The Modern American

Volume 2 | Issue 3 Article 2

2006

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THE SUFFOCATION OF FREE SPEECH DUE TO THE "GRAVITY OF DANGER" OF TERRORISM

*By Tim Davis**

Ali al-Timimi ("al-Timimi"), a well respected, outspoken Muslim scholar, in his fervent support of Muslims everywhere, has openly proclaimed that America is one of the chief enemies of the Muslim populace.[1] He proclaimed that the explosion of the space shuttle Columbia was a sign for Muslims to take action.[2] He urged young Muslim men to *jihad*, to wage armed conflict with the enemies of Islam.[3]

In 2004, the Federal government charged al-Timimi in a ten-count indictment.[4] During his trial in April 2005, the prosecution introduced over 250 evidentiary exhibits,[5] along with testimony from expert witnesses on radical Islamism[6] and testimony from various government agents. In addition, the prosecution introduced testimony from several co-conspirators convicted in an earlier trial.[7] The co-conspirators were facing harsh sentences under the Federal Sentencing Guidelines unless they cooperated with the government.[8]

Despite this mountain of evidence, probative evidence that al-Timimi was actually involved in any illegal activity is quite limited. In fact, the pivotal evidence against al-Timimi centers on the corroborated testimony of co-conspirators testifying that al-Timimi was present at a two-hour meeting at a co-conspirator's home on September 16, 2001, five days after the tragedy of 9/11.[9] The testimony alleged that al-Timimi incited the attendees to take up *jihad* along with the Taliban, even in the likely event that the *jihadists* would engage in direct action with American forces in Afghanistan.[10]

On April 18, 2005, jury deliberations began, and buried in nearly 200 pages of jury instructions, was a single paragraph that unceremoniously described the law of protected speech under *Brandenburg v. Ohio*.[11] After deliberating for seven days, the jury returned a verdict of guilty on all ten counts.[12] Subsequently, al-Timimi was sentenced to life in prison plus 70 years.[13]

The trial of *United States of America v. Ali Al-Timimi*[14] raises a number of First Amendment issues. First, this Article lays a foundation describing the facts of the *Al-Timimi* case and the prior co-conspirator trial, *United States v. Khan*.[15] Next, the Article explores the application of the First Amendment and discusses relevant cases, including *United States v. Rahman*,[16] a case remarkably similar to *Al-Timimi*.

From this analysis, it is clear that courts have had difficulty defining the line between protected advocacy and criminal speech, including whether or how *Brandenburg v. Ohio* should be applied. Moreover, in deciding between what constitutes advocacy and criminal speech, the courts have leaned towards criminal speech when the solicited activity is sufficiently grave, especially in the context of national security. Repeatedly, the courts have demonstrated that there is an inverse relationship between gravity of danger and freedom of speech; when the circumstances are sufficiently grave, free speech will be less tolerated.

Regardless of whether terrorism represents one of the gravest dangers this country has ever faced, it has led the government to scale back fundamental constitutional rights with the enactment of the Patriot Act. Reminiscent of the prosecutions of alleged Communists amidst the hysteria of McCarthyism, the government has brought down swift and furious punishment upon anyone even remotely connected to terrorism. In the final analysis, I assert that al-Timimi's two speeches in September and October of 2001 should be considered protected speech, resulting in the United States government having insufficient proof to sustain the conviction. If al-Timimi were to lose his appeal, the fundamental constitutional right of free speech would be significantly diminished.[38]

ALI AL-TIMIMI BIOGRAPHY

Al-Timimi was born in 1963 in Washington, D.C. to Muslim parents who worked in the Iraqi Embassy.[17] In 1978, his parents moved to Saudi Arabia where he received instruction in the Qur'an. From an early age, he was intrigued by the depiction of Judgement Day in the Qur'an and started a lifelong inquiry of the harbingers and omens of the approach of a foretold apocalypse.

At age 17, al-Timimi returned to a changed United States to attend college, where he perceived a growing intolerance of Muslims in the United States, which fueled his devotion to the study of Islam. In 1987, while thousands of Muslims were pouring into Afghanistan to join the *mujahideen*,[18] he traveled to Medina, Saudi Arabia, to study at the college of Haddith. After his return from Medina, al-Timimi started lecturing on various topics of Islam and became a well-respected lecturer in the global Muslim community. He lectured at various conferences, particularly at those hosted by the Islamic Assembly of North America ("IANA"). He co-founded the Dar al-Arqam Center ("Center") to provide English language instruction on Islam, and became a frequent and popular speaker there.[19] In the aftermath of 9/11, the FBI investigated organizations whose purpose was to incite violent *jihad* and to recruit *jihadists*.[20] The Northern Virginia investigations culminated in the arrest, trial, and conviction of al-Timimi for advocating criminal activity.

