The Suffocation of Free Speech under the Gravity of Danger of Terrorism

I. Introduction

Ali al-Timimi ("al Timimi") is an outspoken Muslim scholar who is well respected in the worldwide Muslim community. In his fervent support of Muslims everywhere, he has openly proclaimed that America is one of the chief enemies of the Muslim populace.[1] He has proclaimed that the explosion of the space shuttle Columbia was a sign for Muslims to take action.[2] He has urged young Muslim men to jihad, to wage armed conflict with the enemies of Islam.[3] It is safe to say that al-Timimi has made numerous speeches that most Americans would find highly objectionable.

On September 23, 2004, the Federal government charged al-Timimi with a six-count indictment[4], which was later superceded by the present ten-count indictment.[5] During the trial in April 2005, the prosecution introduced over 250 evidentiary exhibits[6], testimony from several expert witnesses on radical Islamism[7], and testimony from various government agents. In

[1] Presentencing Report for Muhammed Aatique at 17, United States v. Khan, (No. 03-296-A).
[2] Presentencing Report for Muhammed Aatique at 17, United States v. Khan, (No. 03-296-A).
[3] Transcripts, Rebuttal Argument by Mr. Kromberg, Pleading 123 at 14, United States v. Al-Timimi, (No. 1:04cr385).
[4] Indictment, United States v. Al-Timimi, (No. 1:04cr385), *available at* http://www.altimimi.org.
[5] Superceding Indictment, United States v. Al-Timimi, (No. 1:04cr385), *available at* http://www.altimimi.org.
[6] List Of Entered Government's Exhibits, United States v. Al-Timimi (No. 1:04cr385).
[7] Transcripts, Testimony of Evan Kholman, John Miller, Robert Andrews, United States v. Al-Timimi (No. 1:04cr385).

addition, the prosecution introduced the testimony from several co-conspirators that were convicted in an earlier trial[8], all of whom were facing draconian sentences under the Federal Sentencing Guidelines unless they cooperated with the government[9]. Yet, with this mountain of evidence, the direct 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 the co-conspirators that al-Timimi was present at a two-hour meeting at one of the co-conspirator's home on 16 September, 2001, five days after the tragedy of 9/11.[10] The testimony alleged that al-Timimi incited the attendees to take up jihad with the Taliban, even to the extent that the jihadists would probably engage in direct action with American forces in Afghanistan.[11]

The jury began deliberations on April 18, 2005.[12] Buried in nearly 200 pages of jury instructions was a single paragraph that unceremoniously described the law of protected speech under *Brandenburg v. Ohio*.[13] After deliberating for seven days, the jury returned a verdict of guilty on all ten counts.[14] Al-Timimi was subsequently sentenced to life in prison plus 70 years.[15]

The trial of *United States of America v. Ali Al-Timimi*[16] raises a number of important First Amendment issues. To adequately assess these issues, a foundation must be laid describing the facts of the *Al-Timimi* case as well as the prior co-conspirator trial, *United States v. Khan.*[17] Next, the foundation will explore the applicable First Amendment and Federal law as well as

[8] Transcripts, Testimony of Yong Ki Kwon, Muhammed Aatique, Khwaja Mahmood Hasan, United States v. Al-Timimi, (No. 1:04cr385).
[9] Jerry Markon, *10 Years For Man Who Aided Jihad Probe*, The Washington Post, December 18, 2003, A20.
[10] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 46, United States v. Al-Timimi, (No. 1:04cr385).
[11] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 5-11, United States v. Al-Timimi, (No. 1:04cr385).
[12] *Crime & Justice*, The Washington Post, April 26, 2005, B2.
[13] Jury Instructions, United States v. Al-Timimi, (No. 1:04cr385).
[14] Jerry Markon, *Muslim Leader Is Found Guilty*, The Washington Post, April 27, 2005, A1.
[15] Jerry Markon, *Va. Muslim Lecturer Sentenced To Life*, The Washington Post, July 14, 2005, B1.
[16] No. 1:04cr385.
[17] 309 F. Supp. 2d 789 (2004).

relevant cases, including a case that is remarkably similar to the *al-Timimi* case, *United States v. Rahman*[18].

Two themes emerge from this foundation. The first theme is that the courts have had difficulty defining the line between protected advocacy and criminal speech, or in other words, whether or how *Brandenburg* should be applied. The second theme is that in the decision process between advocacy and criminal speech, the courts will lean toward criminal speech when the gravity of that 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 there will be less freedoms. Unfortunately for al-Timimi, he was prosecuted under the gravity of danger of terrorism. While it may be debatable whether terrorism represents one of the gravest dangers this country has ever faced, it is one that the government has taken very seriously, having already scaled back fundamental Constitutional rights under the Patriot Act. Reminiscent of the prosecutions of supposed 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 will assert that the United States government did not meet its burden of proof and that there was a reasonable doubt as to what Timimi advocated. Furthermore, if Timimi looses his appeal, the fundamental constitutional right of free speech will take a serious blow.

[18] 189 F.3d 88 (1999).

II. Foundation

A. Ali al-Timimi Biography

The following is a summary of Ali al-Timimi's biography taken exclusively from the www.altimimi.org website.[19]

Al Timimi was born in 1963 in Washington, D.C. to Muslim parents who worked in the Iraqi Embassy. In 1978, his parents moved to Saudi Arabia. In school there, he received instruction in the Qur'an, learned how to pray, fast, and other basic Islamic information. 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 the foretold apocalypse.

Two years later, at 17, he returned to the United States to attend college. However, the United States had changed. In the interim, the Soviet Union had invaded Afghanistan and militant Muslim students had overrun the United States Embassy in Tehran and taken the embassy staff hostage. In contrast to the indifference experienced by Muslims in earlier years, al-Timimi perceived a growing intolerance of Muslims in the United States. In response, he devoted himself to the study of Islam. In 1987, while thousands of Muslims were pouring into Afghanistan to join the mujahideen, he traveled to Medina, Saudi Arabia, to study at the college of Haddith. He returned to the United States a year later.

In his secular world, unable to find a job with his undergraduate degree in biology, al-Timimi went back to school and earned a degree in computer science. After a number of years in the IT field, he was drawn to the biotech industry's attempt to map the human genome where he could combine his two fields of study, biology and computer science. He eventually earned a

[19] About Ali Al-Timimi, www.altimimi.org. Al-Timimi's full biography and many of lectures can be found this website. Also available on the website are numerous court motions written his defense counsel.

Ph.D. in Computational Biology from George Mason University and was awarded the degree in December 2004 while on bond awaiting trial.

During this same time period after his return from Medina, al-Timimi started lecturing on various topics of Islam and became a well-respected lecturer in the worldwide Muslim community. He lectured at various conferences, and in particular at the Islamic Assembly of North America ("IANA") conferences. He became a frequent and popular speaker at the Dar al-Arqam Center that he helped co-found.

B. The Wahhabism Connection

Wahhabism is a strain of Islam that originated in the 1740s in the Arabian desert.[20] Wahhabiya, a puritanical asceticism, is considered by many to be a spiritual movement comparable in force and influence to the rise of Islam itself.[21] Wahhabism has sought to purge many of the corrupting influences in Islam and return it to a more original orthodoxy.[22] Among the beliefs of Wahhabism are that any non-Wahhabist is considered an infidel, failure to adhere to the faith's tenets draw severe punishment, and that the church and state should be one under the rule of Sharia.[23] Relegated chiefly to the interior of Arabia for the 18th and 19th centuries, Wahhabism has flourished in the 20th century under the patronage of the House of Saud.[24] It is no surprise that fifteen of the nineteen hijackers that participated in the 9/11 attacks were Saudi.[25]

In the aftermath of 9/11, the FBI started to investigate various organizations whose

[20] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[21] Abington Dictionary of Living Religions, Keith Crim (General Editor), Roger A. Bullard and Larry D. Shinn (Associate Editors), Copyright 1981, Parthenon Press at Nashville, Tennessee, USA, Section Islam, page 355.
[22] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[23] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[24] Abington Dictionary of Living Religions, Keith Crim (General Editor), Roger A. Bullard and Larry D. Shinn (Associate Editors), Copyright 1981, Parthenon Press at Nashville, Tennessee, USA, Section Islam, page 355; Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[25] Craig Whitlock, *Saudis Confront Extremist Ideologies*, The Washington Post, February 6, 2005, A18.

purpose was to incite violent jihad and recruit people to fight it.[26] The FBI was conducting independent investigations in Idaho, Michigan, New York and Northern Virginia until they realized that there might be a connection, namely Wahhabism.[27] The Northern Virginia investigations culminated in *Khan* and *Al-Timimi* trials. The Idaho investigation resulted in the prosecution of Sami Omar Hussayen, the nephew of the Saleh Ibn Abdul Rahman Hussayen, a minister in the Saudi government who has tenuous connections with numerous Saudi-funded charities that have links to terrorist groups.[28] Sami Hussayen was recently acquitted of all charges based on a First Amendment defense.[29]

