtonpost.com/2013/07/29/uk-internet-filter-block-more-than-porn_n_3670771.html) [https://perma.cc/7C8R-6MTD].

193. See discussion, *supra* Section II(C).

lawless action and is likely to incite or produce such action.”<sup>194</sup> The two key clauses for the purposes of this Act are “directed to” and “imminent lawless action.”<sup>195</sup>

“Directed to” was key to the Supreme Court’s decision in *Schenck*, which upheld an individual’s criminal conviction for anti-draft pamphleteering during World War I.<sup>196</sup> For the *Schenck* court, there was an important distinction between the advocacy of general “Communist” principles and the advocacy of Communist behavior, such as draft evasion, which is more closely connected to actively disobeying the government.<sup>197</sup> This distinction is key to the STOP IT Act. STOP IT targets acts of terrorism that have been committed and are now online in photographic or video form, or active terrorist membership.<sup>198</sup> STOP IT does not limit discussing acts of terrorism, with which the Court disagreed in *Yates*, but rather the *specific* actions of terror and advancements of terrorism that the Court was concerned with in *Schenck* and *Dennis*.<sup>199</sup>

“Imminent lawless action” would be difficult to satisfy due to the requirement of “imminence.”<sup>200</sup> The lawless action requirement, although not specifically defined, is generally understood as referring to serious, particularly violent, crimes, which would include acts of terrorism.<sup>201</sup> The “imminent” requirement, however, is lacking a formal definition.<sup>202</sup> In *Rowlee*, the Supreme Court refused to recognize mail fraud, a slower results-producing crime, as an imminent crime under incitement,<sup>203</sup> and lower circuits, such as the Fifth Circuit, have highlighted the importance of the public in incitement doctrine.<sup>204</sup> Timing is the principal issue with viral terrorist videos on the Internet and the active solicitation of members to join terrorist groups.<sup>205</sup> Recruiting an individual to join ISIS and engage in

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

195. *Id.*

196. See *Schenck v. United States*, 249 U.S. 47, 52–53 (1919).

197. *Id.*

198. See Friis, *supra* note 32, at 737.

199. *Dennis v. United States*, 341 U.S. 494, 510 (1951); *Schenck*, 249 U.S. at 52.

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

201. See MAGGS, *supra* note 81, at 993.

202. *Id.*

203. See *United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990).

204. See *Herceg v. Hustler Magazine Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987).

205. Timing is an issue courts have unsympathetically addressed in recent lawsuits involving social media and terrorist organizations. See Eric Goldman, *Facebook Defeats Lawsuit Over Material Support for Terrorists—Cohen v. Facebook*, TECH. & MARKETING L. BLOG (May 18, 2017), <http://blog.ericgoldman.org/archives/2017/05/facebook-defeats-lawsuit-over-material-support-for-terrorists-cohen-v-facebook.htm> [https://perma.cc/W2FB-MJCT]. In *Cohen v. Facebook*, plaintiffs argued that the nature of Facebook allowed, and continues to allow, Hamas to freely recruit new members and plan attacks. See generally *Cohen v. Facebook, Inc.*, 2017 WL 2192621, at \*22 (E.D.N.Y. May 18, 2017). The case was dismissed for lack of subject matter jurisdiction in part because plaintiffs could not establish a specific harm based upon the threat of an imminent terrorist attack. *Id.* at \*11. Although it addresses jurisdiction, *Cohen* exemplifies the challenges social media presents to the law, namely the difficulty in determining how much a party is harmed and the timeline of that specific harm.

terrorist activities could take hours, days, weeks, or months and cannot be quantified under nebulous Supreme Court language that defines imminence as not “some indefinite future time.”<sup>206</sup> This is a more attenuated connection than the Court has traditionally accepted in its standard application of the *Brandenburg* test.<sup>207</sup>

Second, STOP IT could be viewed as effecting speech beyond the incitement doctrine and therefore would need to be “narrowly tailored to serve a compelling state interest” under strict scrutiny.<sup>208</sup> Preventing the spread of terrorism and the viewing of acts of terror are compelling state interests, and the Court has construed the interest of security broadly in times of war and military conflict—most recently with terrorism in *Humanitarian Law Project*.<sup>209</sup> The key, therefore, for STOP IT to pass a strict scrutiny test would be showing how STOP IT is not over or under inclusive, while utilizing the least restrictive means to achieve its goal.<sup>210</sup>

