

Combatting Terrorism in a Digital Age: First Amendment Implications

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As of April 2016, Facebook had 1,590 million active users, Twitter had 320 million active users, and Instagram had 400 million active users.¹ The integration of social media into our daily lives has provided a quick mechanism for users to communicate and disseminate information internationally through a variety of outlets. However, as the number of people that use social media increases, there is also an increase in the “number of people that can engage in unmediated communication, which increases the probability of incendiary speech.”² With social media hate groups are able to expand vastly by relying on digital propaganda to spread their messages of hate and normalize violence.³

Foreign terrorist organizations such as the Islamic State of Iraq and Syria (ISIS), exploit social media to send messages out to their potential and current supporters throughout the world.⁴ In response to the adoption of social media by terror groups to communicate with members and proponents internationally, European Union nations such as France and Germany have passed legislation that blocks pro-terrorist websites and holds information service providers (“ISPs”) subject to prosecution if they provide access to hate speech sites.⁵ Attempts

¹ Leading social networks as of April 2016, ranked by number of active users (in millions), Statista: The Statistics Portal, *available at* <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Apr. 23, 2016).

² Lyrisa Barnett Lidsky, Incendiary Speech and Social Media, 44 **Tex. Tech. L. Rev.** 147, 149 (2011).

³ Id.

⁴ Fields v. Twitter, Inc., No. 3:16-cv-00213, 2016 WL 159948 at ¶ 2 (N.D. Cal. 2016) (Complaint).

⁵ Steven G. Gey, Fear of Freedom: The New Speech Regulation in Cyberspace, 8 **Tex. J. Women & L.** 183, 191 (1999); Amanda Goodman, Blocking Pro-Terrorist Websites: A Balance Between Individual Liberty and National Security in France, 22 **Sw. J. Int'l L.** 209, 229 (2016).

to regulate terrorism on social media have been less welcomed in the United States, where the “guaranty of freedom of speech is one of the most revered cornerstones” of society.⁶

As the Federal Government has urged social media companies to remove pro-terrorist posts on their websites, free speech advocates have opposed these requests, asserting a violation of the First Amendment. Courts have often held that the Federal Government’s efforts to restrict speech during wartime are entitled to greater deference, as acts of terrorism pose a “clear and present danger of a substantive evil.”⁷ However, the White House has stated that their requests for social media companies to remove posts are “confined only to extraordinary circumstances,” thereby limiting the scope in which such authority is exercised.⁸ As the war on terrorism has intensified, legislators have introduced bills that would require social media companies to cooperate with the government's requests to report terrorist propaganda,⁹ but the potential First Amendment implications of doing so have pushed the majority of lawmakers to withdraw support for such legislation.

The First Amendment prohibits Congress from passing legislation “abridging the freedom of speech,”¹⁰ which, in turn, encourages a right to free expression that extends far beyond that of many other nations.¹¹ This right has expanded greatly through the birth of the Internet and the increased use of social media, as more people are able to engage in

⁶ Michael Kahn, The Origination and Early Development of Free Speech in the United States A Brief Overview, **Fla. B.J.** at 71 (Oct. 2002).

⁷ Emily Godberg Knox, The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists, 66 **Hastings L.J.** 295, 324 (2014).

⁸ Mohamed H. Aziz, Counter Terrorism Measures Via Internet Intermediaries: A First Amendment & National Security Dilemma, 4 **J.L. & Cyber Warfare** 1, 4 (2015).

⁹ Combat Terrorist Use of Social Media Act of 2015, H.R. 3654, 114th Cong. § 2 (2015).

¹⁰ U.S. Const. amend. I.

¹¹ Lieutenant Colonel Eric M. Johnson, Examining Blasphemy: International Law, National Security and the U.S. Foreign Policy Regarding Free Speech, 71 **A.F. L. Rev.** 25, 44 (2014) (“The United States has amore liberal view of the freedom of expression than most other countries.”).

unmediated, anonymous communication across all seven continents.¹² Although the increase in dissemination of information is considered to be a positive outcome of social media, it also amplifies the "probability of incendiary speech," thereby increasing the likelihood of speech to cause violence.¹³

In particular, terror groups have looked to social media as a way to distribute propaganda, gaining the support "of primarily vulnerable and marginalized groups with appeals to sentiments of injustice, exclusion, and humiliation."¹⁴ As groups such as ISIS grow through social media, the need to protect national security from these impeding threats has continued to clash with the preservation of individual liberties guaranteed by the Bill of Rights. Thus, the Government has been faced with addressing "the fine line between vital national security concerns and forbidden encroachments on constitutionally protected freedoms of speech and association."¹⁵

Part I of this article will begin with an evaluation of proposed and passed legislation at the federal and state levels, that prohibits conduct in support of acts of terrorism. Next, this article will discuss the contexts in which the regulation of free speech is permissible and when such regulation has infringed upon the First Amendment. From there, the regulation of free speech in social media will be established in an examination of recent cases. The discussion will then transition to cases in which the courts have been required to balance the government's interest in protecting national security while also preserving an individual's constitutional rights.

¹² Lidsky, *supra* note 2 at 149.

¹³ *Id.*

¹⁴ Aziz, *supra* note 8 at 2.

¹⁵ United States v. Mehanna, 735 F.3d 32, 40 (1st Cir. 2013).