While it is unconfirmed that al-Timimi is in fact a Salafi (a Salafi is a non-Saudi adherent of Wahhabism), he has a number of connections with other Salafis and Wahhabists. Firstly, Al-Timimi has given speeches at conferences sponsered by the IANA, which is a known Wahhabi organization dedicated to the teachings of two radical Saudi Muslim clerics, Safar Hawali and Salman Ouda.[30] Al Timimi had maintained contact with Hawali, a fact that the government tried to introduce at trial.[31] However, in an attempt to alleviate some CIPA concerns, Judge Brinkema ruled it inadmissible.[32] Al-Timimi has also maintained a relationship with Bassem K. Khafagi, a former president of IANA who has recently plead guilty to bank fraud in Detroit.[33] Secondly, another frequent lecturer at the Center was Jafaar Idris, an internationally known Salafi imam.[34] Idris is the president of the American Open University in Fairfax, which promotes Salafi

[26] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[27] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[28] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[29] Susan Schmidt, *Saudi Acquitted of Internet Terror;Defense Hails Verdict on Islamic Sites as Victory for Free Speech*, The Washington Post, June 11, 2004, A3.
[30] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[31] Government's Motion For Reconsideration of the Breadth of Ruling Regarding Evidence Involving Hawali, Pelading 71, March 22, 2005, United States v. Al-Timimi, (No. 1:04cr385).
[32] Order, March 20, 2005, , United States v. Al-Timimi, (No. 1:04cr385).
[33] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[34] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.

teaching on the web.[35] Lastly, al-Timimi has lectured at the Islamic Foundation of America (IFA), which was founded by Idris and another Saudi cleric, Ibrahim Ibn Kulaib.[36] Among the well known Wahhabi and Salafi visitors at the IFA have been Saleh Hussayen, the minister in the Saudi government, and Sirhaj Wirhaj, a New York imam who was an unindicted co-conspirator in the 1993 World Trade Center bombing.[37]

C. Factual Background

On February 9, 2004, the government opened its case against the "Virginia jihad network"[38] in *United States v. Khan*[39]. 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.[40] The 11 defendants of the "network" were regular attendees at the Dar al-Arqam Center ("Center") in Falls Church, VA.[41] The Center was co-founded by Ali al-Timimi to provide English language instruction on Islam.[42] A year later, on April 4, 2005, the government opened its case against al-Timimi.[43] He was charged with inciting and/or aiding and abetting the "network" to commit their crimes.[44]

1. United States v. Khan

[35] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[36] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[37] Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.*, The Washington Post, October 2, 2003, A1.
[38] Jerry Markon, *Va. Jihad Case Opens Against Muslim Men*, Washington Post, Feb. 10, 2004, at B1.
[39] 309 F. Supp. 2d 789 (D. Va. 2004).
[40] *Id*. at 795.
[41] *Id*. at 794, 802.
[42] *Id*. at 802.
[43] Jerry Markon, *Terrorism Case Puts Words of Muslim Leader On Trial in Va*., Washington Post, April 5, 2005, at B1.
[44] 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).

Defendants: Randall Todd Royer, masoud Ahmad Khan, Ibrahim Ahmed al-Hamdi, Yong Ki Kwon, Muhammed Aatique, Seifullah Chapman, Hammad Abur-Raheem, Donal Surratt, Caliph Basha Ibn Abdur-Raheem, Khwaja Mahmood Hasan, Sabri Benkhala.

While some of the defendants in the Khan case knew each other from college, the defendants' primary connection was through their association with the Center.[45] In early January 2000, Nabil Gharbieh, a Center co-founder, and Kwon, reached a decision that to order to prepare for jihad they would conduct military training by playing paintball.[46] Eventually all of the defendants played paintball with the expressed purpose of training for jihad.[47] Several defendants acquired weapons such as AK-47s and sniper rifles along with other less exotic weapons.[48] In April 2000, Royer went to Pakistan to obtain military training at a camp run by Laskar-e-Taiba ("LET") in Pakistan.[49] LET is 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.[50] Following Royer's footsteps, al-Hamdi in August 2000 and the Chapman in August 2001 went to Pakistan to train at the LET camps.[51] Testimony was introduced that while at the LET camp, al-Hamdi fired a weapon at Indian troops.[52] All three of these defendants returned to the United States after completing their training.[53] Aatique had already purchased tickets for a trip Pakistan slated for September 19, 2001, a trip he took despite the tragic events of 9/11.[54]

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[45] Khan, 309 F. Supp. 2d at 802-03.
[46] *Khan*, 309 F. Supp. 2d at 803.
[47] *Id*.
[48] *Id*. at 816; Transcript, Pleading 97, Testimony of Yong Ki Kwon at 27, United States v. Al-Timimi, (No. 1:04cr385).
[49] Transcript, Opening Statement by Mr. Kromberg at 7, United States v. Al-Timimi, (No. 1:04cr385).
[50] Transcript, Opening Statement by Mr. Kromberg at 14, United States v. Al-Timimi, (No. 1:04cr385).
[51] Transcript, Opening Statement by Mr. Kromberg at 14, United States v. Al-Timimi, (No. 1:04cr385).
[52] Presentencing Report for Muhammed Aatique, United States v. Khan, (No. 03-296-A).
[53] *Khan*, 309 F. Supp. 2d at 807-09.
[54] *Khan*, 309 F. Supp. 2d at 810-11.

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."[55] Kwon and Royer made all of the phone calls and set up the meeting for Sunday September 16, 2001 at Kwon's home.[56] At the meeting, attended by al-Timimi, 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, will fly to Pakistan with the intention to attend the LET camps.[57] 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.[58]

At another meeting in early October, 2001, al-Timimi exhorted five other members of the paintball group to take up jihad in support of the Taliban.[59] In attendance were Ali Asad Chandia and the defendants Hamdi, Hammad Abdur-Raheem, Caliph Basha Ibn Abdur-Raheem, and Surratt.[60] Within days of the second meeting, Surratt and Chandia left the country.[61] Chandia went to Pakistan and the LET camps and Surratt simply left the country (hijra).[62]

All of the LET camp trainees took part in various weapons training including automatic weapons, grenades, RPGs, and anti-aircraft guns.[63] However, after the start of open hostilities against the Taliban on October 20, 2001, the Pakistanis closed their border with Afghanistan.[64] In addition, the Pakistani government was actively evicting foreign fighters from the camps.[65] Consequently, the defendants still at the camps, Khan, Hasan, and Kwon, learned that LET

[55] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 41, United States v. Al-Timimi, (No. 1:04cr385).
[56] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 41, United States v. Al-Timimi, (No. 1:04cr385).
[57] *Khan*, 309 F. Supp. 2d at 810-11.
[58] *Khan*, 309 F. Supp. 2d at 810-11.
[59] Transcript, Opening Statement by Mr. Kromberg at 12, United States v. Al-Timimi, (No. 1:04cr385).
[60] Transcript, Opening Statement by Mr. Kromberg at 12, United States v. Al-Timimi, (No. 1:04cr385).
[61] Transcript, Opening Statement by Mr. Kromberg at 12, United States v. Al-Timimi, (No. 1:04cr385).
[62] Transcript, Opening Statement by Mr. Kromberg at 12, United States v. Al-Timimi, (No. 1:04cr385).
[63] *Khan*, 309 F. Supp. 2d at 810-27.
[64] *Khan*, 309 F. Supp. 2d at 811.
[65] *Id*.

would no longer facilitate their travel to Afghanistan.[66] Instead, Khan and Hasan returned to the United States and Kwon remained in Pakistan to start a mango export business.[67]

Six of the defendants agreed to plea-bargain deals before trial which required that they cooperate with the government and testify against the others that went on trial. Of the five remaining defendants that stood trial, all but one of them were found guilty. The lone exception, Sabri Benkhala, was acquitted of all charges in a separate trial.[68] In a post-trial motion for acquittal, some charges were dropped against some of the defendants, and all the charges against Caliph Basha were dismissed with prejudice.[69] Bound by Federal guidelines, Judge Leonie Brinkema sentenced Khan to life in prison plus 50 years, Chapman to 85 years, and Adbur-Raheem to 97 months.[70] As a result of their plea-bargained agreements, Royer received 20 years, al-Hamdi received 15 years, Hasan received 11 years and 3 months, Kwon received 11 years and 6 months, Aatique received 12 years and 6 months, Surratt received 3 years and 10 months.[71] In a later adjustment mandated by the then recent Supreme Court decision in *United States v. Booker*[72], Judge Brinkema reduced Khan's sentence to life in prison plus 30 years, Chapman's sentence was reduced to 65 years, and Abdur-Raheem's sentence was reduced to 52 months.[73]

2. United States v. Ali al-Timimi

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[66] *Id*.
[67] *Id*.
[68] Jerry Markon, *Judge Acquits Final Defendant In 'Virginia Jihad' Investigation*, Washington Post, March 10, 2004, B8.
[69] *Khan*, 309 F. Supp. 2d at 796.
[70] Jerry Markon, *Strict Sentences Meted in Va. Jihad Case*, Washington Post, June 16, 2004, A6.
[71] *Randall Todd Royer and Ibrahim Ahmed al-Hamdi Sentenced for Participating in Virginia Jihad Network*, Federal Information and News Dispatch, Inc., Justice Department Press Releases, April 9, 2004*; Defendants Convicted in Northern Virginia 'Jihad' Trial*, Federal Information and News Dispatch, Inc., Justice Department Press Releases, March 4, 2004.
[72] 125 S. Ct. 738 (2004).
[73] Jerry Markon, *U.S. Judge Reduces 'Va. Jihad' Sentences*, Washington Post, July 30, 2005, A3.