To surpass strict scrutiny, STOP IT would have to be narrowly tailored as to not over-include or under-include any speech in its regulation. This is challenging because the Court has referenced narrow tailoring repeatedly when striking down speech restrictions.<sup>211</sup> The CDA and COPA both established a compelling state interest for their Acts to stop the spread of child pornography, but failed to pass the narrowly tailored version of the test because they overburdened adult speech while attempting to protect child speech.<sup>212</sup> In contrast, CIPA met the narrow tailoring standard because it served the goal of stopping the spread of indecent materials to minors by limiting the Act to apply to K-12 schools and libraries.<sup>213</sup> The Court found CIPA to be specific enough to target the eyes of children and stop them from viewing indecent materials.<sup>214</sup>

In order to not be under-inclusive or over-inclusive, STOP IT, like CIPA, would have to show how narrow of a category of speech it is impacting.<sup>215</sup> By defining terrorist speech as largely electronic representations of terrorist acts and active recruitment and solicitation by terrorist organizations, STOP IT is targeted at expression that itself is an act of terror.<sup>216</sup> STOP IT is not intended to stop members of the American press

206. See *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

207. See Tom Hentoff, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV., 1453, 1456–59 (1991).

208. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2417 (1996).

209. See generally *Holder v. Humanitarian Law Project*, 561 U.S. 1, 5 (2010); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, at 574 (1942); *Schenck v. United States*, 249 U.S. 47, 52–53 (1919).

210. See, e.g., *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 875, 879 (1997).

211. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1304 (2007) (quoting Gerald Gunther’s epic “‘strict’ in theory and fatal in fact”).

212. Compare *Reno*, 521 U.S. at 882, with *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 585 (2002).

213. See *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003).

214. *Id.*

215. See, e.g., *Reno*, 521 U.S. at 875, 879.

216. *Contra* Reich, *supra* note 2.



from reporting their thoughts on ISIS, nor from posting about terrorist attacks generally, but is specifically targeted to stop online communications that promote and incite further terrorist action.<sup>217</sup> Factors that would contribute to the definition would include visual representations of violence and active communication with known international terrorist-based communities for the purpose of recruitment, such as ISIS.<sup>218</sup>

To surpass strict scrutiny, STOP IT would also need to remove terrorist speech from the Internet through the least restrictive means,<sup>219</sup> which begs the question of what other means could restrict this type of behavior? Could social media sites, like Twitter, simply continue enforcing their own take down policy?<sup>220</sup> It is likely this approach would be too individualistic, with videos being deleted on some sites and not others. Could the government educate American citizens on the dangers of ISIS recruitment techniques?<sup>221</sup> This approach would be even more intrusive into a citizen's daily life than blocking the action of the recruitment before most people know it is gone. Could the Act criminalize or fine Internet sites that hosted these videos?<sup>222</sup> Again, this approach is less tailored to achieving the stated goal because of the number of users on social media sites and the difference between the user of the site and the owner of the site. However, the Supreme Court would have to take a flexible view on the proposed legislation, as it did in *Humanitarian Law Project*, to uphold the Act under a traditional strict scrutiny analysis.

The Supreme Court's decision in *Humanitarian Law Project* may signal a willingness to assume a more flexible posture toward First Amendment scrutiny in the context of terrorism.<sup>223</sup> Without a strong discussion as to how the statute at issue specifically satisfied scrutiny, the Court held in *Humanitarian Law Project* that a content-based, national security material-support statute for foreign terrorist organizations did not violate the First Amendment.<sup>224</sup> Because the statute upheld in *Humanitarian Law Project* applied to lawful, nonviolent activities, the STOP IT Act might have an even stronger case for constitutionality, given that it targets unlawful, violent activities by international terrorist organizations.

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217. *Id.*

218. *See generally* CBS DC, *supra* note 22.

219. *Id.*

220. *See* E.W., *Twitter, Terror and Free Speech: Should Twitter Block Islamic Snuff Videos?*, THE ECONOMIST:BLOG (Aug. 21, 2014, 11:17 AM), <http://www.economist.com/blogs/democracyinamerica/2014/08/twitter-terror-and-free-speech> [<https://perma.cc/T8VA-FPRH>].