On February 9, 2004, the government opened its case against the "Virginia *jihad* network"[21] in *United States v. Khan*.[22] The network was charged with numerous, serious federal crimes including conspiracy to contribute services to the Taliban and other terrorist organizations, conspiracy to levy war against the United States, and violation of the Neutrality Act.[23] The 11 defendants, including Masoud Ahmad Khan, Yong Ki Kwon, and Muhammed Aatique, were regular attendees at the Center in Falls Church, Virginia.[24]

United States v. Khan

In early January 2000, Kwon and Nabil Gharbieh, a Center co-founder, decided that in order to prepare for *jihad,* they would conduct military training by playing paintball.[25] Eventually all of the defendants played paintball with the express purpose of training for *jihad.*[26] Several defendants acquired weapons such as AK-47s and sniper rifles along with other less exotic weapons.[27] Three of the defendants had traveled to Pakistan to obtain military training at a camp run by Laskar-e-Taiba ("LET"),[28] an organization dedicated to violent *jihad* defending the rights of Muslims in the disputed Kashmir region of India and Pakistan. The United States designated LET as a foreign terrorism organization ("FTO") in December of 2001.[29]

Two days after 9/11, al-Timimi asked Kwon "to organize a plan in case of anti-Muslim backlash and to get the brothers together."[30] Kwon and another defendant, Royer, made all of the phone calls and set up the meeting for Sunday September 16, 2001 at Kwon's home.[31] At the meeting, it is alleged that al-Timimi incited the group for violent *jihad* in support of the Taliban. In the next few days, four of the meeting attendees, Kwon, Khan, Hasan, and Aatique, flew to Pakistan with the intention to attend the LET camps.[32] Khan arranged his flight so he could accompany Aatique on September 19, 2001, since Aatique already had a reservation on a flight to Pakistan for that day.[33]

At another meeting in early October, 2001, al-Timimi allegedly exhorted five other members of the paintball group to take up *jihad* in support of the Taliban.[34] Within days of the second meeting, one defendant left for the LET camps in Pakistan and another simply left the country.[35] The LET camp trainees took part in various weapons training including automatic weapons, grenades, RPGs, and anti-aircraft guns.[36] However, after the start of open hostilities against the Taliban on October 20, 2001, the Pakistanis closed their border with Afghanistan.[37] In addition, the Pakistani government was actively evicting foreign fighters from the camps.[38] Consequently, the defendants still at the camps, Khan, Hasan, and Kwon, learned that LET would no longer facilitate their travel to Afghanistan.[39] Instead, Khan and Hasan returned to the United States and Kwon remained in Pakistan to start a mango export business.[40]

Six of the defendants agreed to plea bargain deals before trial requiring that they cooperate with the government and testify against the other co-defendants. Of the five remaining defendants that stood trial, all but one of them were found guilty.[41] In a separate trial, another alleged coconspirator, Sabri Benkhala, was acquitted of all charges.[42]

United States v. Ali Al-Timimi

In April 2005, al-Timimi was charged with inciting and/or aiding and abetting the "network" to commit their crimes.[43] The government's primary contention was that al-Timimi, through his lectures and direct personal appeals, induced and/or aided and abetted members of the Virginia *jihad* network to leave the country and pursue *jihad* training with the intent to defend the Taliban against all potential enemies, including the United States.[44] A key element of the prosecution's case was that al-Timimi was the ringleader of the Virginia *jihad* network.

Al-Timimi was described as a well respected lecturer at the Center, whom many attendees asked for advice on a wide variety of Islamic matters, including minor, almost trivial matters such as whether one can pray in a moving car or whether one may shorten prayers upon the discovery of a scorpion.[45] On several occasions the paintball group asked al-Timimi's advice on the matters pertaining to paintball. Through an intermediary, Kwon asked al-Timimi what he thought of the paintball, to which al-Timimi said, "That is something good that the brothers can do."[46] In September 2000, FBI agents questioned one defendant about his paintball activities.[47] The defendant related that al-Timimi said to continue playing paintball, because stopping will look more suspicious, but to be more discrete in the future.[48] Soon afterward, the paintball group discontinued playing at local public courses and moved their activities to a private farmland in Spotsylvania County.[49]

On September 11, 2001, al-Timimi was supposed to attend a dinner and give a lecture.[50] However, when the group met for dinner, they cancelled the lecture in light of the tragic events of that day. The government contended that at the dinner al-Timimi expressed his approval of the attacks and sought justification for the attacks.[51] In the *Khan* trial, two witnesses testified that al-Timimi said the attacks were not Islamically justifiable, but that United States' foreign policy had precipitated the attacks.[52] The government's one witness to the contrary, Hasan, was discredited in cross-examination with his inconsistent grand jury testimony.[53]

Two days after 9/11, al-Timimi asked Kwon "to organize a plan in case of anti-Muslim backlash and to get the brothers together."[54] On September 16, 2001, al-Timimi attended the meeting at Kwon's home.[55] When al-Timimi arrived he told the group to turn off their phones, unplug the answering machine, and pull down the curtains.[56] Al-Timimi then told them that this meeting was *amana*, trust, which meant that the attendees were not to talk about the meeting.[57] During the trial, the government wanted to introduce evidence that at this meeting al-Timimi discussed Afghanistan because Mullah Omar, the leader of the Taliban, had called for Muslims from all parts of the world to defend the Taliban against imminent attack.[58] The defense counsel successfully blocked the government from introducing that evidence.[59] Even though the government could not allege that al-Timimi was attempting to recruit *jihad* fighters for the Taliban, other evidence supports a conclusion that Afghanistan was a topic of discussion by the group that night.[60]