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.[74] A key ingredient of the prosecution's case was that al-Timimi was the ringleader of the "Virginia jihad network" and that the defendants in the Khan trial "couldn't figure out how to tie their shoelaces without asking al-Timimi."[75]

Al Timimi was described as a well respected lecturer at the Center, accordingly many attendees at the Center often asked al-Timimi for advice on wide variety of Islamic matters.[76] The government elicited testimony that followers on many occasions asked al-Timimi advice on minor, almost trivial, Islamic matters such as whether one can pray in a moving car or whether one may shorten prayers on the discovery of a scorpion.[77] On several occasions the paintball group asked al-Timimi's advice on the matters pertaining to paintball. Through an intermediary, Nabil Gharbieh, Kwon asked al-Timimi what he thought of the paintball, to which Gharbieh related that al-Timimi said, "That is something good that the brothers can do."[78] In September 2000, FBI agents approached Chapman and questioned him about his paintball activities.[79] In response to a request for guidance, Al-Timimi said to continue to play because if you stop, it will look more suspicious, and be more discrete in the future.[80] Al Timimi related the parable from the Qur'an about Joseph's brothers entering the city through many doors to disguise their

[74] 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).
[75] Transcripts, Rebuttal Argument by Mr. Kromberg, Pleading 123 at 5, United States v. Al-Timimi, (No. 1:04cr385).
[76] Transcripts, Testimony of Yong Ki Kwon, Pleading 97 at 5, United States v. Al-Timimi, (No. 1:04cr385).
[77] Transcripts, Rebuttal Argument by Mr. Kromberg, Pleading 123 at 6, United States v. Al-Timimi, (No. 1:04cr385).
[78] Transcripts, Testimony of Yong Ki Kwon, Pleading 97 at 43, United States v. Al-Timimi, (No. 1:04cr385).
[79] *Khan*, 309 F. Supp. 2d at 803.
[80] Transcripts, Testimony of Yong Ki Kwon, Pleading 97 at 45, United States v. Al-Timimi, (No. 1:04cr385).

numbers.[81] Soon afterward, the paintball group discontinued playing at local public courses and moved their activities to a private farmland in Spotsylvania County.[82]

Sometimes, the lectures would be held at various homes usually accompanied with dinner.[83] On September 11, 2001, al-Timimi was supposed to attend a dinner and give a lecture.[84] When the group met for dinner, they decided to cancel 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 was seeking justification for the attacks in a tense argument with Haytham Hantash and Jafaar Idris, another co-founder of the Center.[85] In the *Khan* trial, two witnesses, Gharbieh and Surratt, testified that al-Timimi said the attacks were not Islamically justifiable but that U.S. foreign policy had precipitated the attacks.[86] The government's one witness to the contrary, Hasan, was discredited in cross-examination during the *Kahn* trial.[87] In a pre-trial motion to the al-Timimi trial, Judge Brinkema denied without opinion the defense's pre-trial motion to suppress Hasan's testimony at the forthcoming al-Timimi's trial.[88] In any event, the prosecution did not elicit this testimony from Hasan.[89] However, Mr. Kromberg referenced this topic in his closing argument.[90] In a post-trial motion, the defense raised this very point as

[81] Transcripts, Testimony of Yong Ki Kwon, Pleading 97 at 46, United States v. Al-Timimi, (No. 1:04cr385).
[82] *Khan*, 309 F. Supp. 2d at 803.
[83] Transcripts, Testimony of Yong Ki Kwon, Pleading 97 at 7, 13, United States v. Al-Timimi, (No. 1:04cr385).
[84] Kwon April 11th cross at 56, , United States v. Al-Timimi, (No. 1:04cr385).
[85] 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).
[86] Motion In Limine Regarding The Government's Unsupported And Prejudicial Claim That The Defendant Expressed Approval For The Events Of September 11, 2001 at 4, United States v. Al-Timimi, (No. 1:04cr385).
[87] 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).
[88] Order dated March 18, 2005, Pleading 65, United States v. Al-Timimi, (No. 1:04cr385).
[89] Transcripts, Testimony of Khwaja Mahmood Hasan, Pleading 117 at 10-52, United States v. Al-Timimi, (No. 1:04cr385).
[90] Transcripts, Rebuttal Argument by Mr. Kromberg, Pleading 123 at 11, United States v. Al-Timimi, (No. 1:04cr385).

prejudicial,[91] however Judge Brinkema denied the motion.

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."[92] On September 16, 2001, al-Timimi attended the meeting at Kwon's home.[93] Among the attendees were al-Timimi, Caliph Basha Abdur-Raheem, Hammad Abdur-Raheem, Hasan, Khan, Aatique, and Royer.[94] When al Timimi arrived he told the group to turn off their phones, unplug the answering machine, and pull down the curtains.[95] Al-Timimi then told them that this meeting was "amana" (trust) which meant that the attendees were not to talk about the meeting.[96] Hasan gave testimony that Al-Timimi said that Mullah Omar has called upon the Muslims to defend Afghanistan.[97] The government wanted to introduce evidence that the reason al-Timimi brought up the subject of Afghanistan was in part 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.[98] The defense counsel successfully filed a motion to block the government from introducing that evidence.[99] Even though the government could not allege that al-Timimi was attempting to recruit jihad fighters for the Taliban, there is other evidence to support a conclusion that Afghanistan was a topic of discussion by the group that night.[100]

Later at the same meeting, Al-Timimi read parts of the al-Uqla fatwa to the group and

[91] Defendant's Motion For A New Trial at 6-7, United States v. Al-Timimi, (No. 1:04cr385), available at www.altimimi.org.
[92] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 41, United States v. Al-Timimi, (No. 1:04cr385).
[93] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 46, United States v. Al-Timimi, (No. 1:04cr385).
[94] Transcript, Opening Statement by Mr. Kromberg at 9, United States v. Al-Timimi, (No. 1:04cr385).
[95] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 51, United States v. Al-Timimi, (No. 1:04cr385).
[96] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 53, United States v. Al-Timimi, (No. 1:04cr385); Transcript, Pleading 117, Testimony of Khwaja Mahmood Hasan at 10, United States v. Al-Timimi, (No. 1:04cr385).
[97] Transcript, Pleading 117, Testimony of Khwaja Mahmood Hasan at 11, United States v. Al-Timimi, (No. 1:04cr385).
[98] Motion For Access To Certain Detainees in Guantanamo, Cuba, United States v. Al-Timimi, (No. 1:04cr385).
[99] Motion For Access To Certain Detainees in Guantanamo, Cuba, United States v. Al-Timimi, (No. 1:04cr385).

gave the fatwa to Khan with the instructions to burn it after he has read it.[101] Al Timimi tells the group that they must join the mujahideen and that it does not matter who they fight, Indians, Russians, or Americans.[102] Al Timimi said that the duty to take up jihad is "fard ayn" – obligatory to all Muslims.[103] Al Timimi offers the group a choice: 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.[104] Three days later, on September 19, Aatique and Khan fly to Pakistan and eventually make their way to the LET camp for military training.[105] That same day, Kwon and Hasan meet and have lunch with al-Timimi.[106] Kwon testified that al-Timimi told them not to take anything suspicious, and in the event that Hasan is stopped that Kwon should stop as well because he will not be able to find his way around Pakistan.[107] Hasan testified that al-Timimi told them to take precautions, carry a magazine, and if stopped that they should cry like a baby.[108] The next day, Kwon and Hasan make the trip to Pakistan.[109]

One month later, in early to mid October, another meeting was convened.[110] In attendance were al-Timimi, Hamdi, Hammad Adbur-Raheem, Caliph Basha Adbur-Raheem,

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[100] 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).
[101] 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.
[102] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 6, United States v. Al-Timimi, (No. 1:04cr385).
[103] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 8, United States v. Al-Timimi, (No. 1:04cr385).
[104] Transcript, Pleading 117, Testimony of Khwaja Mahmood Hasan at 11, United States v. Al-Timimi, (No. 1:04cr385).
[105] Khan, 309 F. Supp. 2d at 810-11.
[106] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 22-23, United States v. Al-Timimi, (No. 1:04cr385).
[107] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 23, United States v. Al-Timimi, (No. 1:04cr385).
[108] Transcript, Pleading 117, Testimony of Khwaja Mahmood Hasan at 28, United States v. Al-Timimi, (No. 1:04cr385).
[109] Khan, 309 F. Supp. 2d at 810-11.
[110] Transcript, Opening Statement by Mr. Kromberg at 12, United States v. Al-Timimi, (No. 1:04cr385).