Part II of this article will focus on the validity of legislation requiring social media platforms to remove pro-terrorist posts, as directed by the Federal Government, through a content-based free speech analysis. This analysis will examine how the Government could evade Section 230 immunity, which protects Internet companies from liability for its users' postings, by asserting the imminent importance of national security. The analysis will then focus on a First Amendment strict scrutiny analysis. The urgency of protecting national security will then be contrasted with potential First Amendment implications imposed by such legislation. Lastly, this article will discuss how the government may reconcile the different issues at stake.

I. Social Media and the First Amendment

A. Current and Potential Legislation to Combat Terrorism on Social Media

The Material Support statute “ha[s] been at the heart of the Justice Department’s terrorist prosecution efforts” since 9/11.¹⁶ Section 2339A of the statute establishes that:

“Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or carrying out, a violation of [lists various terrorist activity statutes] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title...”¹⁷

Section 2239B provides that:

¹⁶ U.S. Congressional Research Service. Terrorist Material Support: A Sketch of 18 U.S.C. 2239A and 2339B (R41334; July 19, 2010), by Charles Doyle.

¹⁷ 18 U.S.C. § 2339A(a).

“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title...To violate this paragraph, a person *must have knowledge* that the organization is a designated terrorist organization...or that the organization has engaged or engages in terrorism.”¹⁸

“Material support or resources” has been broadly defined as “any property, tangible or intangible, or service,”¹⁹ and Congress has stated that material support includes “currency...training...advice.”²⁰ Courts have interpreted the broad definition of “material support” to encompass certain types of speech as well.²¹ However, even if prohibiting speech under the Material Support statute is permissible, that alone will not necessarily push social media platforms to comply with government requests to remove pro-terrorist content because of the immunity they receive through Section 230 of the Communications Decency Act (“CDA”).²² Section 230 provides that:

“No provider or user of an interactive computer service shall be treated as the publisher or speaker of *any* information provided by another information content provider.”²³

Under Section 230, internet service providers that display or publish speech on their websites are protected from both criminal and civil liability for what their users say and do.²⁴

This broad shield against many laws, including the First Amendment, has enabled “innovation

¹⁸ 18 U.S.C. §2339B(a).

¹⁹ 18 U.S.C. §2339A(b).

²⁰ Id.

²¹ Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).; Mehanna, 735 F.3d at 48.

²² 47 U.S.C. §230.

²³ 47 U.S.C. §230(c)(1).

²⁴ 47 U.S.C. §230(e)(3) (barring liability imposed under State or local laws).

and free speech online to flourish.”²⁵ Although most other nations do not have laws like Section 230, many have enacted legislation that explicitly prohibits pro-terrorist speech on the Internet. Both Germany and France have the authority to hold ISPs subject to prosecution if they are found to have provided Internet access to hate speech websites.²⁶ In furtherance of its efforts to mitigate hate speech, France has additionally enacted a decree that blocks pro-terrorist websites.²⁷

Although the U.S. has yet to enact federal legislation that expressly prohibits pro-terrorism speech on the Internet, states have already taken steps to regulate this type of speech within their own boundaries. For example, in 2016 the Indiana Senate introduced its Counterterrorism bill which makes it a felony for a “terrorist associated person” to “publish a communication on a social media web site.”²⁸ Furthermore, this bill imposes criminal liability on a telecommunications provider or social media web site owner that fails to “block a communication from a terrorist associated person within five days of being notified by law enforcement.”²⁹ The constitutionality of this bill and similar bills has yet to be determined.

As heightened awareness of terror groups such as ISIS spreads throughout the country, federal lawmakers are contemplating legislation to combat these groups from all angles, including on social media. In 2015, Senators Dianne Feinstein (Democrat, California) and Richard Burr (Republican, North Carolina) introduced the Combat Terrorist Use of Social Media

²⁵ Section 230 of the Communications Decency Act, Electronic Frontier Foundation, *available at* <https://www.eff.org/issues/cda230> (last visited Apr. 25, 2016).

²⁶ Gey, *supra* note 5 at 191.

²⁷ Amanda Goodman, Blocking Pro-Terrorist Websites: A Balance Between Individual Liberty and National Security in France, 22 *Sw. J. Int’l L.* 209, 228-230 (2016).

²⁸ S.B. 283, 119th Gen. Assemb. (Ind. 2016).

²⁹ Id.

Act of 2015,³⁰ which would require social media platforms to alert federal officials about online terrorist activities.³¹ The bill is still under consideration in Congress, and Feinstein is attempting to push it forward to deter terrorist organizations from continuing to use social media as an outlet to recruit members and spread their propaganda internationally.³² Legislation such as Feinstein's may be strengthened if it poses the additional requirement of imposing a duty upon social media companies to remove pro-terrorist content. However, legislation such as this bill may also face criticism for its potential constitutional violations.

B. The Extension of Free Speech Rights

Under the First Amendment of the United States Constitution, "Congress shall make no law...abridging the freedom of speech, or of the press."³³ Freedom of expression is an "essential human freedom" that allows society to freely communicate, voice its opinions, and to withhold speech if it so desires.³⁴ Free speech promotes a "marketplace of ideas," where speakers may exchange ideas, disseminate information, provide entertainment, facilitate self-government, and encourage debate within society.³⁵ Although the First Amendment right to free speech allows speech that may be offensive, disagreeable, or concerning, this right is not absolute. The government can regulate, or even prohibit, conduct if it conveys a message that is not

³⁰ Combat Terrorist Use of Social Media Act of 2015.