Later, at the same meeting, al-Timimi read parts of the al-Uqla *fatwa* opinion to the group and gave the *fatwa* to Khan with the instructions to burn it after he had read it.[61] (Al-Timimi told the group that they must join the *mujahideen* and that it did not matter who they fought, Indians, Russians, or Americans.)[62] Al-Timimi said that the duty to take up *jihad* is *fard ayn*, obligatory to all Muslims.[63] Al-Timimi offered the group several

choices: (1) to take up *jihad* and defend the Muslims in Afghanistan; (2) to go and make *hijra*, leave the United States to avoid supporting the government by paying taxes; or (3) to lay like a rug in your house.[64] Three days later, on September 19, Aatique and Khan flew to Pakistan and eventually made their way to the LET camps for military training.[65] The next day, Kwon and Hasan followed suit.[66]

One month later, in early to mid-October, another meeting was convened.[67] Al-Timimi told this group the same information he told the group on September 16.[68] In response, one defendant immediately quit his job, flew to Pakistan, and proceeded to the LET camp to receive *jihad* training.[69] Another defendant, who had a family and did not wish to fight, simply left the country (*hijra*).[70]

Advocacy of illegal activity would be protected unless the "words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Additionally, at trial the government introduced numerous speeches given by al-Timimi. One of the most controversial speeches introduced was the "Space Shuttle" speech, delivered shortly after the space shuttle Columbia exploded upon reentry into the earth's atmosphere on February 1, 2003.[71] In it, al-Timimi proclaimed that "[t]here is no doubt that Muslims were overjoyed because of the adversity that befell their greatest enemy."[72] Always interested in omens, al-Timimi then described the numerous omens evoked by space shuttle explosion that foretold the impending doom of the United States.[73] In another speech entitled *World Advice to the Salafis*, al-Timimi said, "waging *jihad* in the path of Allah is an unceasing obligatory duty until the Day of Judgment, not to be forsaken because of the lack of a *khalifa*."[74]

APPLICABLE LAW COVERING ADVOCACY OF ILLEGAL ACTIVITY

Initially, it is worth noting that cases concerning advocacy of illegal activity are relatively rare. Consequently, advocacy of illegal activity cases appear for a time and then disappear for many years, paralleling the wax and wane of the political movements that give rise to the activity. The first political movement that advocated illegal activity was the Socialist movement in the late nineteenth and early twentieth centuries, followed by the Communist movement after World War II. Today, we are potentially engaged in the third act of advocacy cases, those concerning Islamic activism.

The first advocacy cases were almost exclusively confined to the prosecution of members of the socialist party in and around the First World War.[75] Most, if not all of the activities for which Socialists were prosecuted at that time, would be permissible today.[76]

Ironically, our discussion of al-Timimi starts with *Schenck v. United States*.[77] While al-Timimi was convicted of speech that incited young Muslim men to participate in armed conflict,[78] Schenck was convicted of pamphleteering to dissuade young men from enlisting in the armed services during World War I.[79] In *Schenck*, the Court refused to apply First Amendment protection to Schenck's speech, stating that, "the character of every act depends upon the circumstances in which it is done" and on the "proximity and degree."[80] Accordingly, the court set down the "clear and present danger" test that would endure for almost 40 years. Advocacy of illegal activity would be protected unless the "words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[81] The time frame for the actual danger in *Schenck*, that someone would read the pamphlet and decide not to enlist, was anywhere from imminent to several months or years. This rule effectively gave the government broad discretion to prosecute speculatively dangerous speech.

After advocacy of illegal action speech had laid dormant for 30 years, four important cases arose from the Communist era in the United States: *Dennis v. United States*,[82] *Yates v. United States*,[83] *Scales v. United States*,[84] and *Noto v. United States*.[85] These cases mark the first time the Supreme Court was willing to give advocacy of illegal acts First Amendment protection, reversing the holdings in the Socialist cases. The Supreme Court defined numerous examples of protected and non-protected activity in these cases, including requisite evidence.

Decided during the heyday of McCarthyism, the Court in *Dennis* upheld the convictions against all of the defendants for violations of the Smith Act.[86] The Court was concerned that the Communists would use the freedom of speech to destroy liberty. Thus, with this fear in mind, the Supreme Court sidestepped the "clear and present danger" test and adopted the test advanced by Chief Judge Learned Hand who wrote for the lower court.[87] Judge Hand wrote, "in each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[88] Once the court concluded that the danger was sufficient, the invasion of free speech was permissible.[89]