Surratt, and Ali Asad Chandia.[111] Al-Timimi told the group the same information that he told the group at the September 16 meeting.[112] Chandia immediately quit his job and flew to Pakistan and proceeded to the LET camp and received jihad training.[113] Surratt, who had a family and did not wish to fight, simply left the country (hijra).[114]

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.[115] In it, al-Timimi proclaims that "[t]here is no doubt that Muslims were overjoyed because of the adversity that befell their greatest enemy."[116] Always interested in omens, al-Timimi goes on to describe the numerous omens evoked by space shuttle explosion that foretold the coming doom of the United States.[117] In another speech entitled *World Advice to the Salafis*, al-Timimi says, "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."[118]

D. Applicable Law Covering Advocacy of Illegal Activity

Initially, it is worth noting that advocacy of illegal activity cases are relatively rare. This is in part due to the fact that there have only existed a few political organizations that have openly sought to accomplish the organization's goals through illegal means. Consequently, advocacy of illegal activity cases appear for a time and then disappear for many years, paralleling the wax and wane of these broad political movements. The first political movement

[111] Transcript, Opening Statement by Mr. Kromberg at 12, United States v. Al-Timimi, (No. 1:04cr385).
[112] Presentencing Report for Muhammed Aatique at 16, United States v. Khan, (No. 03-296-A).
[113] Transcript, Opening Statement by Mr. Kromberg at 13, United States v. Al-Timimi, (No. 1:04cr385).
[114] Transcript, Opening Statement by Mr. Kromberg at 13, United States v. Al-Timimi, (No. 1:04cr385).
[115] List Of Entered Government's Exhibits at 6, United States v. Al-Timimi (No. 1:04cr385).
[116] Presentencing Report for Muhammed Aatique at 17, United States v. Khan, (No. 03-296-A).
[117] Presentencing Report for Muhammed Aatique at 17-18, United States v. Khan, (No. 03-296-A).
[118] Transcript, Opening Statement by Mr. Kromberg at 14, United States v. Al-Timimi, (No. 1:04cr385).

that advocated illegal activity was the Socialist movement of the late nineteenth century and early twentieth century, followed by the Communist movement after World War II. It is possible that today we are engaged in the third act of advocacy cases, that of Islamist activism. However, as yet, the Supreme Court has not formulated new First Amendment law based on a case involving Islamist activism. The odd case is *Brandenburg v. Ohio*[119] which is the seminal case for advocacy of illegal activity and does not fit the broad political movement paradigm.

1. The Socialist Movement of the Early Twentieth Century

The first advocacy cases were almost exclusively confined to the prosecution of members of the socialist party in and around the First World War.[120] Most, if not all, of the Socialists "illegal" activity that was prosecuted at that time would be permissible today. Yet at that time, the pamphleteering, parades and organized rallies conducted by the Socialists during World War I were deemed a threat to national security and were not given protection by the First Amendment. Many members of the Socialist party, including Eugene V. Debs himself, were imprisoned for voicing their concern that "the war was being fought for the profits of the rich, but with the blood of the poor."[121]

How ironic that our discussion of Ali al-Timimi starts with *Schenck v. United States*.[122] Al-Timimi was convicted of speech that incited young Muslim men to participate in armed conflict[123], while Schenck was convicted of pamphleteering to dissuade young men from enlisting in the armed services during World War I[124]. *Schenck* is one our nation's earliest cases on the advocacy of illegal activity and the court was not prepared to give the First Amendment

[119] 395 U.S. 444 (1969).
[120] 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).
[121] Eugene V. Debs Internet Archive at http://www.marxists.org/archive/debs/.
[122] 249 U.S. 47 (1919).

free reign. Justice Holmes' opinion qualified advocacy by opining that "the character of every act depends upon the circumstances in which it is done" and on the "proximity and degree."[125] 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."[126] Here, the court was giving the government a wide latitude to prosecute speculatively dangerous speech. 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 is important because as we shall see, the Supreme Court, in the years to come, will retreat from the speculative danger that is "clear and present" and hold that the danger must be "imminent."[127]

All of the Socialist cases came out with the same result: no First Amendment protection. Yet there is a subtle distinction to be drawn from the case *Gitlow v. New York*[128]. In *Schecnk*, the statute at issue, the 1917 Espionage Act, prohibited actions, not speech.[129] The speech was not protected because the speech could lead to actions that would violate the statute.[130] In *Gitlow*, the statutes at issue were the New York Penal Laws §§ 160, 161, which prohibited speech itself.[131] Justice Holmes in dissent affirmed his "clear and present danger" test and opined that the danger to the nation was too remote.[132] Responding to the majority's claim that "[The Left Wing] manifesto was more than a theory, that it was an incitement," he wrote that "[e]very idea

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[123] Superceding Indictment, United States v. Al-Timimi, (No. 1:04cr385), *available at* http://www.altimimi.org.
[124] *Schenck*, 249 U.S. at 49.
[125] *Id*. at 52.
[126] *Id*. at 52.
[127] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[128] *Gitlow*, 268 U.S. 652.
[129] *Schenck*, 249 U.S. at 49.
[130] *Id*. at 52-53.
[131] *Gitlow*, 268 U.S. at 654.

is an incitement."[133]

The last of the Socialist cases, *Whitney v. California*[134] was decided in 1927. Twenty-four years would go by before another illegal advocacy case would hit the Supreme Court. The prosecution of Communists began in earnest during the McCarthyism era. Communism was similar in philosophy to Socialism, yet the Communist movement now had a super power nation supporting their efforts.

2. The Communist Movement of the 1950s and early 1960s

There were four important cases during this era: *Dennis v. United States*[135], *Yates v. United States*[136], *Scales v. United States*[137]; *Noto v. United States*[138]. 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. I only dare to analyze these oft-analyzed cases because it is necessary to highlight certain aspects of the holdings. The Supreme Court has defined numerous examples of protected and non-protected activity in these cases, including requisite evidence. 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.

a) Dennis v. United States

Decided during the heyday of McCarthyism, the Court in *Dennis* upheld all of the

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[132] Gitlow, 268 U.S. at 672-73 (Holmes, J., dissenting).
[133] *Id*. at 673.
[134] *Whitney*, 274 U.S. 357.
[135] Dennis v. United States, 341 U.S. 494, 498 (1951).
[136] Yates v. United States, 354 U.S. 298 (1957).
[137] Scales v. United States, 367 U.S. 203 (1961).
[138] Noto v. United States, 367 U.S. 190 (1961).

convictions for all of the defendants for violations of the Smith Act.[139] The Court was not going to let the "powerful forces in the world today [misuse] the privileges of liberty in order to destroy her."[140] Consequently, the Court was not going to permit Communist advocacy speech to flourish unabated and demand that "before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal awaited."[141] With the seriousness of danger evoked by Communism foremost in the majority's 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 court below.[142] 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."[143] Once the court concluded that the danger was sufficient, the invasion of free speech was permissible.[144]

Justice Frankfurter, even though he concurred in the opinion, discussed the propriety of using "imminent peril" instead of the "clear and present danger."[145] In the end, he refused to go against precedent and "risk an ad hoc judgement influenced by the impregnating atmosphere of the times."[146]

Justice Black was willing to go much further. He opined that an "unfettered communication of ideas" was inherently dangerous, but as far as the Founders were concerned, the benefits from free expression were worth the risk.[147] Similarly in dissent with Justice Black, Justice Douglas opined that the Founders "were not cowards" nor did "they exalt order at the

[139] *Dennis*, 341 U.S. at 517.
[140] Dennis v. United States, 341 U.S. 494, 553 (1951) (Frankfurter, J., concurring).
[141] Dennis v. United States, 341 U.S. 494, 509 (1951).
[142] *Dennis*, 341 U.S. at 510.
[143] *Dennis*, 341 U.S. at 510.
[144] *Dennis*, 341 U.S. at 511.
[145] Dennis v. United States, 341 U.S. 494, 527-28 (1951).
[146] Dennis v. United States, 341 U.S. 494, 528 (1951) (Frankfurter, J., concurring).
[147] Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting).

cost of liberty."[148] But more importantly, Justice Douglas implored that "immediate injury to society" should be the criterion by which advocacy speech is judged.[149] The Court was evolving and had certainly come a long way from the Court in *Schenck*. But the Court here, as was the Court in *Schecnk*, was very concerned about advocacy speech that was a smoke screen for criminality, namely the crimes of conspiracy, solicitation, and aiding and abetting.