³¹ Id.

³² Id.

³³ U.S. Const. amend. I.

³⁴ Johan D. van der Vyver, The Binding Force of Economic and Social Rights Listed in the Universal Declaration of Human Rights, 30 **Hamline J. Pub. L. & Pol'y** 125 (2008).

³⁵ See *generally* Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 **Duke L.J.** 125, 132 (2008).

protected by the First Amendment.³⁶ Unprotected categories of speech include: responsive violence, defamation, obscenity, commercial speech, and true threats.³⁷

The government may regulate speech that incites responsive violence because “[w]hen a speaker makes disorder imminent he forfeits” his rights to free speech.³⁸ This concept was first established in Brandenburg v. Ohio,³⁹ where the Court refused to extend the right of free speech to the advocacy of unlawful conduct.⁴⁰ In this case Brandenburg, a Ku Klux Klan leader, made a speech at Klan rally where he encouraged listeners to act against the government if it continued to suppress the white race.⁴¹ Ohio’s Criminal Syndicalism Act criminalized advocacy of “crime, sabotage, violence or...terrorism as a means of accomplishing industrial or political reform,” and Brandenburg was convicted under the Act.⁴²

Brandenburg set forth a four-part test to determine whether speech advocating unlawful conduct may be permissibly regulated. This test requires the speech at issue to be “directed to inciting or producing imminent, lawless action and likely to incite or produce such [imminent] action.”⁴³ The Court reiterated the importance of imminence under Brandenburg in Feiner v. New York, where Feiner made disparaging remarks during a speech on his college campus, which attracted an angry crowd that reacted violently to Feiner’s words, leading to

³⁶ Aziz, supra note 8 at 12.

³⁷ Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or intend to incite an immediate breach of the peace.”).

³⁸ Lidsky, supra note 2 at 153.

³⁹ 395 U.S. 444 (1969).

⁴⁰ Id. at 447 (“[T]he 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 when such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

⁴¹ Id. at 445.

⁴² Id. at 444; see also Ohio Rev. Code. Ann. § 2923.13.

⁴³ Brandenburg, 395 U.S. at 447.

Feinner's own arrest.⁴⁴ In upholding the lower court's decision to uphold Feiner's arrest for a "breach of the peace," the Supreme Court emphasized that the speech must incite an imminent response in a situation where an imminent violent reaction is likely to occur in order to constitute responsive violence.⁴⁵

The Court again refused to extend the right to free expression in Virginia v. Black,⁴⁶ where the burning of a cross was found to be a true threat, as hate speech only requires an "intent to intimidate."⁴⁷ In its holding, the Court explained that it is likely that a jury will always find an intent to intimidate through burning a cross, and thus the limitations of First Amendment protection were further established.⁴⁸ The criteria set forth in Brandenburg and Black have provided a potential mechanism for the government to regulate social media posts promoting terrorism, as the content could either: encourage viewers to engage in terrorist attacks (responsive violence); or foreshadow deadly attacks, threatening the safety of viewers (true threat). However, the applicability of the aforementioned cases to social media has yet to be firmly established, as the line between circumstances when free speech is protected and when it is not has been blurred over time.

For example, National Socialist Party of America v. Village of Skokie demonstrated when a First Amendment restriction stepped too far in regulating the time, place, and manner of speech.⁴⁹ Skokie, Illinois, is a village with a vast Jewish population consisting of many who

⁴⁴ Feiner v. New York, 340 U.S. 315, 316-18 (1951).

⁴⁵ Id. at 325.

⁴⁶ 538 U.S. 343 (2003).

⁴⁷ Id. at 365.

⁴⁸ Id.

⁴⁹ National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977) ("If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards.").

survived the Nazi concentration camps.⁵⁰ The leader of the Nazi Party of America informed Skokie's chief of police that the party intended to march through the Village.⁵¹ The permit request was denied by the Village and subsequently appealed by the Nazi Party.⁵² Displaying the swastika symbol and marching through Skokie were considered to be acts protected by the First Amendment, so the court held this to be an impermissible restriction on free speech.⁵³ The reasoning behind the holding suggested that if Skokie residents did not wish to see the parade, they could simply choose not to watch.

C. First Amendment Rights Online

Social media platforms embody the principles on which the First Amendment was built, as they provide "an increasingly influential medium of communication" that "facilitates unprecedented levels of expression and the exchange of ideas."⁵⁴ The Internet is a "borderless medium,"⁵⁵ that empowers users "to evade governmental efforts to suppress hostile ideas,"⁵⁶ by using social media as a mechanism to post the content of their choosing. Although social media thrives on the exercise of free speech, when posts step beyond the realm of speech which is protected by the First Amendment, these companies may face potential liability for such content.

⁵⁰ Id. at 43.

⁵¹ Id.

⁵² Id.

⁵³ Id. at 44.

⁵⁴ Aaron D. White, Crossing the Electronic Border: Free Speech Protection for the International Internet, 58 **DePaul L. Rev.** 491, 492 (2009).

⁵⁵ Susanna Bagdasarova, The Brave New World: Challenges in International Cybersecurity Strategy and the Need for Centralized Governance, 119 **Penn St. L. Rev.** 1005, 1012 (2015).

