

## A CANCER ON THE INTERNET: A PROPOSAL FOR STATUTORY REGULATION OF INSURRECTIONIST SPEECH ON THE WEB

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### I. INTRODUCTION

Skinheads have YouTube channels. Secessionists maintain Facebook pages. The Internet is a vast, largely unregulated universe where anyone can say anything at anytime and remain anonymous if he or she wishes. The Internet has expanded educational and communication opportunities in ways and to places never before imagined. It has exploded new economic frontiers, resulting in the facilitation of business and advertisement for millions. But the Internet can also be a very dangerous place, rife with hate speech, identity theft, fraud, sexual predators, and other illicit activities. The virtually unlimited audience for websites, the low cost of producing and publishing content, and the ability to remain anonymous as a speaker or listener all are factors that make the Internet an ideal place for those who hold radical beliefs to recruit others to aid in their causes.

In the wake of the attempted assassination of Congresswoman Gabrielle Giffords in Tucson, Arizona,<sup>1</sup> former Alaska Governor Sarah Palin was criticized for a map of the United States, posted online during the 2008 elections, with gunsights drawn over contested congressional districts, including Congresswoman Giffords' district as well as her name.<sup>2</sup> There is no evidence that Palin's map, or her online exhortation to fellow conservatives not to "retreat," but to "rel-

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<sup>1</sup> Marc Lacey and David M. Herszenhorn, *In Attack's Wake, Political Repercussions*, N.Y. TIMES, Jan. 9, 2011, at A1, available at <http://www.nytimes.com/2011/01/09/us/politics/09giffords.html>.

<sup>2</sup> Brian Montopoli and Robert Hendin, *Sarah Palin Criticized over Gabrielle Giffords Presence on "Target List,"* POLITICAL HOTSHEET, CBS NEWS (Jan. 8, 2011, 7:16 PM), [http://www.cbsnews.com/8301-503544\\_162-20027918-503544.html?tag=contentMain;contentBody](http://www.cbsnews.com/8301-503544_162-20027918-503544.html?tag=contentMain;contentBody); see also Jillian Rayfield, *Palin Uses Crosshairs to Identify Dems Who Voted for Health Care Reform*, TPM (March 24, 2010), <http://tpmlivewire.talkingpointsmemo.com/2010/03/palin-uses-crosshairs-to-identify-dems-who-voted-for-health-care-reform.php>.

oad,”<sup>3</sup> at all influenced the Tucson gunman, Jared Lee Loughner. But the nationwide discussion of violent public rhetoric that occurred in the aftermath of the shooting cast a spotlight on the dangers of inciteful speech on the internet.

In April 2009, the Department of Homeland Security released a report warning of the rising danger of right-wing extremism in the United States.<sup>4</sup> The report warned that the economic downturn, coupled with the election of the first African-American President, was creating a “fertile recruiting environment” for white supremacist and antigovernment groups.<sup>5</sup> These groups “gain new recruits by playing on their fears.”<sup>6</sup> The report stated that in the 1990s, similar groups and a similar political and economic climate “contributed to the growth in the number of domestic right-wing terrorist and extremist groups and an increase in violent acts,” including the 1995 bombing of the Oklahoma City Federal Building.<sup>7</sup> The report points out that military veterans returning from war, who already “face significant challenges in reintegrating into their communities,” have “combat skills and experience” that make them attractive recruitment targets.<sup>8</sup> The Department of Homeland Security “is concerned that right wing extremists will attempt to recruit and radicalize returning veterans in order to boost their violent capabilities,” which could lead to “the potential emergence of terrorist groups or lone wolf extremists capable of carrying out violent attacks.”<sup>9</sup>

The Internet is the most powerful tool available to these groups by which they can recruit new members. The inability of current First Amendment jurisprudence to account for the type of communication performed on the Internet hampers the regulation of Internet speech. The federal government should be able to regulate speech on the Internet when that speech advocates criminal acts. Congress should enact a statutory scheme granting law enforcement greater

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<sup>3</sup> *Id.*

<sup>4</sup> See U.S. DEPT. OF HOMELAND SECURITY, OFFICE OF INTELLIGENCE AND ANALYSIS, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (2009), available at [www.fas.org/irp/eprint/rightwing.pdf](http://www.fas.org/irp/eprint/rightwing.pdf) [hereinafter RIGHTWING EXTREMISM].

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2–3.

<sup>9</sup> *Id.*

power to head off violent acts like those anticipated by the DHS report.<sup>10</sup>

There is no constitutional guarantee of unfettered access to the Internet for those who would use that medium to advocate unlawful acts or recruit supporters to join them in committing acts of violence. Freedom to speak is not the same as the right to a megaphone. If, however, the First Amendment is to have any meaning at all, then we must protect even that speech which is most offensive to us. We must preserve “freedom for the thought that we hate.”<sup>11</sup>

This Comment will argue that Congress should expand 18 U.S.C. § 1717, which prohibits the dissemination of materials advocating for or urging insurrection or other violations of U.S. law through the mail, to also prohibit such communications via the Internet, and that such an expansion would not run afoul of First Amendment protections of free speech. Part II presents a case study of examples of secessionist speech taken from Texas in the summer and fall of 2009. Part III sets forth the current state of First Amendment jurisprudence as it pertains to subversive speech, particularly the *Brandenburg* Doctrine and the difficulties in applying *Brandenburg* in an Internet context. Part IV examines § 1717, which renders insurrectionist materials non-mailable and makes the case for a similar provision to regulate the Internet. Part IV also proposes new statutory language and analyzes the case examples from Part II under the proposed regulation. In implementing this type of regulation, Congress should, as always when regulating speech, draw the statute narrowly so as not to chill legitimate speech on the Internet. The balance that must be struck is delicate indeed.

## II. CASE STUDY IN INSURRECTIONIST SPEECH ON THE INTERNET: TEXAS SECESSIONISTS

“I may run for president of Texas.”<sup>12</sup> Chuck Norris is toying with a run at the highest office in the land, and is not deterred in the least by the fact that the land, an independent Republic of Texas, does not

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<sup>10</sup> The DHS report cites possible “violent acts targeting government facilities, law enforcement officers, banks, and infrastructure sectors,” made more dangerous by “high volume purchasing and stockpiling of weapons,” as the types of acts anticipated. RIGHTWING EXTREMISM, *supra* note 4, at 2, 3.

<sup>11</sup> United States v. Schwimmer, 279 US 644, 655 (1929).

<sup>12</sup> Chuck Norris, *I May Run for President of Texas*, WORLDNETDAILY.COM (March 9, 2009), <http://www.wnd.com/index.php?fa=PAGE.view&pageId=91103>.

currently exist. The *Delta Force*<sup>13</sup> star and “Total Gym”<sup>14</sup> pitchman thinks an independent Texas may be a reality soon, born of necessity, he argues, “if the state of the union continues to turn into the enemy of the state.”<sup>15</sup> Citing the then two-month-old Obama Administration’s deficit spending policies, Norris suggested that secession may be the only solution for downtrodden states and that Texas was the most likely candidate to begin the exit parade.<sup>16</sup> “Anyone who has been around Texas for any length of time knows exactly what we’d do if the going got rough in America.”<sup>17</sup> According to Chuck Norris, when the going gets rough in America, Texas leaves.<sup>18</sup> Norris is no “Lone Wolf McQuaid”<sup>19</sup> on secession, however, as the Governor of Texas echoed Norris’s sentiments soon after.

The month after Norris threw his hat into the non-existent ring on Fox News’s Glenn Beck Show, Texas Governor Rick Perry told several thousand protestors that he too sees secession as a not-too-distant possibility.<sup>20</sup> On Tax Day, April 15, 2009, Governor Perry addressed several so-called “Tea Party” protests, comprised of crowds of Republicans, conservatives, and libertarians bearing “Don’t Tread on Me” flags and signs with anti-Socialism, anti-Communism, and anti-Obama slogans.<sup>21</sup> Perry faced the crowds, who held signs that read, “Liar in Chief” and “I’ll Keep My Guns and Money, You Keep the Change,” and told them that he did not consider them to be “right-wing extremists.”<sup>22</sup> But he confided, “if you are, I’m with you.”<sup>23</sup> Some among the throng shouted, “Secede!”<sup>24</sup> In Austin, Perry told the tea partiers that the federal government is “rampaging through the halls of Congress” and that Washington needs to “re-read the

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<sup>13</sup> See *The Delta Force*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0090927/> (last visited Dec. 24, 2009).

<sup>14</sup> See TOTAL GYM, <http://www.totalgymdirect.com/?key=EFI> (last visited Dec. 24, 2009).

<sup>15</sup> Norris, *supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Lone Wolf McQuaid*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0085862/> (last visited Jan. 18, 2009).

<sup>20</sup> See Dave Levinthal and Gromer Jeffers Jr., *Thousands Show up for Dallas ‘Tea Party’*; *Rick Perry Fires Up Rallies*, DALLAS MORNING NEWS (April 16, 2009), <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/041509dnmetteaparties.d8880855.html>.

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Constitution.”<sup>25</sup> The alternative for Texas, he said, might just be to leave.<sup>26</sup>

After the speech in Austin, Perry was asked if he agreed with those in the crowd who advocated secession from the Union.<sup>27</sup> He answered, “There’s absolutely no reason to dissolve it. But if Washington continues to thumb their nose at the American people, you know, who knows what might come out of that.”<sup>28</sup>

Perry’s stance on secession is problematic for two reasons. First, Texas secession under current circumstances is entirely impracticable for financial reasons.<sup>29</sup> That fact robs the Governor’s rhetoric of any

<sup>25</sup> *Id.*

<sup>26</sup> Levinthal, *supra* note 20.