Yates was decided in 1957, several years after public support for Senator Joseph McCarthy had withered, thus allowing the Court to decide an advocacy case without the threat of a public backlash fueled by hysteria. In *Yates*, the court emphasized the distinction between "advocacy in the realm of ideas" and the "advocacy of action."[90] "The essential distinction is that the advocate must be urging his or her audience to do something, now or in the future, rather than merely to believe in something."[91] Therefore, abstract advocacy divorced from action would not be punished,[92] while advocacy meant to instigate action, coupled with evil intent, was punishable.[93] Similarly, *Scales* and *Noto* were decided on the same day in 1960 and stand for the same proposition; mere membership alone in an

organization that advocates the violent overthrow of the government cannot be prosecuted.[94] However, "active" participation, unlike "nominal" membership, could be punished.[95]

Brandenburg v. Ohio

In 1969, the Court decided *Brandenburg*, now the seminal case for advocacy of illegal activity. Although the opinion addressed many of the loose ends left dangling from the Communist party advocacy cases, *Brandenburg's* holding and application is still hotly debated today. If nothing else, *Brandenburg* finally overruled the "clear and present danger" test. In *Brandenburg*, a leader of a Ku Klux Klan group was convicted of advocating unlawful action during two separate rallies where he exhorted attendees to commit violence.[96] In striking down Ohio's Criminal Syndicalism Act, the Court declared:

> 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.[97]

In the wake of *Brandenburg*, the line between mere advocacy and advocacy to action is not always clear. Rather than struggle over this distinction, some courts merely declare that the speech concerned is not advocacy and therefore is not protected.[98] However, a common thread does run through all of these advocacy cases: the more the speech moves away from the ethereal world of ideas toward the concrete world of action, the more likely the speech is unprotected by the First Amendment. An equally important corollary is the more imminent or apparent the danger is, the less likely the speech that instigated the danger is protected. Consistent with this proposition, it is worth noting that *Brandenburg* did not explicitly overrule *Dennis* or *Yates* and courts are free to weigh the "gravity" of the danger to facilitate the desired outcome.[99] Adding to this confusion is the fact that there have been various interpretations of what "imminent" means.

There is scant authority for the proposition that someone can be punished simply on the basis of "steeling" speech.

The seminal case on the interpretation of *Brandenburg's* "imminent" requirement is *Hess v. Indiana*.[100] In *Hess*, the defendant was participating in an antiwar demonstration on the campus of Indiana University.[101] In an effort to retain some control over the demonstration, police officers moved the demonstrators off the street onto the sidewalks.[102] It was then that the defendant uttered, "We'll take the fucking streets later."[103] He was promptly arrested for disorderly conduct.[104] The Supreme Court reversed the conviction holding that "the statement amounted to nothing more than advocacy of illegal action at some indefinite future time."[105] Here, the Court clarified the *Brandenburg* test by stipulating that "imminent" means "now" or "immediately." Most courts adhere to the *Hess* Court's narrow interpretation of the *Brandenburg* test,[106] though in *People v. Rubin*,[107] the court held that five weeks constituted imminent danger.[108]

Additionally, as a practical matter, the more specific the speech, the more likely the speech is unprotected. In *Brandenburg*, Brandenburg said, "Bury the [blacks]."[109] Yet, suppose Brandenburg had said, "See that black man over there, go bury him!" In that instance, the speech is advocacy to action and is very close to incitement or solicitation of murder. Though one might think that the "imminency" requirement of *Brandenburg* would limit the speaker's criminal liability, the specificity of the incitement permits the courts to label the speech "non-advocacy" and ignore *Brandenburg* altogether. At this point, the courts turn to evidence of the intent of the speaker and weigh the gravity of the "advocacy to action."

United States v. Rahman

Omar Ahmad Ali Abdel Rahman was tried and convicted for seditious conspiracy, conspiracy and solicitation to the murder of Egyptian President Mubarak, soliciting an attack on American military installations, and bombing conspiracy.[110] Rahman, otherwise known as the "blind sheik," was indeed blind and could only participate in those acts through speech. The government contended that Rahman generally remained at a level above the details of the individual operations, or in other words, he was the ringleader.[111] In *Rahman*, the government introduced speeches previously delivered by the defendant where he instructed his followers to "do *jihad* with the sword, with the cannon, with grenades, with the missile . . . against God's enemies."[112] The crucial evidence proffered by the government was a number of Rahman's conversations taped by law enforcement agencies.[113]

The *Rahman* case is quite similar to the al-Timimi case in that in each case, a Muslim cleric or scholar was prosecuted for soliciting, counseling, aiding, and abetting acts of terrorism. Each of the men were adherents to a fundamental strain of Islam that not only advocated *jihad*, but believed that *jihad* was obligatory.[114] In each case, the government introduced the defendant's public speeches to demonstrate motive. However, the similarities end there. Rahman had attained the level of *Grand Mufti*, able to render *fatwa* opinions; al-Timimi had not. Rahman authorized all of his directives by issuing the requisite *fatāwa*,[115] whereas al-Timimi had to rely on other Muslim scholars for religious rulings. Rahman was in constant communication with his co-conspirators, giving them direction at every turn.[116] Al-Timimi was a distant observer of the *Khan* defendants and hardly knew them.[117] Rahman had an agenda of terrorism,[118] in contrast to al-Timimi who was simply giving guidance to his followers. Despite these differences, the government used the *Rahman* trial as a template to prosecute al-Timimi.