⁵⁶ Gey, *supra* note 5 at 185.

Social media companies and other ISPs are able to shield themselves from such liability through Section 230 of the CDA.⁵⁷ The CDA establishes that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁵⁸ In other words the CDA protects internet service providers from both criminal and civil liability for content that is posted by users of their site, thus allowing freedom of expression to reach its maxims online. This avoidance of third party liability, often referred to as "Section 230 immunity," helps to "maintain [the] robust nature of Internet communication and, accordingly...keep government interference therein to a minimum."⁵⁹

Zeran v. America Online, Inc.,⁶⁰ was one of the first cases to uphold an ISP's Section 230 immunity. In this case, an unidentified third party posted a message on America Online's ("AOL") bulletin board advertising shirts with "offensive and tasteless slogans" in reference to the Oklahoma City bombing that took place a few days prior to the posting.⁶¹ The post provided Zeran's home phone number and, as a result, he received numerous angry calls and messages, which even included death threats.⁶² Zeran demanded that AOL remove the post and issue a retraction but AOL only complied with the former request, asserting that posting a retraction would violate the company's policy.⁶³ The unidentified person continued to post similar messages with Zeran's phone number for five days, amplifying the volume and intensity of

⁵⁷ 47 U.S.C. § 230.

⁵⁸ §230 (c)(1).

⁵⁹ Zeran v. America Online, 129 F.3d 327, 330 (4th Cir. 1997).

⁶⁰ 129 F.3d 327 (4th Cir. 1997).

⁶¹ Id. at 329.

⁶² Id.

⁶³ Id.

threatening calls, thereby requiring him to have local police survey his home for protection.⁶⁴ Zeran then filed suit against AOL for the defamatory postings and the harm he suffered as a result.

The Fourth Circuit rejected Zeran's claim under the notion that AOL was protected from such liability through the CDA.⁶⁵ The court noted that interactive computer services have millions of users who communicate vast amounts of information, making it extremely difficult for providers to screen posts for potential problems.⁶⁶ For these reasons, the court concluded that, if service providers such as AOL were to be held liable for posts made by third parties, "[t]he specter of tort liability in area of such prolific speech would have an obvious chilling effect."⁶⁷

The First Circuit reached a similar holding in Jane Doe No. 1 v. Backpage.com, LLC,⁶⁸ where victims of sexual trafficking filed suit against a classified advertisement website, alleging that Backpage engaged in the sex trafficking of minors through allowing such conduct to take place on their website.⁶⁹ Despite the court's acknowledgment that it was "deny[ing] relief to plaintiffs whose circumstances evoke outrage,"⁷⁰ it held that Backpage was shielded by Section 230 immunity, with support from other courts that "rejected claims...to hold website operators liable for failing to provide sufficient protections to users from harmful content created by others."⁷¹

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Zeran v. America Online, 129 F.3d 327, 332 (4th Cir. 1997).

⁶⁷ Id. at 331.

⁶⁸ Jane Doe No. 1 v. Backpage.com, LLC, No. 15-1724, 2016 WL 963848 (Mar. 14, 2016).

⁶⁹ Id. at *2.

⁷⁰ Id. at *1.

⁷¹ Id. at *6.

Whether the CDA will shield ISPs from liability for pro-terrorist posts by third parties is an issue that may be addressed by Fields v. Twitter, Inc.⁷² Tamara Fields brought suit on behalf of her husband, a U.S. government contractor, who was murdered by a member of ISIS during his lunch break at the International Police Training Center in Jordan.⁷³ In the Complaint, Fields asserted how Twitter has, not only allowed ISIS to "spread propaganda and incite fear," but also "refused to take any meaningful action" to deter ISIS and other such groups from disseminating pro-terrorist information.⁷⁴ Fields' claim is derived from the Material Support statute, which makes it a federal crime to provide support to an organization in "the preparation and carrying out of acts of international terrorism,"⁷⁵ and to provide support for terrorist crimes with the intent of promoting terrorism.⁷⁶

D. Individual Liberties in the Face of National Security Threats

Constitutional Framers James Madison acknowledged one of the primary difficulties in writing the Constitution as "combining the requisite stability and energy in Government, with the inviolable attention due to liberty, and to Republican form."⁷⁷ As Madison foresaw, the preservation of individual liberties is often threatened when national security is at risk. For example, in Dennis v. United States,⁷⁸ the Supreme Court upheld the government's decision to sanction speech when "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁷⁹ The "evil" in Dennis was

⁷² No. 3:16-cv-00213, 2016 WL 159948 (N.D. Cal.) (Jan. 13, 2016) (Complaint).

⁷³ Id. at ¶ 71.

⁷⁴ Id. at ¶ 30.

⁷⁵ Id. at ¶¶ 80-81; see also 18 U.S.C. §2339A.

⁷⁶ Fields, 2016 WL 159948 at ¶¶ 83-85; 18 U.S.C. §2339B.

⁷⁷ The Federalist No. 37, at 226 (James Madison).

⁷⁸ 341 U.S. 494 (1951).