<sup>27</sup> *See id.*

<sup>28</sup> *Id.* Perry waffled on this point in a Fox News interview on May 14, telling Neil Cavuto that he never said that Texas should secede. Ryan Powers, *Perry Again Refuses to Reject Secession*, THINK PROGRESS (May 14, 2009, 8:37 PM), <http://thinkprogress.org/2009/05/14/perry-secession/>. According to Perry, what he really meant was, “We live in a great country . . . and I saw no reason at all for us to be even talking about seceding, but if Washington continues to force these programs on the states, if Washington continues to disregard the Tenth Amendment, who knows what happens.” *Id.* This equivocation was followed three days later by an editorial that backpedaled even harder:

I can’t say I was surprised that critics worked so hard to recast my defense of federalism and fiscal discipline into advocacy for secession from the Union. Of course, I have never advocated for secession and never will. Like the President, members of Congress and every other state governor, I have sworn oaths to our nation and Constitution. My sincere pledge to uphold and defend the Constitution has fueled my concern and my statements about the recent unprecedented expansion of our federal government.

Press Release, Gov. Rick Perry, Reflections on a Raging Debate (May 17, 2009), *available at* <http://governor.state.tx.us/news/editorial/12389/>.

<sup>29</sup> Texans paid \$86,612,253,000 in individual federal income tax in 2007, the most recent year available. INTERNAL REVENUE SERV., TAX YEAR 2007: HISTORICAL TABLE 2, SOI BULLETIN (2009), *available at* <http://www.irs.gov/taxstats/article/0,,id=171535,00.html> (click on TX in map). Overall federal expenditures in Texas in 2008 totaled \$392,100,177,745. U.S. CENSUS BUREAU, CONSOLIDATED FEDERAL FUNDS REPORT 2008, *available at* <http://www.census.gov/govs/cffr/> (choose “Texas” in dropdown menu, then click “Go”). That means Texas took 3.5 times as much money out of the pot as it put in. State and local sales taxes in Texas were projected to generate only \$77.5 billion for 2008–09. Susan Combs, TX Comptroller, *Texas Taxes*, WINDOW ON STATE GOV’T, <http://www.window.state.tx.us/taxes/> (last visited Mar. 28, 2011). Texas has no state income tax with which to regain any portion of the remaining shortfall if they did secede. *Id.* Even if the state implemented an income tax, it would need to collect \$10,374.17 from every man, woman, and child, assuming that the entire population remains in an independent Texas. POPULATION DIVISION, U.S. CENSUS BUREAU, TABLE 1: ANNUAL ESTIMATES OF THE POPULATION FOR COUNTIES OF TEXAS: APRIL 1, 2000 TO JULY 1, 2007 (CO-EST2007-01-48) (2008), *available at* <http://www.census.gov/popest/counties/tables/CO-EST2007-01-48.xls> (projected 2007 population of Texas was 23,904,380). That is

real threat. The second problem for Perry's position is that secession is unconstitutional and therefore a violation of U.S. law.<sup>30</sup> In the landmark case of *Texas v. White*, the Supreme Court ruled that when Texas and other southern states seceded to form the confederacy, their actions had absolutely no legal effect on the union under the Constitution.<sup>31</sup> The Court held that by the Articles of Confederation, "the Union was solemnly declared to 'be perpetual.' . . . [T]he Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?"<sup>32</sup> The union between Texas and the other states was no less indissoluble than that of the original thirteen states that ratified the Constitution.<sup>33</sup> It was an interpretation of the Union shared by President Abraham Lincoln, who said of the secessionists, "In their view, the Union, as a family relation, would not be anything like a regular marriage at all, but only as a sort of free love arrangement to be maintained on what that sect calls passionate attraction."<sup>34</sup> Modern scholars concur, and the consensus is that no constitutional basis for a legal secession exists.<sup>35</sup>

In viewing Governor Perry's statements in this light, one can reasonably describe his actions as advocating for an act against the laws of the United States. But Governor Perry's words were mild and weak

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nearly triple the per capita federal tax burden in effect in 2007. This fiscal reality makes it impracticable to secede and still maintain anywhere near the current level of government services and programming and moreover defeats the purpose of seceding to avoid what are perceived to be onerous federal income taxes.

<sup>30</sup> See *Texas v. White*, 74 U.S. 700 (1869), *overruled in part by* *Morgan v. United States*, 113 U.S. 476, 496 (1885).

<sup>31</sup> *Id.* at 724–26 ("The position . . . that the legislature of Texas, while the State was owner of the bonds, could limit their negotiability by an act of legislation, of which all subsequent purchasers were charged with notice although the bonds on their face were payable to bearer, must be regarded as overruled.").

<sup>32</sup> *Id.* at 724–25.

<sup>33</sup> *Id.* at 726.

<sup>34</sup> WILLIAM LEE MILLER, *LINCOLN'S VIRTUES: AN ETHICAL BIOGRAPHY* 451 (2002).

<sup>35</sup> See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 242 (2006). Citing Article III of the U.S. Constitution, Amar asserts, "In the event a state made war on the United States, those who fought for the state would be, in a scarlet word, traitors: 'Treason against the United States, shall consist . . . in levying War against them, or in adhering to their Enemies, giving them aid and comfort.'" *Id.* Amar also points to a rejected provision proposed by Anti-Federalist Martin Luther at the Constitutional Convention which would have excluded from the Article III definition of "Treason" any citizen who acted against the United States in a "Civil War" between a state and the "General" government. *Id.* Despite Luther's warnings that "the treason clause as finally worded made no exception for unilateral state secession or civil war," the American people ratified the Constitution with the treason clause intact. *Id.*

when compared to some other secessionists in Texas. In August 2009, a group calling itself the “Texas Nationalist Movement” held a rally in Austin to deliver a petition demanding “Sovereignty or Secession.”<sup>36</sup> Asserting that the Declaration of Independence gives them the right to “alter or abolish” the government if, “after a long train of abuses” it has failed to protect the people’s rights, the “Movement” invited Governor Perry to join them in Austin, but he declined.<sup>37</sup> The event’s organizers claim to have gathered over one million signatures on the petition, a number called into question by the group’s reticence in actually making the petition public as well as the meager turnout of less than 200 for the August 2009 gathering.<sup>38</sup> The speakers were not deterred by the lack of public interest, however, railing to the secessionist faithful with fervor.

A. *Daniel Miller*

The leader of the Texas Nationalist Movement (“TNM”) is Daniel Miller, the former president of the Republic of Texas (“RoT”), which is a group that believes Texas was never legally annexed and, therefore, has always been an independent nation. According to the Memorial Institute for the Prevention of Terrorism, RoT teaches its members a complex set of bank fraud, document fraud, and “paper terrorism” techniques, which RoT justifies through “elaborate conspiracy theories” and the belief that the United States has no legal au-

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<sup>36</sup> See Ian Millhiser, *Texas ‘Tenters’ Plan Pro-Secession Rally Tomorrow*, THINK PROGRESS (Aug. 28, 2009, 8:30 PM), <http://thinkprogress.org/2009/08/28/texas-tenters-rally/>. The petition demands “the abolishment of all legislation which infringes in the least upon the rights of the people.” *Sovereignty or Secession Declaration and Petition*, WE THE PEOPLE, [http://www.drawaline.org/Sovereignty\\_or\\_Secession\\_Petition.htm](http://www.drawaline.org/Sovereignty_or_Secession_Petition.htm) (last visited Mar. 29, 2011). It is difficult to conceive of any law that does not in some way limit the absolute liberty of someone. The petition also demands “that the United States of America should restore the Republic of Texas to its original boundaries of 1844.” *Id.* For that demand to be met, the new Republic of Texas would have to annex parts of present-day Colorado, Kansas, New Mexico, Oklahoma, and Wyoming. See *Map of Texas and Countries Adjacent, 1844*, DAVID RUMSEY MAP COLLECTION <http://www.davidrumsey.com/maps2548.html> (last visited April 18, 2011).

<sup>37</sup> Forrest Wilder, “*We Hate the United States? : Secessionists Rally at Capitol While Perry Stays Home*,” TEXAS OBSERVER (Aug. 29, 2009), available at [http://www.alternet.org/news/142340/%22we\\_hate\\_the\\_united\\_states%22:\\_secessionists\\_rally\\_at\\_tx\\_capitol\\_/?page=1](http://www.alternet.org/news/142340/%22we_hate_the_united_states%22:_secessionists_rally_at_tx_capitol_/?page=1). The Declaration of Independence, of course, has no legal authority. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (“The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts.”).

<sup>38</sup> See Wilder, *supra* note 37.

thority over an independent Texas.<sup>39</sup> In 1997, an RoT leader kidnapped two people, declared them “prisoners of war” for twelve hours, sought a prisoner exchange for the release of two RoT members, and conducted a weeklong armed standoff with police.<sup>40</sup> In 1998, two RoT members were convicted of plotting to assassinate various government officials, including President Bill Clinton, intending to build “a cigarette lighter that would shoot cactus thorns dipped in biological agents such as anthrax, rabies, botulism, and AIDS.”<sup>41</sup> As president of RoT, Miller advocated some cooperation with the U.S. government, saying that “[t]he American people are our brothers. . . . We extend a helping hand.”<sup>42</sup> The cooperation Miller offered was to organize border patrols to “collect and forcibly deport Mexican immigrants illegally crossing the border,” in direct contravention of INS instructions.<sup>43</sup>

Now president of TNM, Miller addressed the small crowd at the Austin rally, calling on the state legislature to choose either “sovereignty or secession,” and stating that, “if [the state legislators] do not pick up that banner and carry it high, then we will.”<sup>44</sup> To illustrate his point, Miller leapt into the crowd to hoist a flag with the image of an M-16 assault rifle under the slogan “Come and Take It,” one of the “Tea Party” fringe’s favorite symbols.<sup>45</sup> The blazon of “Come and Take It” over an image of a cannon adorned the battle flag that the actual Republic of Texas flew in the war against Santa Anna’s army.<sup>46</sup> The modern update is one of many items sold online as part of the secessionist movement.<sup>47</sup>

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<sup>39</sup> *Terrorism Knowledge Base*, MEMORIAL INST. FOR THE PREVENTION OF TERRORISM, <http://web.archive.org/web/20070930033315/http://www.tkb.org/Group.jsp?groupID=95> (last visited Mar. 31, 2011). MIPT is a non-profit organization dedicated to preventing terrorism on U.S. soil or mitigating its effects. MIPT is funded by the Dept. of Homeland Security.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* It should be noted that, among other flaws in this plot, AIDS is a syndrome, and not a tangible substance into which cactus needles could be dipped.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Wilder, *supra* note 37.