b) Yates v. United States

Yates was decided in 1957, several years after public support for Senator Joseph McCarthy had withered.[150] The "calmer times, when present pressures, passions and fears subside" discussed by Justice Black in *Dennis* were upon the Court.[151] Now the Court was positioned to decide an advocacy case without the threat of a public backlash fueled by hysteria. As a result, the Supreme Court outright acquitted five members of the Communist party.[152]

The court emphasized the distinction between "advocacy in the realm of ideas" and the "advocacy of action."[153] "The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something."[154] Because the trial court did not make this distinction, the nine remaining cases were remanded with new instructions.[155] The court rejected the trial court's rationale "that all such advocacy was punishable whether it is language of incitement or not."[156] Instead, the court held that abstract advocacy divorced from action could not be punished.[157] However, advocacy

[148] Dennis v. United States, 341 U.S. 494, 586 (1951) (Douglas, J., dissenting).
[149] *Id*.
[150] McCarthyism, at http://en.wikipedia.org/wiki/McCarthyism.
[151] Dennis v. United States, 341 U.S. 494, 581 (1951) (Black, J., dissenting).
[152] *Yates*, 354 U.S. at 328-29.
[153] *Yates*, 354 U.S. at 320.
[154] *Yates*, 354 U.S. at 324-25.
[155] *Yates*, 354 U.S. at 3.
[156] *Yates*, 354 U.S. at 317.
[157] *Yates*, 354 U.S. at 319.

with an effort to instigate action coupled with evil intent was punishable.[158]

c) Scales v. United States and Noto v. United States

Scales and *Noto* were decided on the same day, June 5, 1960, and stand for the same proposition: mere membership alone in an organization that advocates the violent overthrown of the Unites States government cannot be prosecuted.[159] However, "active" participation can be punished, as opposed to "nominal" membership.[160]

In a rare occurrence, the Supreme Court reviewed the sufficiency of the evidence in both cases.[161] In *Scales*, the court found widespread, deliberate, and focused advocacy of the violent overthrown of the United States government, and upheld the convictions.[162] However, in *Noto*, even though Noto was a member of Communist Party, a party that advocated the violent overthrow of the United States government, he himself did not publicly advocate the violent overthrow of the government.[163] The trial court found that Noto was actively carrying out the methods of his teachings by implementing his "industrial concentration" program.[164] The program exhorted Communist Party members to assume positions of leadership in unions and in key industries such as steel, railroad, and mining.[165] When the time was right, these Party members would shut down these industries by striking.[166] The court found insufficient evidence that Noto was implementing a plan to violently overthrow the government because all of his activities were patently legal.[167] The court held:

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[158] *Yates*, 354 U.S. at 319.
[159] *Scales*, 367 U.S. at 220; *Noto*, 291-92.
[160] *Scales*, 367 U.S. at 221-223
[161] *Scales*, 367 U.S. at 230-57; *Noto*, 367 U.S. at 291-300.
[162] *Scales*, 367 U.S. at 255.
[163] *Noto*, 367 U.S. at 298.
[164] *Noto*, 367 U.S. at 298.
[165] *Noto*, 367 U.S. at 294.
[166] *Noto*, 367 U.S. at 298.
[167] *Noto*, 367 U.S. at 298.

> [T]he evidence as to that [industrial concentration] program might justify an inference that the leadership of the Party was preparing the way for a situation in which future acts of sabotage might be facilitated, but there is no evidence that such acts of sabotage were presently advocated; and it is *present* advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a groundwork has been laid, which is an element of the crime under the membership clause.[168]

Furthermore, the court reiterated its holding in *Yates* that "that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[169] This quote is one of the few quotes from any of the preceding advocacy cases that would later be cited in *per curiam* opinion in *Brandenburg*.[170]

3. Brandenburg v. Ohio

Brandenburg is now the seminal case for advocacy of illegal activity. It was decided at the tail end of the Communist Party advocacy cases in 1969, less than eight years after the decisions in *Scales* and *Noto*.[171] The opinion would seem to tie up all of the loose ends of the previous advocacy cases, however there remains a lingering debate over the reach and interpretations of the opinion.

a) Brandenburg

If nothing else, *Brandenburg* finally overruled the "clear and present danger" test. The principle holding in Brandenburg states:

[168] *Noto*, 367 U.S. at 298.
[169] *Noto*, 367 U.S. at 297-98.
[170] *Brandenburg*, 395 U.S. at 448.
[171] *Brandenburg*, 395 U.S. at 444.

> 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.[172]

However, in the very next sentence, the court draws from *Noto* and distinguishes "abstract advocacy" from "preparing a group for violent action and steeling it to such action."[173] Notice how the principal *Brandenburg* holding does not mention "abstract" and the *Noto* cite does not mention "imminency." To add to the confusion, later in a footnote, the court states that "[s]tatutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to lawless action."[174] It could be argued that this footnote might condone advocacy to action that did not incite imminent lawless action. Although the court would never have granted full protection to advocacy to action that does not incite imminent lawless action because that would permit a wide range of speech-only criminal activity to flourish such as conspiracy, solicitation, extortion, threats, harassment, etc.

The Supreme Court has shed some light on the *Brandenburg* decision in *Stewart v. McCoy*.[175] Even though a denial of certiorari does not require explanation, Justice Stewart issued a short opinion to comment on an issue raised in the petition: whether teaching can be considered advocacy under *Brandenburg*.[176] The Court of Appeals held that McCoy's "teaching" speech

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[172] *Brandenburg*, 395 U.S. at 447.
[173] *Brandenburg*, 395 U.S. at 448.
[174] *Brandenburg*, 395 U.S. at 449.
[175] 537 U.S. 993 (2002). McCoy was a member of a California gang before moving to Arizona. At two social gatherings, McCoy gave a member of a Tucson gang instructions of how to run his gang. He was convicted of participating in a criminal syndicate and sentenced to 15 years. The Ninth Circuit Court of Appeals affirmed a District Court ruling that granted habeas corpus based on excessive sentencing.
[176] *McCoy*, 537 U.S. at 993.

was protected under *Brandenburg*, as long as it did not incite imminent lawless action.[177] Justice Stewart responded by stating that that holding was "surely debatable."[178] Later he states that the case law has not considered the extent of protections for instructional speech.[179] More importantly for our purposes, Justice Stewart clearly states that the opinion in *Brandenburg* "expressly encompassed nothing more than 'mere advocacy.'"[180] Thus, after this opinion, it would seem that advocacy to action is not protected under *Brandenburg*.

Yet, how will the lower courts be able to divine the separation between criminal speech and protected advocacy? The line between mere advocacy and advocacy to action is not always clear. In *Indiana v. Hess*[181], discussed more thoroughly in the next section, the defendant was engaging in advocacy to action, nonetheless his case was deemed to fall under the *Brandenburg* rubric. Or will the courts "know it when they see it"? Some courts do just that, simply declare that the speech is not advocacy and therefore not protected.[182] However, there does seem to be a common thread that runs through all of these advocacy cases including *Brandenburg*: the more the speech moves away from the ethereal world of ideas to the concrete world of action, the more the speech moves from protected to unprotected. An equally important corollary is the more imminent or apparent the speech created danger is, the less the speech 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.[183]

Adding to the *Brandenburg* opinion confusion is that there have been various

[177] *McCoy*, 537 U.S. at 994.
[178] *McCoy*, 537 U.S. at 994.
[179] *McCoy*, 537 U.S. at 995.
[180] *McCoy*, 537 U.S. at 994-95.
[181] 414 U.S. 105 (1973).
[182] See *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978) (holding that even though the tax reform speeches did not meet the immineny requirement of *Brandenburg*, the speeches went beyond advocacy and therefore are not entitled to First Amendment protection)

interpretations of what "imminent" means.

b) Imminency

The seminal case on the interpretation of *Brandenburg's* "imminent" requirement is *Hess v. Inidiana*.[184] In *Hess*, the defendant was participating in an antiwar demonstration on the Campus of Indiana University.[185] In an effort to retain some control over the demonstration, police officers moved the demonstrators off the street on the sidewalks.[186] It was then that the defendant uttered, "We'll take the fucking streets later."[187] He was promptly arrested for disorderly conduct.[188] The Supreme Court reversed the conviction holding that "the statement . . . amounted to nothing more than advocacy of illegal action at some indefinite future time."[189] Here the court clarified the *Brandenburg* test wording by stipulating that "imminent" means "now" or "immediately."

Most courts adhere to the *Hess* court's narrow interpretation of the *Brandenburg* test.[190] On the other hand, in *People v. Rubin*,[191] the court held that five weeks was imminent.[192] Most courts are loath to grant First Amendment protections to criminal speech, and the *Rubin* court was no exception. In its avid pursuit to punish solicitation to murder,[193] the court contorted itself while attempting to fit into the framework of *Brandenburg* and *Hess*.