⁷⁹ Id. at 509.

members of the Communist party who advocated for the overthrow or destruction of the United States government in the post-World War II era.⁸⁰ The interest of the plaintiffs in freely advocating for the overthrow of the government was outweighed by the government's interest in protecting national security during a time when it was most fragile.⁸¹

Nearly sixty years later the Court again addressed the delicate balance between national security and individual freedom in Holder v. Humanitarian Law Project.⁸² In this case, American citizens and domestic organizations were providing support to organizations that had been designated as "foreign terrorist groups."⁸³ The plaintiffs' conduct was applied to the Material Support statute, and they were found to be in violation of Section 2339B.⁸⁴ The plaintiffs argued that, because they were only providing support to the organizations for their lawful activities, Congress was banning their "pure political speech," in violation of the First Amendment.⁸⁵ The Court rejected this argument in addressing whether the federal government could prohibit the plaintiffs from providing material support to the FTOs in the form of speech.⁸⁶ Because the government's "interest in combating terrorism is an urgent objective of the highest order," the Court held that Congress permissibly banned the proposed speech because it was "in coordination with foreign groups that the speaker knows to be terrorist organization," and thus no First Amendment violation took place.⁸⁷

⁸⁰ Id.

⁸¹ Id. at 545.

⁸² 561 U.S. 1 (2010).

⁸³ Id. at 2.

⁸⁴ Id.

⁸⁵ Id. at 26.

⁸⁶ Id.

⁸⁷ Id. at 28.

The validity of the Material Support statute under the First Amendment was reviewed again in United States v. Mehanna,⁸⁸ where the defendant was accused of providing support to al-Qa'ida by traveling to Yemen to find a terrorist training camp and advocating his desire to fight against U.S. military forces in Iraq on a pro-jihad website.⁸⁹ Mehanna attempted to classify these remarks as political speech that were in the realm of First Amendment protection.⁹⁰ Under Holder, the First Circuit explained that “[i]f speech fits within this taxonomy [providing criminal material support to FTOs], it is not protected,”⁹¹ and because the Material Support statute only punishes conduct that “is done in coordination with or at the direction of a foreign terrorist organization,” it accounts for the First Amendment protections afforded to speech outside of the scope of the statute.⁹² Under this notion, the First Circuit upheld the defendant’s conviction under the Material Support statute.⁹³

II. Restricting Pro-Terrorism Internet Speech

A. Section 230 Immunity

As exemplified in the previously mentioned cases, Section 230 immunity applies broadly to internet service providers. . Section 230 “provides a safe haven for websites that want to provide a platform for controversial or political speech and a legal environment favorable to free expression.”⁹⁴ This broad protection of political speech is unique to the U.S. and provides a safe harbor for ISPs from civil and criminal liability for content posted on their sites. Under this

⁸⁸ 735 F.3d 32 (1st Cir. 2013).

⁸⁹ Id. at 40-42.

⁹⁰ Id. at 44.

⁹¹ Id. at 49.

⁹² Id.

⁹³ Id. at 48.

⁹⁴ Section 230 of the Communications Decency Act, Electronic Frontier Foundation, *available at* <https://www.eff.org/issues/cda230> (last visited Apr. 25, 2016).

notion it is unlikely that the government would succeed in prosecution of social media companies for refusal to remove pro-terrorist posts, as they would remain protected under Section 230. For example, in defense to questions about its refusal to prohibit ISIS's use of Twitter, the company has stated that "[i]f you want to create a platform that allows for the freedom of expression for hundreds of millions of people around the world, you really have to take the good with the bad."⁹⁵

The purpose of the Internet as an open forum, promoting self-expression and the free exchange of ideas, is fortified by Section 230, which allows service providers to evade liability for content that is displayed or published on their websites. Therefore, any government action to hold social media companies liable for pro-terrorist posts will fail under Section 230. However, if Congress passes legislation which grants authority to the government to require social media companies to remove terrorist posts, the Section 230 defense may be eviscerated if Congress includes the magic words, "*notwithstanding Section 230 of the Communications Decency Act...*" Such terminology would effectively thwart any attempts by service providers to assert Section 230 as a mechanism to avoid liability for pro-terrorist content.

B. Content-Based Regulations

If Congress is able to require social media companies to remove pro-terrorist content and prevents such ISPs from asserting a Section 230 defense, the legislation may then be subject to a First Amendment analysis. First it must be determined whether what the government is trying to regulate is speech, as required by Spence v. Washington.⁹⁶ As the court

⁹⁵ Fields, 2016 WL 159948 at ¶ 60.

⁹⁶ 418 U.S. 405 (1974).

held in Spence, the requirements for speech are: (1) “an intent to convey a particularized message” and (2) whether the “likelihood was great that the message would be understood by those who viewed it.”⁹⁷ As per the first requirement of the Spence test, the particular type of posts that the government is trying to have removed are those which promote or encourage acts of terrorism. The particularized message that foreign terror groups and their supporters try to convey on social media is the use of terrorism in furtherance of their ideals. For example, ISIS Twitter accounts have posted several pictures and videos of the executions of Americans James Foley, Steven Sotloff, and Peter Kassig, exemplifying their “#WarOnWhites.”⁹⁸ The second requirement of the Spence test, likelihood of understanding by viewers, is also met. Other ISIS Twitter accounts have posted photos referencing the 9/11 attacks, with direct threats to attack and kill Americans “wherever you are.”⁹⁹

Once it has been established that the conduct is speech, the next question is whether the regulation is based on the *content* of the speech or if it concerns the *time, place, and manner* of the speech. In United States v. O’Brien, the Court reasoned that, if the government interest in regulating the conduct is unrelated to the suppression of free expression, then it must be treated as a time, place, and manner regulation.¹⁰⁰ However, if the government’s interest is related to the “communicative impact” of the expressed conduct, then it must be classified as a content-based First Amendment regulation.¹⁰¹ The scope of content-based regulations is limited by underlying principles on which the First Amendment has been built. As courts have held on numerous occasions, the “bedrock principle” of the First Amendment is

⁹⁷ Id. at 411.