<sup>45</sup> *See id.*

<sup>46</sup> *See Texas Gonzales Flag*, TEXAS FLAG MAN, [http://www.texasflagman.com/catalog/product\\_info.php?cPath=2&products\\_id=65](http://www.texasflagman.com/catalog/product_info.php?cPath=2&products_id=65) (last visited Mar. 31, 2011).

<sup>47</sup> *See, e.g., Texas Flag Man*, <http://www.texasflagman.com/catalog/>. The products at this site are sold by the group “TexasSecede.org,” whose website links through to Miller’s TNM website. Among the offerings of the “Flag Man” are the Texas State Flag, the Alamo Flag from 1824, the Gadsden “Don’t Tread on Me!” Flag, and the Confederate Battle Flag. The “Flag Man” does not carry the American Flag.



Another point of historical affection for Miller and many secessionists is the Confederacy. Miller painted a nostalgic image of the Civil War at the Austin rally, indicating the statute of Lady Liberty atop the Capitol. “When they raised her to the top of this Capitol they wanted to face her south so she would forever have her back turned to that nation to the north that knew not liberty,” he told the almost entirely white crowd.<sup>48</sup> The TNM website refers to the Civil War as the legally-unjustified slaughter of 630,000 Americans perpetrated by a “mythical humanitarian,” Abraham Lincoln, and is critical of the Emancipation Proclamation.<sup>49</sup> Another telling signal of the secessionists’ racial politics appeared on many of their signs at the protests in Austin: the image of President Barack Obama with his face digitally altered to appear as the Joker from Batman.<sup>50</sup> This image became a favorite of the secessionists, tea-party groups, and other extreme right-wing factions in the summer of 2009. In looking at the image, one is immediately struck by the notion that it took the first black President and put him in white face; and in clown makeup to boot.

Miller expands on his views at much greater length on the TNM website, where he writes blog entries, recruits members, collects donations, and announces upcoming events.<sup>51</sup> Miller circulates a petition demanding a popular referendum on secession.<sup>52</sup> Several of the posts refer to a potential military response to a decision by Texas to secede. One Miller post cites a poll stating that “42% of members of the armed forces . . . agree secession is a right,” and states that this number “raises some interesting questions about what would happen to a U.S. soldier from Texas in the unlikely creation of a Lone Star Republic.”<sup>53</sup> Miller argues that the polling “speaks to the question that we often get regarding a military response from the Federal Gov-

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<sup>48</sup> Wilder, *supra* note 37.

<sup>49</sup> Lauren Savage, *Yes’ If Texas Could Secede*, TEXAS NATIONALIST MOVEMENT (Nov. 1, 2009), [http://www.texasnationalist.com/index.php?option=com\\_myblog&Itemid=105](http://www.texasnationalist.com/index.php?option=com_myblog&Itemid=105).

<sup>50</sup> See Wilder, *supra* note 37.

<sup>51</sup> See TEXAS NATIONALIST MOVEMENT, <http://www.texasnationalist.com/> (last visited Mar. 31, 2011).

<sup>52</sup> See *Let Texas Decide Petition*, TEXAS NATIONALIST MOVEMENT, <http://www.texasnationalist.com/forms/let-texas-decide-petition-10.pdf> (last visited Mar. 31, 2011).

<sup>53</sup> Daniel Miller, *Military Support for Independence*, TEXAS NATIONALIST MOVEMENT (Sep. 20, 2009) [http://www.texasnationalist.com/index.php?option=com\\_content&view=article&id=196:military-support-for-independence&catid=8:newsflash&Itemid=104](http://www.texasnationalist.com/index.php?option=com_content&view=article&id=196:military-support-for-independence&catid=8:newsflash&Itemid=104).

ernment when Texas secedes.”<sup>54</sup> Seemingly, Miller is suggesting that 42% of U.S. troops would likely fight against the U.S. military if a forcible response were invoked against Texas secession.<sup>55</sup>

*B. Debra Medina*

The TNM website also endorsed the gubernatorial candidacy of another speaker at the August rally, Debra Medina.<sup>56</sup> Medina is a “Ron Paul Republican” and was a candidate to replace Perry as Governor in 2010.<sup>57</sup> The Texas Nationalist Movement supports Medina’s candidacy because she is pro-secession and supports the invocation of “nullification.”<sup>58</sup> As TNM sees it, nullification is a simple enforcement of the Ninth and Tenth Amendments, thereby allowing states to rescind or ignore any federal law that is not explicitly authorized in the Constitution.<sup>59</sup> At TNM’s rally in Austin, Medina shared her outlook on secession with the crowd: “We are aware that stepping off into secession may in fact be a bloody war. We are aware that the tree of freedom is occasionally watered with the blood of tyrants and patriots.”<sup>60</sup> This last line alludes to a Thomas Jefferson quote with an infamous history of being taken out of context and used by the anti-government right wing.<sup>61</sup> Probably the most notorious use occurred when Timothy McVeigh wore the words on a t-shirt as he bombed the Oklahoma City Federal Building in 1995.<sup>62</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> See Part II.C *infra* and accompanying text regarding Larry Kilgore and Texas appropriation of federal military resources.

<sup>56</sup> See Darryl Mulloy, *Steps to Texas Independence*, TEXAS NATIONALIST MOVEMENT, [http://www.texasnationalist.com/index.php?option=com\\_content&view=article&id=204&catid=10:president-blog](http://www.texasnationalist.com/index.php?option=com_content&view=article&id=204&catid=10:president-blog) (last visited Feb. 11, 2010).

<sup>57</sup> Wilder, *supra* note 37.

<sup>58</sup> Mulloy, *supra* note 56.

<sup>59</sup> See *id.*

<sup>60</sup> Wilder, *supra* note 37.

<sup>61</sup> See, e.g., Sean Hannity, *Obama Plucking the Tree of Liberty Bare*, FOX NEWS (May 6, 2009) <http://www.foxnews.com/story/0,2933,519158,00.html>.

<sup>62</sup> ‘Turner Diaries’ Introduced in *McVeigh Trial*, CNN (Apr. 28, 1997), <http://www.cnn.com/US/9704/28/okc/>. The irony of Medina and other proponents of secession and state sovereignty using this Thomas Jefferson quote, a reaction to Shay’s Rebellion in Massachusetts, is readily seen when the quote is presented in context:

The people cannot be all, and always, well informed. The part which is wrong will be discontented, in proportion to the importance of the facts they misconceive. If they remain quiet under such misconceptions, it is lethargy, the forerunner of death to the public liberty. . . . And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance?

C. *Larry Kilgore*

Larry Kilgore hates the United States.<sup>63</sup> An oft-rejected, though never deterred, candidate for Governor of Texas, Kilgore hates pretty much everything about the U.S. government. “We hate the United States!” he shouted when it was his turn to address the small crowd at the Texas capitol.<sup>64</sup> “‘I hate that flag up there,’ Kilgore said pointing to the American flag flying over the Capitol. ‘I hate the United States government. . . . They’re an evil, corrupt government.’”<sup>65</sup> Kilgore exhorted the crowd to turn this hatred into action: “They need to go. Sovereignty is not good enough. Secession is what we need!”<sup>66</sup> Larry Kilgore wants Texas to leave the United States, and he wants anyone who disagrees with him to leave Texas. After the rally, “Kilgore was seen yelling at some health-care reform advocates to ‘Go back to the U.S. where you belong.’”<sup>67</sup>

Kilgore’s online outlets repeatedly advocate for secession and other illegal acts. His Facebook message for Veteran’s Day 2009 read, “Thank you Veterans. If a military coup becomes necessary to protect us from domestic enemies, do your duty.”<sup>68</sup> He is a proponent of the

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Let them take arms. The remedy is to set them right as to the facts, pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants. It is its natural manure.

Letter from Thomas Jefferson to William S. Smith (Nov. 13, 1787), *available at* <http://etext.virginia.edu/etcbin/ot2www-singleauthor?specfile=/web/data/jefferson/texts/jefall.o2w&act=text&offset=5674387&textreg=1&query=tree+of+liberty>.

Jefferson saw the unrest in Massachusetts as a sign of ignorance and misconception, and the remedy was for the “rulers” to set the malcontents right as to the facts. *See id.* “For Jefferson, this was a textbook example of how passions could cloud judgment, creating an atmosphere of panic and fear.” Brad Hart, *Jefferson’s “Tree of Liberty” Quote in Context*, AMERICAN CREATION (Aug. 18, 2009, 6:58 PM), <http://americancreation.blogspot.com/2009/08/jeffersons-tree-of-liberty-quote-in.html>.