Analysis

There are a number of factors present in the *Al-Timimi* case that tend to move al-Timimi's speech toward the protected sphere of *Brandenburg*.

Ringleader

The allegation that al-Timimi was the Virginia *jihad* network ringleader was a crucial part of the government's case vis-à-vis the First Amendment. Yet, just as the defendant in *Brandenburg* disassociated from the attendees at the KKK rally, al-Timimi advocated at a distance from his co-defendants.

No evidence exists that al-Timimi was the Virginia *jihad* network ringleader. The prosecutor elicited testimony from the *Khan* defendants that al-Timimi was well respected and answered many of their questions concerning Islam. However, al-Timimi was not a *Grand Mufti* and he had to rely on other more established Muslim scholars for their *fatāwa*. Al-Timimi merely relayed these *fatāwa* to all members of the Center. In fact, the government pointed out the fact that al-Timimi brought the al-Uqla *fatwa* to the September 16 meeting at Kwon's house.[119] Testimony was introduced that al-Timimi gave the written *fatwa* to Masoud Khan with the instructions to burn it after reading it.[120] Rather than supporting the prosecution's allegations that al-Timimi was a ringleader, this incident demonstrates that al-Timimi was obligated to follow the Islamic rulings of other clerics. Instead of being a ringleader, al-Timimi was a low-ranking Muslim scholar who acted as a messenger between other *muftis* and the Muslims at the Center.

Aiding and Abetting

The is little doubt that al-Timimi gave the *Khan* defendants a wide variety of advice on Islamic matters. Moreover, there is no reason to doubt the testimony of Kwon and Hasan, both of whom corroborated the fact that al-Timimi gave them information specifically intended to facilitate their criminal objective – travel to Pakistan. The problem is that everything al-Timimi said to them was information that anybody could have given them.[121] Additionally, aiding and abetting can take the form of "steeling [one] to such action,"[122] and a case can be made that al-Timimi did in fact steel some of the *Khan* defendants to action. After the September 16 meeting, Kwon and Hasan immediately purchased airline tickets to travel to Pakistan on September 20.[123] Al-Timimi met with Kwon and Hasan on September 19 for lunch.[124] It is alleged that al-Timimi discussed their plans and gave them more advice.[125] Admittedly, this meeting smacks of "steeling [a group] to such action." However, rarely in this country's history has a defendant been prosecuted for merely steeling one to an action that they have already decided to do.

Solicitation

Solicitation can only happen before the recipient-doer has formed the intent to commit the crime.[126] This is especially important for al-Timimi's case because if the *Khan* defendants formed the intent to travel to the LET camps prior to the September 16 meeting, then al-Timimi cannot be legally prosecuted for incitement, which is criminalized as solicitation. There are several factors that could support this conclusion: several of the Khan defendants had already traveled to the LET camps and there has been no assertion that they were prompted by al-Timimi; the hostile reaction to the Muslim community after 9/11;[127] and the fact that several of the Khan defendants had already purchased cold weather camouflage jackets from Cabela's before the September 16 meeting.[128] If so, then al-Timimi's speech merely added to their resolve, it did not precipitate it.

While al-Timimi is undoubtedly a devout adherent to his faith who fully expected that his advice be followed, al-Timimi had no personal stake in the *Khan* defendants' endeavors to take up *jihad*. Furthermore, al-Timimi rarely provided specific details about the manner in which someone might follow his advice. While Rahman exhorted specific acts from his followers, such as executing Egyptiona President Mubarak and bombing the United Nations building,[129] al-Timimi in a more general way, advised the Khan defendants to take up the defense of Muslims, regardless of who was oppressor.[130]

If the *Khan* defendants did indeed form the intent to take *jihad* before the September 16 meeting, then al-Timimi could be convicted based on "steeling"[131] them to action at the meeting itself. However, al-Timimi did not engage in any instructional speech that could constitute overt physical acts of aiding and abetting the *Khan* defendants. Furthermore, as stated earlier, there is scant authority for the proposition that someone can be punished solely on the basis of "steeling" speech.

Imminent Lawless Action

Imminent lawless action under *Brandenburg* evolved with the realization that anyone can be incited to lawless action in the heat of the moment. While it may be conceded that al-Timimi did in fact exert significant influence over the *Khan* defendants, in a two-hour meeting, al-Timimi likely did not exert sufficient influence over these men to have them abandon their lives here in the United States, travel to foreign lands, wait for several weeks in a foreign land, obtain military training for another several weeks, and then potentially sacrifice their lives waging *jihad*. Kwon testified that he and Hasan spent the first two weeks in Pakistan at Hasan's uncle's house where they passed the time by shopping and taking in the sights.[132] Clearly their actions were far from imminent.