221. *See* Ryan Reilly, *If You're Trying to Join ISIS Through Twitter, The FBI Probably Knows About It*, HUFFINGTON POST (July 9, 2015), [http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state\\_n\\_7763992.html](http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state_n_7763992.html) (examples of modern-day ISIS recruitment techniques) [<https://perma.cc/N5X4-Q3MT>].

222. As President Woodrow Wilson did with the Espionage Act of 1917. *See generally* 18 U.S.C. §§ 792–98 (2012).

223. *See* Tom Hentoff, *supra* note 13, at 1456–59. ; *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 36 (2010); *Brandenburg v. United States*, 395 U.S. 444, 446 (1944).

224. *See Humanitarian Law Project*, 561 U.S. at 36.

*C. If STOP IT Were to Fail Constitutional Muster, an Alternative to this Act Would be the Creation of a Uniform “Code of Ethics” for Major Social Media Sites.*

Given the modern, practical limitations on the actions of Congress and the harsh reality of the strict scrutiny test, a non-governmental method to address terrorist speech through voluntary action on behalf of social media sites themselves might be more viable, or desirable, as a backup solution. Most prominent sites already employ their own standards and codes of ethics articulating their ability to take down user content,<sup>225</sup> and some sites, such as Twitter, have specifically expressed their desire to adequately address the growing problem of terrorist speech.<sup>226</sup>

By creating their own universal “Terrorist Speech Code of Ethics,” these media sources could band together to take down user content related to the categories discussed above: representations of acts of terrorism and active terrorist recruitment. The Office of Censorship during World War II establishes the precedent for a voluntary self-censorship program, with the exception that this would be privately, rather than publicly, introduced.<sup>227</sup> The benefits of a universal code would include more consistent and rigorous application in blocking these types of speech. A potential weakness of this approach would be dealing with the reality that some sites have less wealth and manpower than other sites to monitor this type of activity. These organizations, therefore, could create a committee to oversee all the involved social media sites as one coalition, or attempt to enforce the doctrines separately and measure the effectiveness on a month-to-month basis. Another benefit of this approach would be adaptability, as the potential coalition could adequately adjust any of its policies to meet the needs of the project. The first step in launching such an initiative would involve a meeting and discussion among the major social media platforms (e.g., Twitter, Facebook, YouTube, etc.) and take-down policy experts.<sup>228</sup>

## V. CONCLUSION

The viral dissemination of James Foley’s execution gave ISIS exactly the free publicity it was hoping for. America cannot continue to let this

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225. See, e.g., Community Guidelines, YOUTUBE, <http://www.youtube.com/yt/policyandsafety/communityguidelines.html> (last visited Mar. 27, 2017) [https://perma.cc/G3N3-Y4H8].

226. See Ryan Reilly, *If You’re Trying to Join ISIS Through Twitter, the FBI Probably Knows About It*, HUFFINGTON POST (July 9, 2015, 3:32 PM EST), [http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state\\_n\\_7763992.html](http://www.huffingtonpost.com/2015/07/09/isis-twitter-fbi-islamic-state_n_7763992.html) [https://perma.cc/4CTR-EFQF].

227. See ROEDER, *supra* note 49, at 8.

228. Compare Help Center: Abusive Behavior Policy, TWITTER, <https://support.twitter.com/articles/20169997>, with Community Guidelines, YOUTUBE, <http://www.youtube.com/yt/policyandsafety/communityguidelines.html> [https://perma.cc/K4UA-PYK9].

content freely circulate in 2017. The historical practice of wartime censorship continues to exist as it has at least for the last two centuries.<sup>229</sup> The legal trend, although more protective of speech than not, continues to vacillate the shifting balance between liberty and order.<sup>230</sup> It is time for that censorship to take a more formal and transparent place in our legal system. Starting with the regulation of terrorist speech that directly represents an act of terror, the beheading of an American national, or the recruitment of American citizens to ISIS, should be within the discretion of the federal government to regulate. This regulation could start on social media sources, before expanding to other sources on the Internet to sufficiently tailor the regulation to the constraints of the First Amendment. Short of such ambitious legislation, however, a more realistic plan for curtailing online terrorist speech would be to spur major social media sites to develop a voluntary, uniform “Code of Ethics” addressing the issue.<sup>231</sup>

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229. See discussion *supra* Section II(B).

230. See HALLIN, *supra* note 12, at 215.

231. See discussion *supra* Section III(C).