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[183] "Tax evasion is a wrong of such sufficient gravity that Congress can punish incitement to the crime." *Freeman*, 761 F.2d at 552.
[184] 414 U.S. 105 (1973).
[185] *Hess*, 414 U.S. at 106.
[186] *Hess*, 414 U.S. at 106.
[187] *Hess*, 414 U.S. at 106.
[188] *Hess*, 414 U.S. at 107.
[189] *Hess*, 414 U.S. at 108.
[190] See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (U.S. 2002) (holding that the argument that virtual child pornography whets 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).
[191] 96 Cal. App. 3d 968 (Cal. Ct. App. 1979).
[192] *Rubin*, 96 Cal. App. 3d at 979.

c) Specificity

As a practical matter, specificity in speech will carry the speaker out of protected speech into the realm of criminality. Advocacy of ideas, mere advocacy, or abstract advocacy advance generalities as opposed to specifics. In *Brandenburg*, Brandenburg said, "Bury the [blacks]."[194] 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. One might think that the "imminency" requirement of *Brandenburg* would limit the speaker's criminal liability. However, the specificity of the incitement permits the courts to label the speech "non-advocacy" and skip *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."

4. The Federal Crime of Solicitation

a) History

The Federal crime of solicitation was enacted in the Comprehensive Crime Control Act ("the Act") of 1984, thirty-six years after the Federal crime of conspiracy was enacted into law in 1948. The Act was a massive piece of legislation that encompassed numerous additions and changes to Federal criminal law. Tucked away in Chapter X: Miscellaneous Violent Crime Amendments was the crime of solicitation, which stated:

> Makes it a Federal offense to solicit an individual to commit a felony that has as an element the use or threatened use of physical force against the person or property of another.

Although there was discussion in Senate Judiciary committee to allow for a broader range of

[193] *Rubin*, 96 Cal. App. 3d at 979.
[194] Brandenburg, 395 U.S. at 446 (offensive words substituted).

offenses, the enacted version of the crime of solicitation only applies to crimes of violence.[195]

b) "Strongly Corroborative Circumstances"

The seminal case showcasing the newly enacted Federal crime of solicitation was *United States v. Gabriel*.[196] The defendants in *Gabriel* were convicted of attempted arson, conspiracy and solicitation, in that they tried to hire an arsonist to burn down their store.[197] In response to the defendant's assertion that the government did not establish their criminal intent to solicit the crime of arson, Judge Wood referenced the legislative history.[198] The Senate Report attached to the Act stated that "the surrounding circumstances in general must indicate that the solicitor is serious that the person solicited actually carry out the crime."[199] Included in the report were examples of "strongly corroborative circumstances" that are highly probative of intent:

> (i) the fact that the defendant offered or promised payment or some other benefit to the person solicited if he would commit the offense;
> (ii) the fact that the defendant threatened harm or some other detriment to the person solicited if he would not commit the offense;
> (iii) the fact that the defendant repeatedly solicited the commission of the offense, held forth at length in soliciting the commission of the offense, or made express protestations of seriousness in soliciting the commission of the offense;
> (iv) the fact that the defendant believed or was aware that the person solicited had previously committed similar offenses;
> (v) the fact that the defendant acquired weapons, tools or information suited for use by the person solicited in the commission of the offense, or made other apparent preparations for the commission of the offense by the person solicited.[200]

When any of these "strongly corroborative circumstances" are present, the government is quick to show that relationship. However, when none of the circumstances are present in a case, such

[195] United States v. Gabriel, 810 F.2d 627, 635 (7th Cir. 1987) (*quoting* S.Rep. No. 225, 98th Cong., 2d Sess. 308 & n. 4, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3487-88 & n. 4).
[196] United States v. Gabriel, 810 F.2d 627 (7th Cir. 1987).
[197] *Gabriel*, 810 F.2d at 629-30.
[198] *Gabriel*, 810 F.2d at 634-35.
[199] *Gabriel*, 810 F.2d at 635.
[200] *Gabriel*, 810 F.2d at 635.

as in *United States v. Rahman*[201] and *United States v. al-Timimi*, the "strongly corroborative circumstances" are glossed over or not even mentioned. To be fair, the Senate Report clearly indicated that these factors are "not exclusive or conclusive indicators of intent to solicit."[202] Neither was the Senate Report prescient to foresee religious fundamentalists who personally gain nothing from their solicited acts. Nonetheless, it is so much more persuasive to a jury or an appeals court when a defendant's actions are implicated by one or more of the "strongly corroborative circumstances."

5. Crime-Facilitating Speech of Aiding and Abetting

Even though several of the Communist era cases considered teaching, instructing, and aiding and abetting speech, the primary focus of this article up to this point has been criminality of speech that incites or encourages another person to commit a crime. Incitement speech must precede the formation of the intent to commit the crime by the recipient-doer. Here for the first time, criminal speech is considered in the context that the recipient-doer has already formed the intent to commit a crime.

Crime-facilitating speech is speech that "provides information that makes it easier for people to commit crimes, torts, or other harms."[203] Crime-facilitating speech is a broad topic with numerous complexities that has achieved only scant guidance from the Supreme Court. However, the topic must be addressed because the government charged al-Timimi with aiding and abetting, which can take the form of speech. Furthermore, within aiding and abetting speech, there are two flavors: speech that steels the recipient to commit the crime and speech that instructs how to accomplish or perpetrate the crime. It will be my contention that the

[201] United States v. Rahman, 189 F.3d 88 (2nd Cir. 1999).
[202] *Gabriel*, 810 F.2d at 635.
[203] Eugene Volokh, *Crime-Facilitaing Speech*, 4 Stanford L.R. 57, 57 (2005).

government did not prove that al-Timimi prepared the *Khan* defendants for jihad or taught them how to take up jihad. However, there is a reasonable question of fact as to whether al-Timimi encouraged or steeled the *Khan* defendants to stay the course once they had decided to take up jihad. Only these two components of crime-facilitating speech will be covered here.

a) Instructional Speech as Aiding and Abetting

Justice Stewart in *McCoy* left open the question whether instructional speech is punishable.[204] However, in *McCoy*, the trial court convicted and the Arizona Court of Appeals affirmed the conviction.[205] In fact, the tradition in the lower courts is to fully prosecute instructional speech. This is plainly evident in the spate of "tax reform" cases of the 1970s and 1980s.[206] Not only was the physical assistance in filling out forms prosecuted[207], but as in *United States v. Buttorff*,[208] mere speech that instructed the audience how to fill out various forms in violation of the tax law was also prosecuted.[209] In *Buttorff*, the meeting attendees went home and investigated other methods of "tax reform" in the "marketplace of ideas" and then decided to follow Buttorff's advice.[210]

Equally disturbing is the line of cases that permit the punishment of the written word as aiding and abetting.[211] Yet, the "speaker's enthusiasm for the result"[212] is nontrivial difference

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[204] *McCoy*, 537 U.S. at 995.
[205] *McCoy*, 537 U.S. at 993.
[206] *See* United States v. Freeman, 761 F.2d 549 (9th Cir. 1985) (holding that soliciting or counseling a violation of the law is not protected under the First Amendment); United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978). (holding that explanations on how to avoid withholding are not advocacy and hence not protected).
[207] In *Freeman*, Freeman had gone beyond speech and physically assisted at least one person in filling out the forms. 761 F.2d at 552.
[208] 572 F.2d 619 (8th Cir. 1978).
[209] In *Buttorff*, the defendants did nothing more than speak at meetings, although evidence was presented that they gave detailed instructions on how to implement their "tax reform" strategies. 572 F.2d at 622.
[210] Buttorff, 572 U.S. at 623.
[211] *See* Rice v. The Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997) (holding that in civil liability for aiding and abetting could be brought against the publishers of the book *Hit Man: A Manual for Independent Contractors*); United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (holding that probable cause that a crime had been committed was proper for distributor of instructions on the manufacture of phencyclidine); *but see* James v. Meow Media, Inc.,

between the written word and speech.

But what is clear in both oral and written aiding and abetting speech cases is that when the "gravity of danger" is sufficient, the courts will freely sacrifice the First Amendment. In the last paragraph of the *McCoy* opinion, written in 2002, Justice Stewart states that "the First Amendment does not prevent restrictions on speech that have 'clear support in public danger.'"[213] Video games and pornography are not sufficiently grave while murder for hire and tax evasion are. It is a small wonder that the Supreme Court had even permitted speech that advocated the violent overthrow of the country[214] and hate speech sprinkled with veiled threats of physical violence.[215] On the heels of 9/11, there will be little debate as to which side of the "gravity" fence that terrorism will fall.

b) Encouraging or Steeling Speech as Aiding and Abetting

There is not much authority where a speaker was prosecuted for merely encouraging or steeling another person to commit a crime when that person had already formed the intent to commit the crime. In general, the person who solicits the crimes usually aids and abets the crime. Consequently, the solicitor is prosecuted for both crimes at the same time, as in the al-Timimi case.[216]

6. United States v. Rahman

Omar Ahmad Ali Abdel Rahman was tried and convicted for seditious conspiracy,

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300 F.3d 683 (6th Cir. 2002) (rejecting wrongful death claim against maker of a violent video game); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (rejecting claim that article on auto-erotic asphyxiation incited imminent lawless action and raising the question of whether written materials could ever create culpable imminent incitement under Brandenburg).