While it is true that Jefferson was wont to hyperbolize regarding the glorification of revolution, in this case he was saying only that the passionate overreactions of the masses should serve to remind the federal government that the liberty to dissent must be preserved. *See* JOSEPH J. ELLIS, AMERICAN SPHINX 99–103 (1996).

<sup>63</sup> *See generally* FAQs, [http://www.larrykilgore.com/Larry\\_Kilgore/FAQs.html](http://www.larrykilgore.com/Larry_Kilgore/FAQs.html) (last visited Sep. 21, 2009).

<sup>64</sup> Wilder, *supra* note 37.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Larry Kilgore for Gov—Texas Secession*, FACEBOOK PAGES, FACEBOOK, <http://www.facebook.com/pages/Larry-Kilgore-for-Gov-Texas-Secession/44066004175> (last visited Jan. 31, 2010).

death penalty for homosexuals.<sup>69</sup> He has posted links to videos of an interview on an Iranian state television network, wherein Daniel Miller and Thomas Naylor, a Vermont secessionist, describe what “freedom from American tyranny will be like.”<sup>70</sup> It is unknown how many readers Kilgore’s websites have attracted, but Kilgore did garner 226,000 votes for Texas Senator in the 2008 Republican primary.<sup>71</sup>

D. *Clay Laird*

Clay Laird did not speak at the August rally, but he did make an appearance in the capitol on April 15, 2009, for a hearing before Texas’s Senate Transportation and Homeland Security Committee.<sup>72</sup> Laird was escorted from the committee chambers when he threatened to visit the homes of Senators who opposed an anti-“sanctuary city” measure.<sup>73</sup> He told legislators that if they did not support the bill, they would “hear from him.”<sup>74</sup> When asked where they could expect to hear from Laird, he responded, “At your homes.”<sup>75</sup> “[W]herever you live. . . . I mean I’m gonna be knocking on your door.”<sup>76</sup> When Committee Chair John Carona cautioned Laird that his comment sounded like a threat, Laird assured Carona, “It’s not a threat, sir, it’s a promise written in blood. It might be yours, it might be mine.”<sup>77</sup>

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<sup>69</sup> See Matt Lum, *Protesters Ultimately Want Death for Homosexuals*, TEX. TRIANGLE, Mar. 2–8, 2001, available at <http://www.glapn.org/sodomylaws/usa/texas/txnews64.htm> (“Well, we know punishing homosexuals by death would be extremely hard in today’s society. . . . But we hope that we can help to drive it underground so in about twenty or thirty years, the punishment can fit the crime.”).

<sup>70</sup> Larry Kilgore, <http://www.facebook.com/pages/Larry-Kilgore-for-Gov-Texas-Secession/44066004175> (Oct. 14, 2009); The videos are available at <http://www.youtube.com/watch?v=yIu5fk8Bejc> and <http://www.youtube.com/watch?v=pMa12OU903k>.

<sup>71</sup> See Karl-Thomas Musselman, *Larry Kilgore Withdraws from Governor’s Race, Endorses Debra Medina*, BURNT ORANGE REPORT (Dec. 15, 2009, 3:53 PM), <http://www.burntorangereport.com/diary/9757/larry-kilgore-withdraws-from-governors-race-endorses-debra-medina>.

<sup>72</sup> See Richard Whittaker, *Menacing Behavior Under the Dome*, NEWSDESK, AUSTIN CHRONICLE (Apr. 15, 2009, 3:06 PM), available at <http://www.austinchronicle.com/blogs/news/2009-04-15/767665/>.

<sup>73</sup> See *id.*

<sup>74</sup> Ben Wear, *Witness Escorted by DPS from Senate Hearing*, POSTCARDS, STATESMAN.COM (Apr. 15, 2009, 9:33 AM), [http://www.statesman.com/blogs/content/shared-gen/blogs/austin/politics/entries/2009/04/15/witness\\_escorted\\_by\\_dps\\_from\\_s.html](http://www.statesman.com/blogs/content/shared-gen/blogs/austin/politics/entries/2009/04/15/witness_escorted_by_dps_from_s.html).

<sup>75</sup> *Id.*

<sup>76</sup> Whittaker, *supra* note 72.

<sup>77</sup> *Id.*

Laird is a secession advocate in Texas and a frequent reader and poster on secession blogs and websites. On a Facebook page opposing federal gun control, Laird advocated for teaching children as young as six how to shoot, and followed with this appeal: “If you are a TRUE conserative [sic], move to Texas. We will need your help in the comming [sic] years.”<sup>78</sup> Why Texas may need armed conservatives might have something to do with Laird’s post on the TexasSecede.com blog. In response to a blog entry about the legality of secession, Laird commented, “One simple question for those that say we *can’t* secede: If some of us are willing to die to get Texas out of the USSA [sic], how many in the old 48 (am not including Alaska, my second home) are willing to die to keep us?”<sup>79</sup> Three days after that post, Laird expanded on the same comment on another website, saying that

If you want your children to live in a free Capitalist [country], then come/stay and join us. Those of you that want someone to take care of you, please leave before we drive you out. You only have a few years to make a decision. After that the fence on the South, West, North, East will be built to keep all [socialists] out.<sup>80</sup>

He also stated, “Every real Texan knows they are required to have weapons and ammuniton.”<sup>81</sup> Laird further suggested that Texas contains and runs most of the military bases in the U.S.<sup>82</sup> and that when soldiers return from overseas, presumably referring to Iraq and Afghanistan, they would assist in the secession effort.<sup>83</sup>

Just a few weeks later, Laird threatened the Texas Senate committee members. Then a few days after that Laird posted a comment on another blog page identifying himself as the man who was es-

<sup>78</sup> Clay Laird (Oct. 10, 2009, 11:43 PM), Comment to *Wall, Fight to Protect the 2nd Amendment from H.R. 45*, FACEBOOK, <http://www.facebook.com/group.php?gid=56069929010#/group.php?v=wall&gid=56069929010>.

<sup>79</sup> Clay Laird (May 26, 2009, 9:18 AM), Comment to *Mindless Obedience, Anyone?*, TEXAS SECEDE! (May 25, 2009, 7:31 PM), <http://texassecede.blogspot.com/2009/03/mindless-obedience-anyone.html>.

<sup>80</sup> Clay Laird (May 29, 2009, 12:17 PM), Comment to Tony Romm, *So What if Texas Did Secede from the Union*, BRIGHT HALL (Apr. 23, 2009, 7:26 PM), <http://brighthall.aol.com/2009/04/23/so-what-if-texas-did-secede-from-the-union/7>.

<sup>81</sup> *Id.*

<sup>82</sup> Texas is home to 28 of the 440 U.S. military bases located within the continental United States. See *Military Bases in the Continental US*, NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, <http://www.nps.gov/history/nagpra/DOCUMENTS/BasesMilitaryMAp.htm> (last visited Mar. 31, 2011).

<sup>83</sup> See Laird, *supra* note 80; see also *supra* note 9 and accompanying text regarding the DHS report’s concerns about recruitment of returning veterans.

corted out of the Senate hearing the previous week.<sup>84</sup> He went on to say that he was planning to return to the capitol the following day to once again “comment” on a House Resolution, and gave the time, building address, and room number.<sup>85</sup> His conclusion was chilling: “If you don’t hear from me after tomorrow, please check the Travis county jail. Clay Laird, CDT (Certified Domestic Terrorist).”<sup>86</sup>

### III. FIRST AMENDMENT DOCTRINE REGARDING SUBVERSIVE SPEECH: THE *BRANDENBURG* DOCTRINE

Many of the extreme examples of inciteful speech in the above case study may substantially contribute to the possibilities of violence that the DHS report warned of.<sup>87</sup> Regulating such speech would aid in achieving the legitimate state interest of preventing violence, but the interaction of the First Amendment and the Internet renders this kind of regulation a difficult proposition.

#### A. *The Current State of the Law*

First Amendment doctrine, and in particular, the famous line of Supreme Court decisions addressing the restrictions placed on subversive speech, has been explored and explained thoroughly in legal scholarship.<sup>88</sup> For the purposes of this Comment, two judicial tests that formed the foundation for the *Brandenburg* doctrine are particularly relevant.

The first is Justice Oliver Wendell Holmes’s “clear and present danger” test.<sup>89</sup> In *Schenck v. United States*, Justice Holmes wrote that the government could place restraints on speech if the “words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent.”<sup>90</sup> “Falsely shouting fire in a theater and causing a panic” would not be protected speech accord-

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<sup>84</sup> See Clay Laird (Apr. 20, 2009, 12:33 PM), Comment to *No More Government Bailouts!*, TEXASFRED BLOG (Apr. 17, 2009), <http://texasfred.net/archives/4026>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *supra* note 4.

<sup>88</sup> See, e.g., ANTHONY LEWIS, FREEDOM FOR THE THOUGHT WE HATE (2007); Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655 (2009); Chris Montgomery, *Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism?*, 70 OHIO ST. L.J. 141 (2009); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207 (1983).

<sup>89</sup> See *Schneck v. United States*, 249 U.S. 47 (1919).