⁹⁸ Fields, 2016 WL 159948 at ¶¶ 39-40.

⁹⁹ Fields, 2016 WL 159948 at ¶ 39.

¹⁰⁰ United States v. O’Brien, 319 U.S. 367, 377 (1968).

¹⁰¹ Texas v. Johnson, 419 U.S. 397, 411 (1989).

“that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁰² Moreover, “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”¹⁰³ Under these theories, the government’s content-based regulations must be viewpoint neutral in order to avoid a First Amendment violation. As the government’s regulations would be directed at terrorist speech, it is questionable whether they would be content-neutral.

The government may lawfully regulate: responsive violence, defamation, obscenity, commercial speech, and true threats, as these types of speech are not protected by the First Amendment.¹⁰⁴ Terrorists posting on social media may arguably constitute responsive violence as terrorism presents an “imminent lawless action or clear and present danger of a substantive evil.”¹⁰⁵ Furthermore, when a speaker makes disorder imminent he forfeits his free speech rights as established by Brandenburg.¹⁰⁶ In order for speech to constitute advocacy of unlawful content under Brandenburg, it must be “directed to inciting or producing imminent, lawless action and likely to incite or produce such [imminent] action.”¹⁰⁷

When considering whether the government may permissibly order social media platforms to remove pro-terrorist speech on their sites, the intent of the speech must be determined. Terror groups “exploit social media” to spread their message internationally.¹⁰⁸ ISIS in particular has been known to start “hashtag” campaigns on Twitter, where “it enlists thousands of members to repetitively tweet hashtags at certain times of day so that they trend

¹⁰² Snyder v. Phelps, 562 U.S. 443, 458 (2011).

¹⁰³ Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969).

¹⁰⁴ Supra note 37.

¹⁰⁵ Knox, supra note 7 at 324.

¹⁰⁶ Brandenburg, 395 U.S. at 447.

¹⁰⁷ Id.

¹⁰⁸ Fields v. Twitter, Inc., 2016 WL 159948 at ¶ 2.

on Twitter, meaning a wider number of users are exposed to the tweets.”¹⁰⁹ ISIS also posts photos of their attack victims, such as decapitated Syrian soldiers they had captured.¹¹⁰ Based on past social media posts from ISIS and other FTOs, it is clear that the speech they are emitting is intended to spread the message of terror, meeting the first prong of the Brandenburg test.

The “imminence” requirement of Brandenburg is of “particular importance” because the government must protect national security.¹¹¹ Tashfeen Malik, who joined her husband in the deadly shooting that killed fourteen Americans in San Bernardino, California, posted violent pro-jihad messages on social media.¹¹² Malik used a pseudonym and privacy settings to circumvent any review of her social media activity by U.S. authorities during her visa application process.¹¹³ If Malik's advocacy for jihad had been discovered sooner, it is possible that both her entry into the U.S. and the San Bernardino attack could have been prevented. However, social media allows rapid communications, accessible from all over the world, so determining whether or not speech in this context is “imminent” may present issues to the government. Under this notion, extending Brandenburg to social media may allow the government “to overstate the link between speech and violence,” thus creating a “chilling effect” on speech.¹¹⁴

Social media posts promoting acts of terrorism may be classified as “lawless action” if such speech constitutes a violation of the Material Support statute. The Supreme Court has held in both Holder and Mehanna that political speech may constitute material support to a

¹⁰⁹ Id. at ¶ 42.

¹¹⁰ Id. at ¶¶ 36-37.

¹¹¹ Abigail M. Pierce, #Tweeting for Terrorism: First Amendment Implications in Using Proterrorist Tweets to Convict Under the Material Support Statute, 24 Wm. & Mary Bill Rts. J. 251, 260 (2015).

¹¹² Evan Perez and Dana Ford, San Bernardino shooter's social media posts on jihad were obscured, CNN (Dec. 14, 2015), available at <http://www.cnn.com/2015/12/14/us/san-bernardino-shooting>.

¹¹³ Id.

¹¹⁴ Lidsky, supra note 2 at 161.

FTO, as required by the statute.¹¹⁵ As the Material Support statute requires that the individual “knowingly” provides support, the speaker must know that his or her otherwise-protected speech is in coordination with an foreign terror groups.¹¹⁶ Thus, it is probable that a court would find certain pro-terrorist social media posts to be material support if the speaker is associated with such a group. . For example, in 2013 two Twitter users were deemed “ISIS-affiliated” when they posted about the group killing both a man it believed to be Shiite and an Iraqi cameraman.¹¹⁷

The final element of the Brandenburg test is that the speech must be “likely to produce” such imminent, lawless action.¹¹⁸ In November 2015, Anwar Abu Zaid, the killer of Tamara Fields’ husband, told his friends he was “going on a journey to ‘paradise or hell.’”¹¹⁹ The attack at the International Police Training Center occurred on November 9, 2015.¹²⁰ ISIS claimed responsibility for the attack and Zaid was praised for the shooting by ISIS supporters all around.¹²¹ ISIS’s use of Twitter has allowed it to become “the most-feared terrorist group in the world,” through “perfect[ing] its use of Twitter to inspire small-scale attacks, ‘to crowdsource terrorism’ and ‘to sell murder.’”¹²² Considering that the “explosive growth of ISIS” can be attributed to its exploitation of social media, it is likely that its speech would be found “likely to produce” imminent, lawless action as required by Brandenburg.¹²³

C. Strict Scrutiny Analysis

¹¹⁵ Holder, 561 U.S. at 28; Mehanna, 735 F.3d at 48.