[212] Gitlow v. New York, 268 U.S. 652, 673 (1925).

[213] *McCoy*, 537 U.S. at 995.

[214] *Yates*, 354 U.S. at 319.

[215] *Brandenburg*,

conspiracy and solicitation to the murder of Egyptian President Mubarak, soliciting an attack on American military installations, and bombing conspiracy.[217] 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 a level above the details of the individual operations, or in other words, he was the ringleader.[218]

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."[219] However, the crucial evidence proffered by the government was a number of Rahman's conversations taped by law enforcement agencies.[220] A sample of these conversations include:

> Rahman told Salem he "should make up with God . . . by turning his rifle's barrel to President Mubarak's chest, and killing him."
>
> On another occasion, speaking to Abdo Mohammed Haggag about murdering President Mubarak during his visit to the United States, Rahman told Haggag, "Depend on God. Carry out this operation. It does not require a fatwa . . . You are ready in training, but do it. Go ahead."
>
> The evidence further showed that Siddig Ali consulted with Rahman about the bombing of the United Nations Headquarters, and Rahman told him, "Yes, it's a must, it's a duty."
>
> On another occasion, when Rahman was asked by Salem about bombing the United Nations, he counseled against it on the ground that it would be "bad for Muslims," but added that Salem should "find a plan to destroy or to bomb or to . . . inflict damage to the American Army."[221]

The appeals court affirmed that Rahman's words instructed, solicited and/or persuaded others to commit crimes and thus was not protected speech.[222] The court touched on the "strongly corroborative circumstances" from *Gabriel*, yet did not furnish any facts that related to the

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[216] Memorandum Of Law In Support Of A Motion For A Bill Of Particulars, Pleading 11, October 21, 2004, United States v. Al-Timimi, (No. 1:04cr385).
[217] *Rahman*, 189 F.3d at 103.
[218] *Rahman*, 189 F.3d at 104.
[219] *Rahman*, 189 F.3d at 104.
[220] *Rahman*, 189 F.3d at 117.

enumerated examples given by the Senate Report.[223] Instead, the court merely stated that intent was as issue for the jury and upon the facts of the case, the jury was within its discretion to find Rahman guilty.[224] Furthermore, the court held that Rahman could not assert immunity based on a religious ministry because freedom of religion is not a protection from prosecution for generally applicable laws.[225] Lastly, the court upheld the government's introduction of Rahman's public speeches to demonstrate criminal intent, even though the speeches *were* protected by the First Amendment.[226]

The *Rahman* case is quite similar to the al-Timimi case. 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 advocated jihad and that jihad was a duty.[227] 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 Mufti and could issue fatwas (opinions or rulings), al-Timimi had not. Rahman authorized all of his directives by issuing the requisite fatwas[228], where al-Timimi had to rely on other Muslim scholars for religious rulings. Rahman was in constant communications with his co-conspirators, giving them direction at every turn.[229] Al-Timimi was a distant observer of the *Khan* defendants and

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[221] *Rahman*, 189 F.3d at 117.
[222] *Rahman*, 189 F.3d at 117.
[223] *Rahman*, 189 F.3d at 125-26.
[224] *Rahman*, 189 F.3d at 125-26.
[225] *Rahman*, 189 F.3d at 117.
[226] Rahman, 189 F.3d at 118. The Court of Appeals based its decision on *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (holding that "the First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").
[227] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 8, United States v. Al-Timimi, (No. 1:04cr385); *Rahman*, 1897 F.3d at 124.
[228] *Rahman*, 1897 F.3d at 104.
[229] *Rahman*, 1897 F.3d at 104.

hardly knew them.[230] Rahman had an agenda of terrorism[231] 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.

III. Analysis

Currently, al-Timimi's case is being appealed and this analysis was written with that appeal in mind. However, the analysis aims a bit lower and merely attempts to poke weaknesses in the prosecution's case against al-Timimi. It was written to provide a broad picture of the actual case against al-Timimi and not to raise particular appellate issues.

A. Toughest Evidence to Overcome

The toughest evidence that al-Timimi must overcome is that after attending the meeting at Kwon 's house on September 16, 2001, Kwon, Hasan, Aatique, and Khan, four meeting attendees, dropped their lives in the United States and headed off to Pakistan and trained in a LET terrorist camp. After attending another meeting in October, Surratt left the country and Chandia also headed off to the LET camp in Pakistan. For a jury that is grappling with a very complex case involving serious issues, here was a simple issue of cause and effect that could easily be grasped. Al-Timimi's fate was sealed when the government introduced al-Timimi's anti-American speeches, his contacts with various Muslim scholars some of whom have links to terrorism, and that fact that al-Timimi was well respected by the *Khan* defendants.

Furthermore, *Buttorff* is the case that is closest on point and possibly the most difficult for al-Timimi to overcome. The principles in *Buttorff* were investigating other means to evade

[230] *See* Transcripts, Testimony of Khwaja Mahmood Hasan, Pleading 117, United States v. Al-Timimi, (No. 1:04cr385); Transcript, Testimony of Yong Ki Kwon, Pleading 97 and 98,United States v. Al-Timimi, (No. 1:04cr385).
[231] Rahman, 189 F.3d at 104-112 ("The Government's Case").

taxes.[232] Yet, after attending a meeting presented by the defendants, it was then that the principles decided to evade federal income taxes using the defendant's methods.[233] The Court of Appeals in *Buttorff* sidestepped any *Brandenburg* analysis by holding that the speech was not advocacy and not entitled *Brandenburg's* speech protections.[234] By invalidating the "imminency" requirement in *Brandenburg*, the court could uphold the guilty verdict despite the fact that the *Buttorff* principles filed their tax returns several days and weeks after the meeting.[235]

In sidestepping *Brandenburg*, the Court of Appeals in *Buttorff* did not explicitly reference the "gravity of danger" rationale in *Dennis*, instead the court casually mentioned the "potential of substantially hindering the administration of [tax] revenue."[236] Likewise, in another tax evasion case, the court in *Freeman* cited *Buttorff* for the proposition that "[t]ax evasion is a wrong of sufficient gravity that Congress can punish incitement to the crime."[237] If al-Timimi went beyond mere advocacy and the courts are free to weigh the "gravity of the danger" when deciding First Amendment protections, then al-Timimi does not stand a chance under the specter of supporting terrorism. Yet, 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*.

1. Ringleader

As I began my research for this article, I read a number of motions and portions of the transcripts from the *Al-Timimi* trial. My first impression was that the prosecution was attempting to portray al-Timimi not just as a ringleader, but as a Mafia don sitting behind the scenes, pulling the strings and keeping a safe distance between himself and the day-to-day machinations of his

[232] *Buttorff*, 572 F.2d at 622-23.
[233] *Buttorff*, 572 F.2d at 622-23.
[234] *Buttorff*, 572 F.2d at 624.
[235] *Buttorff*, 572 F.2d at 622.
[236] *Buttorff*, 572 F.2d at 624.

crime syndicate. I was not surprised upon reading the first paragraph of prosecution's rebuttal closing argument that dispelled First Amendment privileges for criminals like Tony Soprano, the crime boss of the hit HBO series, *The Sopranos*.[238] Mr. Kromberg said:

> [W]hen Tony Soprano says, "Go Whack that guy," that's not protected speech. And when Tony Soprano's lawyer said, "My client didn't say, "Go whack that guy," but even if he did, it was protected speech," that's not a good argument."[239]

To be fair, Mr. Kromberg was not implying that al-Timimi was like Tony Soprano, but the mere mention of mobster dons is prejudicial when a key component of the government's case alleges that al-Timimi was the ringleader of the "Virginia jihad network."