<sup>90</sup> *Id.* at 52.

ing to Justice Holmes.<sup>91</sup> Justice Holmes refined the test in his dissent from *Abrams v. United States*, emphasizing the requirement that a danger be imminent to allow restriction of speech.<sup>92</sup> The United States could “punish speech that produces and is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils.”<sup>93</sup> Justice Holmes crafted this statement of the test in a dissent in which he would have overturned the conviction of the defendant for an act Holmes described as “the surreptitious publishing of a silly leaflet by an unknown man” because it presented no immediate danger.<sup>94</sup>

In his powerful dissent, Justice Holmes called for greater protections for speech than he had in the past.<sup>95</sup> He said the “ultimate good desired is better reached by free trade in ideas,” and “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>96</sup> Of our Constitution, he said, “It is an experiment, as all life is an experiment,” so we should “be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.”<sup>97</sup> Such checks should only be imposed where an imminent danger poses a threat to the law, and therefore the nation, itself.<sup>98</sup> As one author aptly put it, “Holmes was the closest we have had to a poet judge.”<sup>99</sup>

Eight years later in *Whitney v. California*, Justice Holmes joined another eloquent opinion urging strong protection of the freedom of speech.<sup>100</sup> Justice Louis Brandeis penned a concurrence “that many regard as the greatest judicial statement of the case for freedom of speech.”<sup>101</sup> Brandeis argued that

those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dis-

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<sup>91</sup> *Id.*

<sup>92</sup> 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

<sup>93</sup> *Id.* at 627.

<sup>94</sup> *Id.* at 628.

<sup>95</sup> See LEWIS, *supra* note 88, at 23–38 .

<sup>96</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

<sup>97</sup> *Id.*

<sup>98</sup> See *id.* at 630–31.

<sup>99</sup> LEWIS, *supra* note 88, at 33.

<sup>100</sup> 274 U.S. 357 (1927).

<sup>101</sup> LEWIS, *supra* note 88, at 35.

semination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.<sup>102</sup>

Two years later, evoking his own notion of protecting “expressions of opinions we loathe” expressed in *Abrams*, Justice Holmes dissented in *United States v. Schwimmer*.<sup>103</sup> Justice Holmes disagreed with the defendant’s pacifist views, he wrote, but he defended her right to express those views.<sup>104</sup> “[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”<sup>105</sup>

Justices Holmes and Brandeis both advocated for strict protections of speech that should be overcome only where the speech creates a clear and imminent danger of some grave harm to our law and nation. That it might have been important to Holmes’s position in *Abrams* that the leaflet was published by an “unknown man” foreshadowed the contribution of Judge Learned Hand to this area of First Amendment jurisprudence. In *Dennis v. United States*, Judge Hand endorsed “clear and present danger” as a valid “shorthand statement” of the general type of speech that the First Amendment does not protect, but found that the term did not in itself fully define the analysis.<sup>106</sup> In a variation on the famous Hand Calculus,<sup>107</sup> Judge Hand devised a formula for judges to use in determining whether the repression of a particular utterance would be justified. “In each case they must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to

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<sup>102</sup> *Whitney*, 274 U.S. at 375–78 (Brandeis, J., concurring).

<sup>103</sup> 279 U.S. 644 (1929) (Holmes, J., dissenting).

<sup>104</sup> *See id.* at 654.

<sup>105</sup> *Id.* at 654–55.

<sup>106</sup> 183 F.2d 201, 212 (2d Cir. 1950).

<sup>107</sup> *See United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (In the context of tort liability, “if the probability [of injury] be called P; the [gravity of the] injury, L; and the burden [of adequate precautions], B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.”)



avoid the danger.”<sup>108</sup> Chief Justice Fred Vinson adopted this sliding scale approach to “clear and present danger” when the Supreme Court affirmed Judge Hand’s decision.<sup>109</sup> The Chief Justice asserted that “[o]bviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited.”<sup>110</sup> The result of Judge Hand’s new approach was “a significant watering down of the doctrine as interpreted by Justices Holmes and Brandeis—gone were the requirements of imminence and intent—and it placed near-absolute importance on the perceived threat . . . by the judge and jury.”<sup>111</sup> Under Judge Hand’s formula, even the minutest likelihood of the intended evil ever actually coming about could be enough to justify restraint on speech if the gravity of the harm was weighty enough.<sup>112</sup>

The Supreme Court articulated the current constitutional standard applicable to speech advocating for the commission of unlawful acts in *Brandenburg v. Ohio* in 1969.<sup>113</sup> In implementing a very protective reading of the First Amendment, the Supreme Court held that the “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>114</sup> Under *Brandenburg*, subversive speech is protected from governmental restraint unless it is both (1) intentionally directed at inciting immediate and unlawful action, and (2) likely to actually produce such action.<sup>115</sup>

The *Brandenburg* Doctrine combined the imminence requirement from Justices Holmes and Brandeis with the element of likelihood from Judge Hand and Justice Vinson. In general, it reinforced the notion that the “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”<sup>116</sup> The Court went on to state that a “statute which fails to draw this distinction impermissibly intrudes upon the freedoms

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<sup>108</sup> *Dennis*, 183 F.2d at 212.

<sup>109</sup> *See* *Dennis v. United States*, 341 U.S. 494, 510 (1951).

<sup>110</sup> *Id.*

<sup>111</sup> *Montgomery*, *supra* note 88, at 152.

<sup>112</sup> *See id.*

<sup>113</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>114</sup> *Id.* at 447.

<sup>115</sup> *Id.* at 447–48.

<sup>116</sup> *Id.* at 448.

guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.”<sup>117</sup> Conversely, a statute that does carefully draw the distinction between advocating for the use of force or violence in the abstract and speech intended to incite some person or persons to immediately use force or violence does not intrude upon the freedom of speech.<sup>118</sup>

One further court decision since *Brandenburg* is worth noting here. In *Rice v. Paladin Enterprises, Inc.*, the Fourth Circuit examined the First Amendment claim of the publisher of a book called *Hit Man: A Technical Manual for Independent Contractors*.<sup>119</sup> The case against the publisher was a wrongful death suit brought by survivors of murder victims whose killers applied the very specific and very graphic techniques taught in the book.<sup>120</sup> The publisher stipulated that the book was published with the full knowledge and intent that the information it contained would be used by readers to commit murders-for-hire.<sup>121</sup> The Court, stating that this type of speech was not the “mere advocacy” of an unlawful act, held that the government does not need to satisfy the imminency requirement to proscribe speech under those circumstances.<sup>122</sup>

In reaching this holding, the court found that “*Brandenburg*’s imminency requirement . . . did not apply because it is only pertinent ‘where, as in *Brandenburg* itself, the government attempts to restrict advocacy, as such.’”<sup>123</sup> The court also found that freedom of speech “would not relieve from liability those who would . . . intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment.”<sup>124</sup> The court stated that “just because a message may be disseminated to a wide audience does not automatically provide First Amendment protection.”<sup>125</sup> Ultimately, the court found that the book constituted speech that was “the antithesis of speech protected under *Brandenburg*.”<sup>126</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *See id.*

<sup>119</sup> 128 F.3d 233 (4th Cir. 1997).

<sup>120</sup> *See id.* at 239.

<sup>121</sup> *See id.* at 241.

<sup>122</sup> *Id.* at 249.

<sup>123</sup> Nadine E. McSpadden, Note, *Slow and Steady Does Not Always Win the Race*, 76 IND. L.J. 485, 495 (2001) (quoting *Rice*, 128 F.3d at 246).

<sup>124</sup> *Rice*, 128 F.3d at 248.

<sup>125</sup> McSpadden, *supra* note 123, at 495.

<sup>126</sup> *Rice*, 128 F.3d at 249.

If speech urges violence with the intent to provoke the reader to act, then under the reasoning of *Rice*, the imminence requirement would not apply because the speech is not “advocacy as such.”<sup>127</sup> This allows for regulation of inciteful speech even without imminence in the context of a book, as in *Rice*, or on the Internet.

*B. The Difficulty of Applying Brandenburg to the Internet*

Commentators have identified the imminency requirement of *Brandenburg* as creating a major impediment to policing truly dangerous speech on the Internet. “A website will never be able to fulfill the imminency requirement.”<sup>128</sup> The crux of the problem lies in the nature of communication on the Internet. With the exception of web tools such as chatting or video conferencing, which are more akin to telephonic communication, most communication via the Internet rarely occurs in the contemporaneous manner contemplated by the *Brandenburg* Doctrine. Most commonly, a poster creates a page and publishes it to the web, but because Internet users must log on and find content, “it could be a day, a week, or a year before a user accesses the Web page.”<sup>129</sup> Therefore, while any instantaneous communication, such as instant messages or video chats, can satisfy the imminence requirement, a traditional webpage is not instantaneous—it is speech that is set down to wait for an audience—and as such, it presents a circumstance in which a court cannot find imminence.

Likewise, the imminence requirement recognizes that, if there is enough time between the speech and the unlawful act it intends to incite, intervening speech from other sources may dissuade the audience from committing that act, and the original speech is therefore not dangerous enough to outweigh the protections of the First Amendment.<sup>130</sup> The Internet’s design, however, is perfectly suited to allowing users to see, read, and hear only what they seek out, thus diminishing the possibility that any other viewpoints will be heard before a user takes action.<sup>131</sup> In such circumstances, the lack of immi-

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<sup>127</sup> *Id.* at 246.

<sup>128</sup> McSpadden, *supra* note 123, at 497; *see also* Kenneth J. Brown, *Assessing The Legitimacy Of Governmental Regulation Of Modern Speech Aimed At Social Reform: The Importance Of Hindsight And Causation*, 10 WM. & MARY BILL OF RTS. J. 459, 476 (“Analysis that courts have traditionally used for other broadcast media simply does not apply to the Internet.”).

<sup>129</sup> McSpadden, *supra* note 123, at 497.

<sup>130</sup> *See id.* at 498.

<sup>131</sup> *Id.*

nence does not seem to affect the level of danger that a viewer of inciteful messages will act upon them.