¹¹⁶ Pierce, supra note 110 at at 262.

¹¹⁷ Fields v. Twitter, Inc., 2016 WL 159948 at ¶¶ 33-34.

¹¹⁸ Brandenburg, 395 U.S. at 447.

¹¹⁹ Fields v. Twitter, Inc., 2016 WL 159948 at ¶ 70.

¹²⁰ Id. at ¶ 71.

¹²¹ Id. at ¶¶ 74-75.

¹²² Id. at ¶ 2.

¹²³ Id.

If such a government regulation cannot be categorized as a permissible regulation, it will then be subject to a strict scrutiny analysis. As held in Zablocki v. Redhail, a government action that substantially interferes with a fundamental constitutional right is subject to a strict scrutiny review.¹²⁴ This is because regulations that infringe on a fundamental liberty interest have no presumption of constitutionality. Furthermore, the burden is on the government to demonstrate: (1) a compelling state interest; (2) the means used to achieve this interest must be narrowly tailored; (3) the means may neither be over-inclusive nor under-inclusive.¹²⁵ The government's interest in deterring pro-terrorist propaganda on social media is part of its bigger efforts to fight terrorism. Courts have held the interest in protecting national security to be compelling enough to survive strict scrutiny in many cases because "efforts to restrict speech during wartime are entitled greater deference," so it is likely that a compelling state interest will be established.¹²⁶

After a compelling state interest has been identified, the question turns to whether the means used to achieve this interest is "narrowly tailored." Social media companies may challenge federal legislation that requires them to remove pro-terrorist posts because of the undue burden such an obligation would create. Twitter officials have asserted that the company wishes "to allow the free flow of information" and, in order to promote these efforts, it "must take the good [posts] with the bad [posts]."¹²⁷ To refute this, it may be noted that Twitter prohibits threats of violence, like promoting terrorism, in its terms of service and therefore, Twitter is under an obligation to prevent such content from being distributed on

¹²⁴ Zablocki v. Redhail, 434 U.S. 374, 381 (1978).

¹²⁵ Id. at 402.

¹²⁶ Knox, *supra* note 7 at 324.

¹²⁷ Fields v. Twitter, Inc., 2016 WL 159948 at ¶ 60.

their website.¹²⁸ However, Twitter hosts millions of accounts from all over the world, so under Zeran it would not be reasonable to require Twitter and other social media platforms to actively monitor and filter content.¹²⁹ As such legislation would require social media companies to constantly monitor and censor posts, it is arguable that the means used would be narrowly tailored.

If the regulation is found to be narrowly tailored, the means used must then be tested for over- and under-inclusiveness. As demonstrated by the holdings in Holder and Mehanna, the Material Support statute has created a mechanism through which the political speech of individuals in support of terror groups has been deemed outside of the scope of First Amendment protection. However, it is questionable whether social media companies would be able to be prosecuted under the statute as well. Using the Material Support statute to enforce against social media platforms in this context may be considered over-inclusive because of the “chilling effect it” could have on Internet speech.¹³⁰ If Twitter was to be prosecuted under the Material Support statute for failing to remove pro-terrorist content, it may start to censor all of its content in order to avoid future liability.¹³¹ This may restrict all Twitter users from exercising their right to free expression, thereby infringing on their First Amendment rights. Because of the possibility of such a “chilling effect” on free expression, the means used by the government to remove terrorist posts on social media may end up being over-inclusive, resulting in a failure of the strict scrutiny analysis.

¹²⁸ Id. at ¶ 65.

¹²⁹ Id. at ¶ 61.

¹³⁰ Knox, *supra* note 7 at 325.

¹³¹ Id.

As for under-inclusiveness, it may be argued that simply removing such pro-terrorist content on social media websites is insufficient to stop foreign terrorist groups from expanding. As argued in Fields, when an ISIS account is shutdown on Twitter, nothing is done to stop it from reappearing.¹³² Under the same notion, just because a pro-terrorist post is removed from a social media website does not mean that a similar post will not be published shortly thereafter. Although social media has become a major resource for such groups to communicate, recruit, and distribute propaganda, the Internet is only one of many resources available to FTOs. Groups like ISIS are launching deadly attacks across the world daily with the use of explosives and automatic weaponry. As these attacks have severe consequences, causing thousands of fatalities and injuries, the mere requirement that pro-terrorist social media posts be removed to deter acts of terrorism is arguably under-inclusive to address that very issue. Therefore, it is unlikely that such a regulation would survive strict scrutiny.

D. "Best Practices" May be the Best Way to Reconcile the Issues at Stake

As both preserving national security and the individual liberty of free expression are important interests, it is vital that the government find the proper balance between the two. It is highly unlikely that a regulation requiring social media platforms to remove pro-terrorist posts would survive strict scrutiny so it may be in the best interest of the government to consider alternative options to deterring terrorist activity online, such as through issuing best practices for social media companies to follow.