Conclusion

When the United States began to zealously prosecute terrorists after 9/11, instead of success, the government encountered numerous problems prosecuting terrorists. Against this backdrop, the trials of *Khan* and *Al-Timimi* unfolded. Emboldened by its success in the *Khan* trial, the government went after the *Khan* defendant's spiritual leader, al-Timimi. With their full might, the FBI and the Department of Justice rapidly descended

upon al-Timimi. The lead prosecutor used every opportunity to portray al-Timimi as a religious zealot with links to terrorism who ordered his mindless devotees to take up *jihad* against United States soldiers.

The facts speak for themselves. Al-Timimi was not the Virginia *jihad* network ringleader, but rather a revered Muslim scholar at the Center, who counseled on Islamic matters. Before 9/11, the *Khan* defendants readied themselves for *jihad* by playing paintball, while two of the *Khan* defendants bolstered their skills by traveling to Pakistan and training with live weapons at terrorist camps. These men may have gotten the idea of *jihad* from al-Timimi, but they decided to prepare for *jihad* on their own. After 9/11, the *Khan* defendants were primed and ready. At the September 16, 2001, meeting, had al-Timimi stated that waging *jihad* was not Islamically permissible, likely none of the *Khan* defendants would have proceeded. Yet, the tenor of al-Timimi's speeches on *jihad* was consistent: he believed that *jihad* was *fard ayn*. That message did not suddenly change after 9/11. Furthermore, it was al-Timimi's position that the Qur'an made no exceptions for the United States.

This was a close case. The jury deliberated for seven days, but there was little chance they would be able to comprehend and apply *Brandenburg* correctly, given the hot debate among learned legal scholars. Yet, there are a number of factors that should have categorized al-Timimi's speech as protected under *Brandenburg*. Al-Timimi usually spoke in generalities, he gave the *Khan* defendants choices regarding *jihad*, and he merely answered questions about Islamic permissibility. Al-Timimi advocated ideas based on his religious beliefs, regardless of whether his speech was likely to prompt action. Furthermore, each of the *Khan* defendants waited weeks before they actually participated in terrorist camp training, indicating the lack of imminence. Yet, these vital facts to this case become negligible if the courts simply declare that al-Timimi's speeches are not advocacy and therefore *Brandenburg* does not apply. There is nothing to stop this course of action. If this occurs, the First Amendment protection of free speech will be derogated.

NOTES

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[1] Presentencing Report for Muhammed Aatique at 17, United States v. Khan, (No. 03-296-A).
[2] *Id.*
[3] Transcripts, Pleading 123, Rebuttal Argument by Mr. Kromberg at 14, United States v. Al-Timimi, (No. 1:04cr385).
[4] Superceding Indictment, United States v. al-Timimi, (No. 1:04cr385), *available at* http://www.altimimi.org.
[5] List Of Entered Government's Exhibits, United States v. Al-Timimi (No. 1:04cr385).
[6] Transcripts, Testimony of Evan Kholman, John Miller, Robert Andrews, United States v. al-Timimi (No. 1:04cr385).
[7] Transcripts, Testimony of Yong Ki Kwon, Muhammed Aatique, Khwaja Mahmood Hasan, United States v. al-Timimi, (No. 1:04cr385).
[8] Jerry Markon, *10 Years For Man Who Aided Jihad Probe*, WASH. POST, December 18, 2003, A20.
[9] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 46, United States v. Al-Timimi, (No. 1:04cr385).
[10] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 5-11, United States v. Al-Timimi, (No. 1:04cr385).
[11] *Crime and Justice*, WASH. POST, April 26, 2005, B2; Jury Instructions, United States v. Al-Timimi, (No. 1:04cr385).
[12] Jerry Markon, *Muslim Leader Is Found Guilty*, WASH. POST, April 27, 2005, A1.
[13] Jerry Markon, *Va. Muslim Lecturer Sentenced To Life*, WASH. POST, July 14, 2005, B1.
[14] No. 1:04cr385.
[15] 309 F. Supp. 2d 789 (D. Va. 2004).
[16] 189 F.3d 88 (2d Cir. 1999).
[17] About Ali al-Timimi, http://www.altimimi.org. Al-Timimi's full biography and many of his lectures can be found on this website. Also available on the website are numerous court motions written by his defense counsel.
[18] Mujahideen is an Islamic term for Muslim "holy-warriors." The Afghan mujahideen were loosely-aligned opposition groups that fought against the Soviet invasion of Afghanistan. "Mujahideen", en.wikipedia.org/wiki/mujahideen (11/27).
[19] Khan, 309 F. Supp. 2d at 802.
[20] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, WASH. POST, October 2, 2003, A1. An investigation in Idaho resulted in the prosecution of Sami Omar Hussayen, the nephew of a minister in the Saudi government who has tenuous connections with numerous Saudi-funded charities with links to terrorist groups. Sami Hussayen was recently acquitted of all charges based on a First Amendment defense.
[21] Jerry Markon, *Va. Jihad Case Opens Against Muslim Men*, WASH. POST, Feb. 10, 2004, at B1.
[22] 309 F. Supp. 2d 789 (D. Va. 2004).
[23] *Id.* at 795.
[24] *Id.* at 794, 802.
[25] *Id.* at 803.
[26] *Id.*
[27] *Id.* at 816; Transcript, Pleading 97, Testimony of Yong Ki Kwon at 27, United States v. al-Timimi, (No. 1:04cr385).
[28] Transcript, Opening Statement by Mr. Kromberg at 7-9, United States v. Al-Timimi, (No. 1:04cr385).
[29] *Id.* at 14.
[30] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 41, United States v. Al-Timimi, (No. 1:04cr385).
[31] *Id.*
[32] Khan, 309 F. Supp. 2d at 810-11.
[33] *Id.*
[34] Transcript, Opening Statement by Mr. Kromberg at 12, United States v. Al-Timimi, (No. 1:04cr385).
[35] *Id.*
[36] Khan, 309 F. Supp. 2d at 810-27.
[37] *Id.* at 811.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Khan, 309 F. Supp. 2d at 796. All the defendants were found guilty, yet in a post-trial motion for acquittal, all counts against Caliph Basha Ibn Abdur-Raheem were dismissed.
[42] Jerry Markon, *Judge Acquits Final Defendant In 'Virginia Jihad' Investigation*, WASH. POST, March 10, 2004, B8.
[43] Superceding Indictment, United States v. al-Timimi, (No. 1:04cr385), *available at* http://www.altimimi.org; Government's Response to Defendant's Supplemental Pre-Trial Motions, United States v. al-Timimi, (No. 1:04cr385).
[44] *Id.*
[45] Transcripts, Pleading 97, Testimony of Yong Ki Kwon at 5, United States v. Al-Timimi, (No. 1:04cr385); *See also* Transcripts, Pleading 123, Rebuttal Argument by Mr. Kromberg at 6, United States v. al-Timimi, (No. 1:04cr385).
[46] *Id.* at 43.
[47] Khan, 309 F. Supp. 2d at 803.
[48] Transcripts, Testimony of Yong Ki Kwon, Pleading 97 at 45, United States v. Al-Timimi, (No. 1:04cr385).
[49] Khan, 309 F. Supp. 2d at 803.