*Brandenburg* simply does not contemplate the Internet context. Some recommend “expanding the relatively strict temporal requirements of the doctrine’s imminence requirement.”<sup>132</sup> Regarding websites advocating for terroristic attacks on the United States, one commentator argues that in the current climate, indeed in all times of threat, there exists a “threshold of imminence” because of the circumstances, and thus all inciteful speech posted on the Internet should be considered to pose an “imminent” danger.<sup>133</sup> One commentator suggests that courts should consider imminence from the point of view of the reader rather than the poster.<sup>134</sup> Under this reading of the imminence test, “a court would inquire into whether the viewer, upon reading the message, is likely to be incited to initiate imminent, lawless action.”<sup>135</sup> All of these scholars stress the importance of maintaining the protective intent of *Brandenburg* to avoid a chilling effect on legitimate speech while curbing the dangers of inciteful speech intended to provoke unlawful action. *Rice* differentiated between legitimate speech and speech that did not invoke protections under *Brandenburg*, and would leave the imminency requirement intact only as a protection of the former.

If the *Rice* approach is ignored and *Brandenburg* is strictly applied in all circumstances, dangerous speech on the Internet cannot be regulated without violating the First Amendment. But a statutory solution that applies the reasoning from *Rice* to avoid burdening First Amendment rights could remedy this difficulty. Such regulation is not without precedent. There exists another mode of communication that is not contemporaneous, but over which Congress has regulatory power, and from which insurrectionist speech materials may be excluded: the Postal Service.

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<sup>132</sup> Montgomery, *supra* note 88, at 163.

<sup>133</sup> Thomas E. Crocco, Comment, *Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites*, 23 ST. LOUIS U. PUB. L. REV. 451, 459 (2004).

<sup>134</sup> See John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U.L. REV. 425, 456 (2002).

<sup>135</sup> *Id.*

IV. APPLYING THE NONMAILABILITY PROVISION OF THE  
ESPIONAGE ACT TO THE INTERNET

A. *Section 1717*

In the United States, mailing any material advocating or urging treason, insurrection, or forcible resistance to any law of the United States is a federal crime.<sup>136</sup> These kinds of materials were declared nonmailable by the predecessor to 18 U.S.C. § 1717, originally passed as part of the Espionage Act of 1917.<sup>137</sup> In the run-up to World War I, the Department of Justice was concerned that traditional treason laws would not suffice in combating “political agitation . . . of a certain character directly affecting the safety of the state.”<sup>138</sup> The debates surrounding the adoption of the Act reveal much about Congress’s concern with balancing First Amendment freedom of speech against the very real danger that some kinds of speech might pose under the circumstances.<sup>139</sup>

Regulation of the mail is subject to First Amendment analysis in the courts, though this was not always the case.<sup>140</sup> The Supreme Court had originally adopted the “Privilege Doctrine” in dealing with claims that a postal regulation unconstitutionally restricted First Amendment rights. Beginning in *Ex Parte Jackson*, the Court held that “[t]he power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.”<sup>141</sup> The Privilege Doctrine came under a slow-grinding attack, and is no longer considered good law. Justice Oliver Wendell Holmes, writing in a 1921 dissent, said, “The United States may give up the Post office when it sees fit; but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . .”<sup>142</sup> In 1957, Justice John Marshall Harlan, concurring in part and dissenting in part in *Roth v. United States*, remarked that “[t]he hoary dogma of [*Jackson*], that the use of the mails is a

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<sup>136</sup> See 18 U.S.C. § 1717 (2006).

<sup>137</sup> See 18 U.S.C. §§ 343–346 (1917).

<sup>138</sup> Rabban, *supra* note 88, at 1217.

<sup>139</sup> See *id.*

<sup>140</sup> See generally *United States v. Handler*, 383 F. Supp. 1267, 1275–76 (D. Md. 1974) (tracing the history of the Privilege Doctrine and adopting the modern rule from *Hiatt v. United States*, 415 F.2d 664 (5th Cir. 1976), and *Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973)).

<sup>141</sup> *Ex Parte Jackson*, 96 U.S. 727, 732 (1877).

<sup>142</sup> *United States ex rel. Milwaukee Soc. Democratic Publ’g Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

privilege on which the Government may impose such conditions as it chooses, has long since evaporated.”<sup>143</sup> Then in 1965, Justice William O. Douglas quoted Justice Holmes’s dissent in *Burleson* in the majority opinion in *Lamont v. Postmaster General*,<sup>144</sup> and brought the use of the mail to disseminate one’s opinions under the protection of the First Amendment.<sup>145</sup> Therefore, the modern holding is that prohibitions contained in postal regulatory statutes “must be construed in the light of the First Amendment rather than in the light of any regulatory power granted to the Postal Service.”<sup>146</sup>

Even before the modern First Amendment analysis of mail regulation, Congress was concerned with restrictions on free speech imposed by restrictions on what could be mailed. The modern § 1717(a) bars “every letter writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing” that violates several enumerated sections or “which contains any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States” from the mails.<sup>147</sup> Such material is deemed entirely “nonmailable,” and the statute prohibits carriers and post offices from conveying it.<sup>148</sup> Subsection (b) of § 1717 makes it a crime to use or “attempt to use the mails or Postal Service for the transmission of any matter declared by this section to be nonmailable,” and prescribes as punishment fines or up to ten years imprisonment, or both.<sup>149</sup>

The Postal Service is given discretion as to the handling of nonmailable materials under 39 U.S.C. § 3001. Any materials barred from the mail by § 1717, but which nonetheless reach the office of delivery, “shall be disposed of as the Postal Service shall direct.”<sup>150</sup> This includes the power to destroy illegally mailed items, a power which has been upheld despite a First Amendment challenge.<sup>151</sup>

The nonmailability provision of the Espionage Act was intended as a restriction on a particular mode of dissemination of certain types of speech, but was not enacted without great consideration of the

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<sup>143</sup> 354 U.S. 476, 505 n.5 (1957) (Harlan, J., concurring in part, dissenting in part).

<sup>144</sup> See *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965).

<sup>145</sup> *Id.*

<sup>146</sup> *Tollett*, 485 F.2d at 1091.

<sup>147</sup> 18 U.S.C. § 1717 (2006).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> 39 U.S.C. § 3001(b) (2006).

<sup>151</sup> See *Cherry v. Postmaster General*, 272 F. Supp. 982 (D.P.R. 1967).

First Amendment.<sup>152</sup> This provision was approved, while a censorship provision in the same bill was struck in conference committee.<sup>153</sup> The censorship portion of the bill would have allowed the President to censor the press, which brought much criticism from Congress.<sup>154</sup> The major distinction between the two—that which doomed the censorship provision while the nonmailability provision survived—was the issue of prior restraint.<sup>155</sup> The censorship provision would have restricted speech by prohibiting publication (i.e., it would have constituted a “prior restraint”), whereas the nonmailability provision placed no restriction on publication, though it “could effectively prevent circulation.”<sup>156</sup> This distinction is important, because the Supreme Court has held that “prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment Rights.”<sup>157</sup> The Court has also held, however, that enjoining publication of material that is not “arguably protected speech,” is not an impermissible prior restraint where the regulation “is clear and sweeps no more broadly than necessary.”<sup>158</sup>

Congress also voiced concern about possible abuse in the interpretation of the definition of “treason.” One representative cautioned, “A whole lot of people here and elsewhere seem to think that if a man does not agree with you he is a traitor and guilty of treasonable utterances.”<sup>159</sup> As Professor David Rabban points out, however, “even vociferous opponents of the nonmailability provision conceded throughout the lengthy congressional debates that a variety of publications should not be circulated.”<sup>160</sup>

The nonmailability provision was not without precedent at the time of its adoption. The Comstock Act, as amended in 1876, prohibited the transmission of “every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character” through the mail.<sup>161</sup> Therefore, the Post Office

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<sup>152</sup> See Rabban, *supra* note 88, at 1219–23.

<sup>153</sup> See *id.* at 1218.

<sup>154</sup> *Id.* at 1218–1219.

<sup>155</sup> See *id.* at 1219.

<sup>156</sup> *Id.* at 1221.

<sup>157</sup> *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>158</sup> *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Rights*, 413 U.S. 376, 390 (1973).

<sup>159</sup> Rabban, *supra* note 88, at 1220.

<sup>160</sup> *Id.*

<sup>161</sup> Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 311 (2003); see also 17 Stat.

was already empowered to exclude certain matter from the mail, a power tested and upheld by the Supreme Court.<sup>162</sup> Viewed as an expansion of sorts of the Comstock restrictions, the nonmailability provision seemed far less onerous than the wholly new restriction on speech contained in the censorship provision.<sup>163</sup>

The constitutionality of the nonmailability provision was upheld in *Masses Publishing Co. v. Patten* in 1917.<sup>164</sup> In *Masses*, a magazine called “The Masses,” a self-styled revolutionary publication advocating radical, passive resistance to United States’ laws, was deemed unmailable by the Postmaster.<sup>165</sup> The magazine’s publisher argued that the statute stifled freedom of the press in violation of the First Amendment.<sup>166</sup> At the district court level, Judge Learned Hand had construed the Espionage Act as a whole quite narrowly, limiting its restrictions on speech to protect “anything less than urging resistance to the law.”<sup>167</sup> The Second Circuit reversed, holding that incitement to a crime may be indirect. Addressing the nonmailability provision, the court found that the statute clearly “imposes no restraint prior to publication, and no restraint afterwards, except as it restricts circulation through the mails. Liberty of circulating may be essential to freedom of the press, but liberty of circulating through the mails is not, so long as its transportation in any other way as merchandise is not forbidden.”<sup>168</sup>

### B. *The Internet Is Like the Mail*

The history of the Internet’s creation justifies regulating the Internet in a similar manner to the mail. The Postal Service is a federal agency, intended to bring the country together through communication.<sup>169</sup> The Internet is essentially a quasi-public entity, having been invented and funded solely by the federal government in its early

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599 (1873). The Comstock Act is currently codified as 18 U.S.C. § 1461 (2006), and has not changed substantively in any way relevant to its import for this Comment.