Federal agencies, such as the Federal Trade Commission ("FTC"), have influenced industry without constricting regulations through issuing "best practices" guidelines on various

¹³² Fields v. Twitter, Inc., 2016 WL 159948 at ¶ 64.

topics. For example, the FTC issued a report in January 2015 that urged businesses to adopt best practices to protect consumer privacy and prevent data security risks.¹³³ Although businesses are not required to comply with these best practices, FTC Chairwoman Edith Ramirez stated that, "by adopting the best practices we've laid out, businesses will be better able to provide consumers the protections they want and allow the benefits of the Internet of Things to be fully realized."¹³⁴ In lieu of legislation, perhaps a federal agency, like the Department of Homeland Security, could issue best practices for social media companies to address concerns of pro-terrorist activities on their sites. These guidelines could provide social media platforms with suggestions on how to deter violent posts from being circulated and how to lock or suspend pro-terrorist accounts, without infringing on the free speech rights of other users.

Although best practices would not be binding on social media companies, adopting such methods could serve as a means of self-regulation to show that further government intervention is not needed. Venmo is an application that acts as a "digital wallet" by allowing users to make and share payments with friends.¹³⁵ Venmo users have experienced account suspensions when paying for an item and using the description "IDEK" ("I don't even know"), as Venmo is required to filter transactions in compliance with federal laws. IDEK is also an acronym for a radical Islamic organization that has been deemed a foreign terrorist group, so when users type "IDEK" for their payment description, the transaction is flagged as a payment

¹³³ FTC Report on Internet of Things Urges Companies to Adopt Best Practices to Address Consumer Privacy and Security Risks, Federal Trade Commission, Press Release (Jan. 27, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-report-internet-things-urges-companies-adopt-best-practices>.

¹³⁴ Id.

¹³⁵ What is Venmo? Venmo, Help Center (last accessed Apr. 25, 2015), *available at* <https://help.venmo.com/hc/en-us/articles/209690178-What-is-Venmo->.

to such a group, in violation of the Material Support statute.¹³⁶ If social media platforms enacted a similar flagging or filtration system, pro-terrorist posts could be blocked or removed more efficiently, as exemplified by actions taken by Twitter since 2015.

In its recent efforts to combat violent extremism, Twitter announced that it suspended an additional 235,000 accounts for violating the social media company's policies on promotion of terrorism.¹³⁷ In February 2016, Twitter announced that it had suspended over 125,000 accounts,¹³⁸ bringing its account suspensions to a grand total of 360,000 since mid-year 2015. If other social media platforms adopt practices similar to those of Venmo and Twitter, self-regulation may prove to be a successful way to combat the promotion of terrorism, thereby avoiding any potential First Amendment violations brought forth by proposed legislation.

III. Conclusion

As social media has become a primary mechanism for communication worldwide, the influx of unrestricted speech has been accompanied by online campaigns by hate groups, promoting violence and threatening deadly attacks. Groups such as ISIS have become particularly reliant on social media platforms to recruit members to join their cause and to spread their message of hate through gruesome images of murder victims and menacing messages that hint at imminent acts of violence. In response to the vast exploitation of social media for terrorist activity, Congressmen have introduced legislation that would require social media companies to report any terrorist activity on their sites to the federal government. Such

¹³⁶ Specially Designated Nationals and Block Persons List, Office of Foreign Assets Control (Apr. 19, 2016), *available at* <https://www.treasury.gov/ofac/downloads/sdnlist.pdf>.

¹³⁷ An update on our efforts to combat violent extremism, Twitter (Aug. 18, 2016), *available at* <https://blog.twitter.com/2016/an-update-on-our-efforts-to-combat-violent-extremism>.

¹³⁸ Combating Violent Extremism, Twitter (Feb. 5, 2016), *available at* <https://blog.twitter.com/2016/combating-violent-extremism>.

legislation may be strengthened by additionally requiring social media platforms to remove such posts as well.

On several occasions, courts have found that certain types of political speech in support of foreign terror groups would not receive First Amendment protection, as such speech violated the Material Support statute. However, service providers receive sound protection from any sort of liability for content posted on their sites through Section 230 of the CDA. Section 230 provides a vast shield for such providers that may only be circumvented by legislation that contains the words "*notwithstanding Section 230 of the Communications Decency Act.*" Such legislation may be permissible if the court finds that it is appropriate in light of the national security issues at stake. In several cases, the Supreme Court has held that restrictions on individual liberties, such as free speech, are constitutional during times when national security is at risk. However, such legislation must survive a strict scrutiny analysis to avoid any constitutional concerns.

In conclusion, if the government desires social media companies to assist in the war on terrorism through removing and blocking pro-terrorist posts, but also wishes to avoid any constitutional concerns, it may instead opt to issue best practices. Formulating best practices for social media platforms on how to deter pro-terrorist activity may create an appropriate medium between the issues of protecting national security and preserving First Amendment rights, as the government would be providing social media companies with suggestions that they could adopt without requiring strict compliance. Therefore, as foreign terror groups continue to grow exponentially through social media, it is important that the government

maintains a balance between taking the necessary actions to safeguard national security and perpetuating the right of free speech, one of the core liberties on which this nation stands.