[50] Kwon April 11th cross at 56, , United States v. Al-Timimi, (No. 1:04cr385).
[51] Motion In Limine Regarding The Government's Unsupported And Prejudicial Claim That The Defendant Expressed Approval For The Events Of September 11, 2001 at 1-3, United States v. al-Timimi, (No. 1:04cr385).
[52] *Id.* at 4.
[53] *Id.* At 2-3.
[54] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 41, United States v. Al-Timimi, (No. 1:04cr385).
[55] *Id.* at 46.
[56] *Id.* at 51.
[57] *Id.* at 53; Transcript, Pleading 117, Testimony of Khwaja Mahmood Hasan at 10, United States v. al-Timimi, (No. 1:04cr385).
[58] Motion For Access To Certain Detainees in Guantanamo, Cuba, United States v. al-Timimi, (No. 1:04cr385).
[59] *Id.*
[60] Memorandum Of Points And Authorities in Support Of Defendant Randall Royer's Motion For Show Cause Hearing And Protective Hearing, Tech Cut 6 and 7, United States v. Khan, (No. 03-296-A).
[61] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 5, United States v. Al-Timimi, (No. 1:04cr385). The al-Uqla fatwa ruled that the Taliban is a proper Shariah Government. Fatwa of Sheikh Hamoud bin Al Uqla on the Taliban, *at* http://www.sunniforum.com.
[62] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 6, United States v. Al-Timimi, (No. 1:04cr385).
[63] *Id.* at 8.
[64] Transcript, Pleading 117, Testimony of Khwaja Mahmood Hasan at 11, United States v. Al-Timimi, (No. 1:04cr385).
[65] Khan, 309 F. Supp. 2d at 810-11.
[66] *Id.*
[67] Transcript, Opening Statement by Mr. Kromberg at 12, United States v. Al-Timimi, (No. 1:04cr385).
[68] Presentencing Report for Muhammed Aatique at 16, United States v. Khan, (No. 03-296-A).
[69] Transcript, Opening Statement by Mr. Kromberg at 13, United States v. Al-Timimi, (No. 1:04cr385).
[70] *Id.*
[71] List Of Entered Government's Exhibits at 6, United States v. Al-Timimi (No. 1:04cr385).
[72] Presentencing Report for Muhammed Aatique at 17, United States v. Khan, (No. 03-296-A).
[73] *Id.* at 17-18.
[74] Transcript, Opening Statement by Mr. Kromberg at 14, United States v. Al-Timimi, (No. 1:04cr385).
[75] Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1918); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927).
[76] Schenck (denying First Amendment protection to anti-war pamphleteering); Debs (denying First Amendment protection to anti-war and anti-government speech); Abrams (denying First Amendment protection to those who urged curtailment of war production); Gitlow (denying First Amendment protection to distribution through the mail of the "Left Wing Manifesto," which advocated militant and revolutionary Socialism); Whitney (denying First Amendment protection to organizing the Communist Labor Party of California).
[77] 249 U.S. 47 (1919).
[78] Superceding Indictment, United States v. Al-Timimi, (No. 1:04cr385), *available at* http://www.altimimi.org.
[79] Schenck, 249 U.S. at 49.
[80] *Id.* at 52.
[81] *Id.* at 52.
[82] Dennis v. United States, 341 U.S. 494, 498 (1951).
[83] Yates v. United States, 354 U.S. 298 (1957).
[84] Scales v. United States, 367 U.S. 203 (1961).
[85] Noto v. United States, 367 U.S. 290 (1961). All of the Communist era cases evolve from violations of the 1946 Smith Act, which is still codified today at 18 U.S.C.A. § 2385, entitled Advocating Overthrow of Government.
[86] Dennis, 341 U.S. at 517.
[87] *Id.* at 510
[88] *Id.* at 510.
[89] *Id.* at 511.
[90] Yates, 354 U.S. at 320.
[91] *Id.* at 324-25.
[92] *Id.* at 319.
[93] *Id.* at 319.
[94] Scales, 367 U.S. at 220; Noto, 367 U.S. at 291-92.