<sup>162</sup> Rabban, *supra* note 88, at 1222 (citing *In re Rapier*, 143 U.S. 110, 133–35 (1892); *Ex Parte Jackson*, 96 U.S. 727, 736–37 (1877)).

<sup>163</sup> *Id.*

<sup>164</sup> 246 F. 24 (2d Cir. 1917).

<sup>165</sup> *See id.* at 34.

<sup>166</sup> *See id.* at 27.

<sup>167</sup> *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917); *see* Rabban, *supra* note 88, at 1238.

<sup>168</sup> *Masses*, 246 F. at 27; *see also* *Gitlow v. Kiely*, 44 F.2d 227, 229 (S.D.N.Y. 1930) (holding that freedom of the press is not interfered with except by suppression before publication).

<sup>169</sup> *See infra* notes 181–83 and accompanying text.



years of existence.<sup>170</sup> The Internet exists now as an interwoven network of commercial and non-profit websites, which is actually the fulfillment of the original designers' plans.<sup>171</sup> Thus, the Internet is substantially similar to the Postal Service, and may be regulated in a similar fashion. Additionally, by its very nature, the Internet *is* interstate commerce and falls fully within the power of Congress to regulate under Article 1, Section 8, Clause 3 of the Constitution.<sup>172</sup>

The U.S. Postal Service is a "fundamental service" operated by the federal government, "authorized by the Constitution, created by Act of Congress, and supported by the people."<sup>173</sup> Congress intended that the Postal Service would "bind the Nation together through the personal, educational, literary, and business correspondence of the people."<sup>174</sup> The Postal Service is an agency of the U.S. government and, specifically, an "independent establishment of the executive branch."<sup>175</sup> The Internet is not currently operated by the government, but it was, and the motivation behind its creation was—similar to that of the Postal Service—to establish a cohesive communication system nationwide.<sup>176</sup>

The Internet began as a system called ARPANET, created by the U.S. Department of Defense's Advanced Research Projects Agency (ARPA).<sup>177</sup> During the Cold War, there arose a desire within the military for a communication system that the U.S.S.R. could not knock out with a single strike.<sup>178</sup> For example, if a traditional telephone system is used, a caller is connected to the receiver through a single point, a switchboard.<sup>179</sup> If the switchboard is disabled, the caller is cut off from the receiver.<sup>180</sup> This is true of any linear communications system where information is passed from point to point in a series.<sup>181</sup> The idea behind the Internet was to create a web of points, each connected to multiple other points instead of a linear series.<sup>182</sup> That

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<sup>170</sup> See *infra* notes 185–200 and accompanying text.

<sup>171</sup> See *infra* notes 185–200 and accompanying text.

<sup>172</sup> See *infra* notes 201–02 and accompanying text.

<sup>173</sup> 39 U.S.C. § 101(a) (2006).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* § 201.

<sup>176</sup> See *infra* notes 185–200 and accompanying text.

<sup>177</sup> See JANET ABBATE, *INVENTING THE INTERNET 2* (1999).

<sup>178</sup> *Id.* at 9–11, 13–17.

<sup>179</sup> *Id.* at 11.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 11–17, 30, 32.

way, if any one point is removed from the system, the message can be rerouted through other points.<sup>183</sup>

“The system evolved through an unusual (and sometimes uneasy) alliance between military and civilian interests.”<sup>184</sup> The private communications industry would never have originally attempted to build the Internet because, for them, the risk outweighed the reward. Professionals in the private sector thought the technical approach taken by ARPA, a novel “packet switching” approach, was “crazy,” and predicted its failure.<sup>185</sup> So the Department of Defense (“DOD”) took the initiative and granted contracts and funding to nonprofits and universities to make it work, in addition to the work ARPA did in-house.<sup>186</sup> Work done by Rand (formerly RAND), a nonprofit corporation “dedicated to research on military strategy and technology” and funded primarily by contracts from the Air Force and other governmental agencies, was pivotal.<sup>187</sup> MIT’s Lincoln Laboratory was also involved, with the Lab receiving half of its funding from ARPA.<sup>188</sup>

For the network to meet its full potential, the military needed it to grow exponentially. By design, ARPANET’s designers and users intended that “its techniques would be discussed in professional forums, taught in computer science departments, and implemented in commercial systems.”<sup>189</sup> The National Science Foundation took control of the Internet in the 1980s, and subsequently turned the net-

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<sup>183</sup> ABBATE, *supra* note 177 at 11 (“A distributed system would have many switching nodes, and many links attached to each node. The redundancy would make it harder to cut off service to users.”).

<sup>184</sup> *Id.* at 2.

<sup>185</sup> *Id.* at 47.

<sup>186</sup> *See id.* at 10, 44.

<sup>187</sup> *Id.* at 10.

<sup>188</sup> *See id.* at 44.

During this time, several universities began building their own computer networks to aid research. George Strawn, currently the Chief Information Officer at NSF, was a computer scientist at the University of Iowa in the 1970s. He and colleagues at other universities saw the potential that computer networks had to offer as they began to use email and other innovations. At the same time, the development of micro computers meant that universities were moving away from large research computers in favor of many smaller computers dispersed around campus. This posed a problem for researchers who still needed access to faster, stronger computers and it opened an opportunity to expand fledging networks to more and more users.

*NSF and the Birth of the Internet*, NAT’L SCIENCE FOUND., [http://www.nsf.gov/news/special\\_reports/nsf-net/textonly/70s.jsp](http://www.nsf.gov/news/special_reports/nsf-net/textonly/70s.jsp) (last updated Mar. 23, 2009). Thus universities were ripe for participation in the new Internet once ARPANET went national.

<sup>189</sup> ABBATE, *supra* note 177, at 81.

work over to private businesses in the 1990s.<sup>190</sup> Once the framework was in place, the strategy was to allow the profit-driven private sector and educational institutions to drive further development.<sup>191</sup> The current form of the Internet, as an almost organic nervous system of computer networks, is the fruit of the seeds planted by the federally funded Internet development programs.<sup>192</sup>

In a very real sense, the Internet now functions as a marketplace involving the commerce of ideas and goods and services between parties located in different states and in different countries. The Constitution allows Congress to regulate commerce among the several states as well as with foreign nations.<sup>193</sup> Courts have consistently found that transmission of information via the Internet is the equivalent of interstate commerce.<sup>194</sup> Therefore, under the express grant of powers to Congress under the constitution, Congress can regulate the Internet.

The Constitution also grants Congress the power to establish post offices and post roads.<sup>195</sup> Arguably, the power to establish an “Internet” could be implied from that grant of power, though such a thing did not exist at the founding. If the authors of the Constitution put enough priority on communication between citizens to make the creation of a post office an enumerated power of Congress, logically,

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<sup>190</sup> “The National Science Foundation (NSF) is an independent federal agency created by Congress in 1950 ‘to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense . . .’ With an annual budget of about \$6.9 billion (FY 2010), [the NSF is] the funding source for approximately 20 percent of all federally supported basic research conducted by America’s colleges and universities. In many fields such as mathematics, computer science and the social sciences, NSF is the major source of federal backing.” *See About the NSF, NAT’L SCIENCE FOUND.*, <http://www.nsf.gov/about> (last updated Apr. 7, 2010).

<sup>191</sup> ABBATE, *supra* note 177, at 81.

<sup>192</sup> Indeed, ARPA is still involved in advancing the Internet’s development. In December 2009 ARPA gave away a \$40,000 prize as part of their Network Challenge, involving a nationwide hunt for large red balloons designed to study the effects of social networking and the Internet on “the timely communication, wide-area team-building, and urgent mobilization required to solve broad-scope, time-critical problems.” *DARPA Network Challenge*, DARPA, <https://networkchallenge.darpa.mil/Default.aspxhttps://networkchallenge.darpa.mil/Default.aspxhttps://networkchallenge.darpa.mil/Default.aspx> (last visited Mar. 31, 2011).

<sup>193</sup> *See* U.S. CONST. art. I, § 8.

<sup>194</sup> *See, e.g.*, *United States v. Thomas*, 74 F.3d 701, 706 (6th Cir. 1996) (finding that a combined computer/telephone system constituted a facility and means of interstate commerce); *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) (“Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce.”).

<sup>195</sup> *See* U.S. CONST. art. I, § 8.

if the technology was available at the time to create a medium capable of facilitating that communication in a more efficient manner, the authors would have chosen that medium instead of the mail. Therefore, even if the DOD did not create ARPANET, Congress could have created the Internet under the grant of postal power in Article I, Section 8. Likewise, if Congress can create post offices and post roads, then Congress impliedly can maintain those roads and offices, regulate their operation, and police the use of the mail for the security of the system.<sup>196</sup> Extrapolating to the modern form of communication, Congress can regulate the Internet under the same grant of power.

*D. Adjusting § 1717 to Address Internet Speech*

Congress should implement a statutory approach to limiting Internet dissemination of inciteful materials on the basis of § 1717. Like § 1717, the statute should prohibit the posting of materials advocating or urging treason, insurrection, or forcible resistance to any law of the United States on the Internet. Also like § 1717, this statute would be constitutional. To avoid invoking *Brandenburg's* imminency requirement, and in the interest of preserving the precious freedom of speech, the regulation should be narrowly tailored so as not to sweep too broadly, carefully drawing the distinction between advocating for the use of force or violence in the abstract, and speech intended to incite an immediate use of force or violence.

1. Proposed Statutory Language

(a) It shall be unlawful to use the Internet to transmit material advocating or urging treason, insurrection, or forcible resistance to any law of the United States, where such material creates a substantial likelihood of an imminent threat of such actions upon viewing by the recipient of such material. Such material shall not be hosted by any Internet Service Provider.

(b) Whoever uses or attempts to use the Internet for the transmission of any matter declared by this section to be prohibited, shall be fined under this title or imprisoned not more than ten years or both.

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<sup>196</sup> Cf. *McCulloch v. Md.*, 17 U.S. 316, 417 (U.S. 1819) (From the Constitutional grant of power in Art. 1, § 8, cl. 7 “to establish post offices and post roads” is inferred the power and duty to carry the mail and punish those who steal it.).

## 2. The Proposed Statute is Constitutional

*Masses* sets up two threshold questions for applying the First Amendment in this type of situation.<sup>197</sup> First, is the regulation a restraint prior to publication? Second, is the regulation a post-publication restraint that does not merely burden circulation, but eliminates it altogether? This proposed statute satisfies both inquiries. For the same reasons that the nonmailability provision is not an unconstitutional burden on freedom of the press, the proposed regulation of inciteful speech on the Internet is likewise not unconstitutional.

Further, under the reasoning of *Rice*, the imminence consideration would apply only when inciteful speech is “mere advocacy” and not to the regulation of speech intended to provoke and aid in violent acts. Thus, the proposed regulation would not invoke *Brandenburg*, because it does not burden the freedom of speech. If speech creates a substantial likelihood of an imminent threat, it cannot be viewed as “mere advocacy” or an abstract idea.

Section 1717 is not a prior restraint on speech. Individuals are free to print or publish any speech they choose, but if the material falls under the nonmailable provision, it simply cannot be transported through the mail.<sup>198</sup> Likewise, a statute prohibiting insurrectionist materials on the Internet would not be a prior restraint on speech. It would merely prohibit the use of a particular medium of communication to disseminate materials advocating for insurrection or other illegal acts. Just as § 1717 was merely an extension of the Comstock Act, this would, in essence, be an extension of § 1717 to cover a mode of communication not contemplated at the time of passage of the statute. Courts, in applying the prohibition, would need to be careful so as to avoid applying the statute in an overly broad manner such that it would have a chilling effect on legitimate speech.

In the proposed statutory language, imminence of the threat is not required. This accounts for the lack of instantaneous communication in most Internet transactions. The types of content that this language prohibits are very narrow, tracking the language in § 1717. Because the State has a strong interest in preventing the downfall of the nation, barring advocacy for treason, insurrection, and forcible resistance over the Internet should survive judicial scrutiny. In these ways, this new statute should satisfy the First Amendment generally and *Brandenburg* in particular.

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<sup>197</sup> See *supra* notes 164–68 and accompanying text.

<sup>198</sup> See *supra* Part IV.A.

*E. Arguments in Support of the New Statute*

1. Failure to Proscribe the Dissemination of  
Insurrectionist Materials on the Internet Would  
Defeat the Purpose of Section 1717

Section 1717 is a valid restraint on the use of the postal service in furthering the compelling national interest in preserving the country and upholding the law. To allow circumvention of this interest by allowing the same materials banned from the mails to be disseminated on the Internet defeats the entire purpose of § 1717. If a newsletter, for example, could be precluded from the mail based on inciteful or insurrectionist materials that are considered a danger to the public welfare, why allow the same material to be posted on the Internet? The Internet provides a far greater audience than direct mailing ever could and at a mere fraction of the cost. The need for § 1717 has not diminished in the Internet age, but the reach of its protections is not great enough to fulfill its purpose.

- 2 The New Statute Will Make Censorship Less Likely

A statutory approach like this could also address the concerns of Internet Service Providers (ISPs) who have been pressured in recent years by the government to censor questionable material posted by their customers.<sup>199</sup> Because the ISPs, as companies, do not fall under the same constitutional restraints as the government, when they remove content, no First Amendment right is infringed.<sup>200</sup> The government has, according to some commentators, adopted the tactic of pressuring ISPs into a censorship by proxy role because officials do not have the direct authority to order the removal of content from the Internet.<sup>201</sup> A statute such as the one proposed here would eliminate this practice, which is looked upon by experts with “a jaundiced eye.”<sup>202</sup>

3. Application to the Secession Case Study

Governor Perry’s statements about the possibility of secession were vague and noncommittal.<sup>203</sup> He seemed to indirectly address an abstract idea, which is exactly the kind of speech protected by *Bran-*

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<sup>199</sup> See Montgomery, *supra* note 88, at 144.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.* at 164–65.

<sup>202</sup> *Id.* at 165.

<sup>203</sup> See *supra* notes 20–36 and accompanying text.

*denburg*. Were someone to post on the Internet what Governor Perry said in his Tea Party speeches, that content should be protected.

Daniel Miller, the president of TNM, runs a website on which he expressly calls for Texas to secede from the Union.<sup>204</sup> He organizes supporters, disseminates a petition, and posts blog entries in favor of Texas secession. Miller's suggestion that U.S. troops would fight against the U.S. in the event of a war of secession does not really rise to an effort to incite a violent response. Miller ultimately advocates for state legislative action to hold a popular referendum on the question of secession. He argues that if the people approve a measure declaring independence, secession is legal. These, again, are examples of advocacy for ideas, and are protected under *Brandenburg*. Even with a less stringent imminency component in the test, Miller's message, while urging for a violation of U.S. law, does not call for violence, and is not likely to produce violence. It may even be that Miller's website is the modern example of Holmes's "surreptitious publishing of a silly leaflet by an unknown man."<sup>205</sup> Therefore, Miller's speech should be protected by the First Amendment under an expanded § 1717.

Similarly, Debra Medina's statements about a "bloody war" merely describe what she thinks might happen in her secessionist vision, and does not call for people to engage in violence or insurrection.<sup>206</sup> Her arguments regarding nullification are not a call for individuals to disobey federal law, but rather an expression of the idea that states have some kind of power under the Constitution to supersede federal law. Medina's speech would also be protected by the First Amendment under an expanded § 1717.

Larry Kilgore, by contrast, presents a close case.<sup>207</sup> Kilgore openly advocates for an immediate secession from the United States, and his speech in Austin might be considered by reasonable people to have been inciteful. One specific posting by Kilgore to the Internet might fall under a new § 1717 for the Internet. His Veteran's Day message was a blatant call for support in a military coup. This is an effort at direct incitement, and it is certainly an act of speech advocating for insurrection. The likelihood of it being followed is debatable, but the gravity of the potential harm is immense. With nearly a quarter of a million people voting for Kilgore in a race for national office,

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<sup>204</sup> See *supra* Part II.A.

<sup>205</sup> *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

<sup>206</sup> See *supra* Part II.B.

<sup>207</sup> See *supra* Part II.C.

he can hardly be called “an unknown man.”<sup>208</sup> It is no defense to say that secession itself is highly unlikely, because an armed attempt at secession by some disgruntled group or individual is far more likely than a successful attempt at secession. This is speech that is not protected by *Brandenburg*, and would be prohibited from the Internet under the proposed statute.

Finally, Clay Laird should not be permitted to post threats to the Internet.<sup>209</sup> He advocates for violent secession, stating that he is willing to die to achieve it and that those who oppose it will die as well. The self-titled “Certified Domestic Terrorist” warned Texas residents that if they did not like the political point of view he was espousing, they should leave or be driven out, and suggested his manner of doing so would involve weapons and ammunition. He also stated that members of the military would assist in a war of secession upon return from deployment overseas. Laird’s statements clearly do not constitute the advocacy of ideas in the abstract, especially in light of Laird’s in-person threats at the Capitol. Posting such speech to the Internet should be restricted, and such speech is not protected under the First Amendment. If Laird printed these postings out and mailed them, he would be in violation of § 1717 and subject to criminal penalty. He should not be allowed to skirt the obvious intent of Congress by instead posting them to the Internet, while at the same time reaching an even bigger potential audience.

## V. CONCLUSION

The Internet is a powerful medium of communication, and like many tools intended to build, it can also be wielded to destroy. Websites promoting violence, hate, insurrection, treason, and other crimes are freely published under current law. This is a threat to both national security and personal safety. Terrorists and criminals utilize this powerful tool to recruit followers and incite action. The Internet was created by the U.S. government to improve national defense, not to aid violent criminals. A need for regulation of incendiary speech on the Internet exists, and § 1717 provides a constitutional mode to achieve that regulation.

Free speech over the Internet should be protected, but not all speech falls under the protection of the First Amendment. The *Brandenburg* Doctrine is ill-suited to the context of Internet communications. Under a modified version of § 1717, incendiary speech on

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<sup>208</sup> See *supra* note 71 and accompanying text.

<sup>209</sup> See *supra* Part II.D.



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the Internet could be prohibited without doing damage to the liberty of the majority of Internet users, who do not advocate or recruit for violent resistance to U.S. law.

The First Amendment guarantees the right to speak without prior restraint. It does not exonerate the speaker from all responsibility for the words he chooses. It also does not guarantee equal access to all available media to spread that speech. A State has a legitimate interest in preserving peace, upholding law, and protecting itself and its citizens from crime and violence. If an act of speech contributes to the likelihood of violence, indeed, when it is intended to do so, the State has the right to regulate that speech and if it is dangerous enough, to prohibit it altogether. This right of the State, however, must be exercised with the precision of a surgeon because it is, after all, an infringement on the absolute liberty of speech. Just as a surgeon must delicately cut away a cancerous matter without damaging the far greater mass of healthy tissue, so too must a restraint on speech only dampen or silence the very dangerous, cancerous speech without harming the very liberty that protects all others. But make no mistake: the cancer must be removed to preserve the entire body, or all will die together.