[95] Scales, 367 U.S. at 221-223
[96] Brandenburg, 395 U.S. at 444-45 (Brandenberg's statements included: "Send the Jews back to Israel" and "a dirty nigger").
[97] *Id.* at 447.
[98] See United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978) (holding that even though the tax reform speeches did not meet the imminency requirement of Brandenburg, the speeches went beyond advocacy and therefore were not entitled to First Amendment protection)
[99] "Tax evasion is a wrong of such sufficient gravity that Congress can punish incitement to the crime." Freeman, 761 F.2d at 552.
[100] 414 U.S. 105 (1973).
[101] Hess, 414 U.S. at 106.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 107.
[105] *Id.* at 108.
[106] See Ashcroft v. Free Speech Coalition, 535 U.S. 234 (U.S. 2002) (holding that the argument that virtual child pornography wets pedophiles' appetites and encourages them to engage in illegal conduct is unavailing because the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it, absent some showing of a direct connection between the speech and imminent illegal conduct); James v. Meow Media, Inc. 300 F.3d 683 (6th Cir. 1989) (rejecting wrongful death claim against maker of a violent video game).
[107] 96 Cal. App. 3d 968 (Ct. App. 1979).
[108] Rubin, 96 Cal. App. 3d at 979.
[109] Brandenburg, 395 U.S. at 446 (offensive words substituted).
[110] Rahman, 189 F.3d at 103.
[111] *Id.* at 104.
[112] *Id.*
[113] *Id.* at 117.
[114] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 8, United States v. Al-Timimi, (No. 1:04cr385); Rahman, 1897 F.3d at 124.
[115] Rahman, 1897 F.3d at 104.
[116] *Id.* at 104.
[117] *See* Transcripts, Pleading 117, Testimony of Khwaja Mahmood Hasan, United States v. Al-Timimi, (No. 1:04cr385); Transcript, Pleading 97 and 98, Testimony of Yong Ki Kwon, United States v. Al-Timimi, (No. 1:04cr385).
[118] Rahman, 189 F.3d at 104-112 ("The Government's Case").
[119] Transcripts, Pleadings 117, Testimony of Khwaja Mahmood Hasan at 13, United States v. Al-Timimi, (No. 1:04cr385).
[120] *Id.* at 14.
[121] Al-Timimi told them to carry a magazine, act normal, and if stopped, then cry like a baby or ask for a lawyer. *See* Transcript, Pleading 98, Testimony of Yong Ki Kwon at 23, United States v. Al-Timimi, (No. 1:04cr385)
[122] Brandenburg, 395 U.S. at 448.
[123] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 19-23, United States v. Al-Timimi, (No. 1:04cr385).
[124] *Id.* at 22-23.
[125] *Id.* at 23.
[126] *See e.g.,* U.S. v. Razo-Leora, 961 F.2d 1140 (5th Cir. 1992); Pope v. State, 587 So. 2d 1278 (Ala. Crim. App. 1991); *see also* People v. Hood, 878 P.2d 89 (Colo. Ct. App. 1994); Pope v. State, 587 So. 2d 1278 (Ala. Crim. App. 1991); People v. Vandelinder, 192 Mich. App. 447, 481 N.W.2d 787 (1992) (holding that evidence of the circumstances surrounding the act of solicitation must be presented, to show the solicitation was done with the intent to promote or facilitate commission of the crime solicited.).
[127] Phuong Ly, *Montgomery Steps Up Its Fight Against Hate,* WASH. POST, October 3, 2001, B4.
[128] Kwon cross at 73, United States v. al-Timimi, (No.1:04cr385).
[129] Rahman, 189 F.3d at 117.
[130] 2 *See* Transcripts, Pleading 98, Testimony of Yong Ki Kwon at 6, *United* States v. Al-Timimi (No. 1:04cr385).
[131] Brandenburg, 395 U.S. at 448
[132] Kwon April 7 cross at 160, United States v. Al-Timimi, (No. 1:04cr385). This testimony reinforces my contention that the Khan defendants considered their trips to Pakistan as exotic adventure travel.