In fact, there is no evidence that al-Timimi was the "Virginia jihad network" ringleader. Mr. Kromberg elicited testimony from the Khan defendants that al-Timimi was well respected and answered many of their questions concerning Islam. Mr. Kromberg characterized that relationship when he said the Khan defendants "couldn't figure out how to tie their shoelaces without asking al-Timimi."[240] Yet, to understand the relationship between al-Timimi and the Khan defendants, it is necessary to touch on a particularity of the Muslim religion. Most Americans are familiar with the some variation of Judeo-Christian ethic, which lays out broad guidelines for moral conduct, namely the Ten Commandments and the Golden Rule ("Treat other as you want to be treated"). In contrast the Qur'an specifically details all acceptable and prohibited conduct; all facets of a Muslim's life are spelled out. However, not every possible situation is covered in the Qur'an, especially situations that could not have occurred a thousand

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[237] *Freeman*, 761 F.2d at 552.
[238] Transcripts, Rebuttal Argument by Mr. Kromberg, Pleading 123 at 1, United States v. Al-Timimi, (No. 1:04cr385).
[239] Transcripts, Rebuttal Argument by Mr. Kromberg, Pleading 123 at 1, United States v. Al-Timimi, (No. 1:04cr385).
[240] Transcripts, Rebuttal Argument by Mr. Kromberg, Pleading 123 at 1, United States v. Al-Timimi, (No. 1:04cr385).

years ago when the Qur'an was written, such as praying in a moving car. As a result Qur'anic scholars and muftis are often consulted for rulings. For instance, the Grand Ayatollah Sistani is a renowned Shi'ite scholar in Iraq and has his own website, www.sistani.org.[241] Anyone can ask the Ayatollah questions and his assistants will retrieve the question and then ask the Ayatollah himself. The answer will be sent in a reply email. No question is too mundane. For instance, fatwa 2648 reads:

> It is unworthy to drink too much water; to drink water after eating fatty food; and to drink water while standing during the night. It is also unworthy to drink water with one's left hand; to drink from the side of a container which is cracked or chipped off, or from the side of its handle.[242]

No question is too mundane, even if it involves shoelace tying. This type of relationship between Muslim scholars and Muslim devotees is quite common and it is misleading for Mr. Kromberg to compare it to the relationship between a Mafia crime don and his henchmen.

That is not to say that Muslim scholars such as Ayatollah Sistani do not hold great respect and devotion from their followers that sometimes borders on zealousness. In that respect, much depends on the individual Muslim scholar and what he demands from the devotion of his followers. Cleric Moqtada Sadr, another well-respected Shiite Muslim scholar in Iraq, organized his followers into the Madhi Army. While the Mahdi Army was only a loosely organized paramilitary group, it held off the United States Army in the battle in the holy city of Najaf for several weeks before a peace settlement could be arranged.[243] But it would be a mistake to put al-Timimi on the same level with either of these two Iraqi clerics. Although al-Timimi was a

[241] Phillip Kennicott, *The Religious Face of Iraq; Shiite Leader Ali Sistani's Edicts Illuminate the Gap With the West*, Washington Post, February 18, 2005, C1.
[242] Phillip Kennicott, *The Religious Face of Iraq; Shiite Leader Ali Sistani's Edicts Illuminate the Gap With the West*, Washington Post, February 18, 2005, C1.

rising star in the Muslim community, he was not a mufti (able to render fatwas or opinions) and he had to rely on other more established Muslim scholars for their fatwas. Al-Timimi merely relayed these fatwas to all members of the Center.

In fact, the government has made much of the fact that al-Timimi brought the al-Uqla fatwa to the September 16th meeting at Kwon's house.[244] Testimony was introduced that al-Timimi gave it to Masoud Khan with the instructions to burn it after reading it.[245] 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.

However, 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. If al-Timimi remains at arms-length from the *Khan* defendants, his speech is more likely to be protected by the First Amendment, so long as the speech did not cause an imminent violation of the law. In a similar manner as the defendant in *Brandenburg*, disassociated from the attendees at the KKK rally, al-Timimi can advocate at a distance. This is in stark contrast to the Mafia boss who is connected to all phases of his operation and benefits immensely from its continuing criminal activities. Behind every Supreme Court advocacy of illegal action decision, there is the abhorrent thought that a Mafia don might invoke First Amendment protections for orders to his underlings to commit violent crimes.

This is exactly why the Fourth Circuit Court of Appeals would not extend First Amendment protections to Rahman. There is little question that Rahman was a ringleader. He directed the activities of his followers for the expressed purpose of terrorism bolstered by his

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[243] Rajiv Chandrasekaran, *At the Ready to Answer Sadr's Call*, The Washington Post, August 28, 2004, A16.
[244] Transcripts, Testimony of Khwaja Mahmood Hasan at 13, Pleading 117, United States v. Al-Timimi, (No. 1:04cr385).

own religious rulings[246] and his speech exhorted specific criminal activity.[247] The Fourth Circuit Court of Appeals gave Rahman's First Amendment defense short shrift.[248]

In contrast, al-Timimi did not associate with the Khan defendants, he was not friends with any of them. In fact, other than the September 16th meeting, al-Timimi had minimal contact with the *Khan* defendants. However, there is abundant testimony that al-Timimi answered numerous Islamic permissibility questions, not only from the Khan defendants but also from any Center attendee. Rather than ordering the*Khan* defendants to take up jihad on September 16th, he gave them a choice based on Muslim rulings: jihad, hijra, or lay like a rug. While "laying like a rug" may be perceived as derogatory, several of the meeting attendees chose that option. At the second meeting in October, al-Timimi gave the same advice and one attendee chose jihad training, one chose hijra and left the country but did not participate in jihad training, and the rest chose to "lay like a rug." In fact, there is little or no evidence that al-Timimi directed anyone to do anything. Rather the evidence points to a scholar who at all times was eager to give advice to anyone who would listen. Instead of being a ringleader, al-Timimi was a low ranking Muslim scholar who was a messenger between other muftis and the Muslims at the Center.

Lastly, there is a dispute as to who initiated the September 16 meeting. Kwon testified that al-Timimi called him right before the meeting was to take place and asked for permission to attend the meeting.[249] After the events of 9/11 and the subsequent backlash against Muslims[250], it is conceivable than al-Timimi was worried that the meeting attendees would plan something

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[245] Transcripts, Testimony of Khwaja Mahmood Hasan at 14, Pleading 117, United States v. Al-Timimi, (No. 1:04cr385).
[246] *Rahman*, 189 F.3d at 104.
[247] *Rahman*, 189 F.3d at 117.
[248] *Rahman*, 189 F.3d 115.
[249] Kwon April 5th direct at 47-50, United States v. Al-Timimi, (No. 1:04cr385).
[250] Phuong Ly, *Montgomery Steps Up Its Fight Against Hate*, The Washington Post, October 3, 2001, B4.

Islamically impermissible. Al-Timimi was not the *Khan* defendant's lawyer and could not advise them as to the legality their plans for jihad training, instead he was their spiritual advisor who freely dispensed his firm belief that jihad is required of all Muslims.

2. Aiding and Abetting

There 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, each of whom corroborated the fact that al-Timimi gave them information specifically to facilitate their criminal objective – travel to Pakistan. The problem is that everything that al-Timimi said to them was information that anybody could have given them. Al-Timimi told them that when traveling: 1) to disguise your numbers like Joseph, 2) that if stopped to act scared and ask for our lawyers or our mothers or cry like a baby, 3) carry a magazine to look normal, and 4) that if Mahmood is detained, that Kwon should also stop because Kwon was not Pakistani and would not be able to find his way around Pakistan. Al-Timimi's advice arose from ordinary, run-of-mill common sense that can readily be distinguished from Royer's advice. Royer gave each of the defendants who were heading to the LET camp the phone number of the LET office in Lahore, Pakistan. Furthermore, he contacted the LET office himself to arrange for their travel. The LET office gave Royer the "kunyas" (aliases) that the men would travel under in Pakistan. Compare al-Timimi's advice to the advice given in the tax reform cases, *Freeman* and *Buttorff*. In those cases the defendants gave technical advice on how to fill out tax forms to evade paying taxes. Compare al-Timimi's advice to the *Hit Man* book that gave detailed, step-by-step instructions in all aspects of perpetrating a contract killing and eluding detection. Al-Timimi speech could hardly be deemed aiding and abetting.

Nonetheless, aiding and abetting can take the form of "steeling one to action." 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 the 20th.[251] Al Timimi met with Kwon and Hasan on September 19 for lunch.[252] It is alleged that al-Timimi discussed their plans and gave them more advice.[253] Admittedly, this meeting smacks of "steeling one's resolve to 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. In fact, not a single case on point was found. While this is not an overly convincing argument, it will have to suffice for now.

3. Solicitation

Solicitation can only happen before the recipient-doer has formed the intent to commit the crime. This is especially import for al-Timimi for if the*Khan* defendants formed the intent to travel to the LET camps prior to the September 16 meeting, then legally al-Timimi cannot be prosecuted for incitement.

a) Several of the Khan Defendants had already Traveled to the LET Camps

There was absolutely no testimony given that al-Timimi in any way influenced Royer, al-Hamdi, or Chapman to travel to the LET camps in Pakistin before 9/11. Neither is there any testimony that al-Timimi influenced Aatique to purchase his ticket for Pakistan before 9/11.

One curious side affect of this travel is that nothing significant actually happened during the LET training. All three men reported the same thing, that they fired all sorts of weapons and played war games in the mountains of Pakistan. Royer, al-Hamdi, and Chapman all returned

[251] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 19-23, United States v. Al-Timimi, (No. 1:04cr385).
[252] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 22-23, United States v. Al-Timimi, (No. 1:04cr385).
[253] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 23, United States v. Al-Timimi, (No. 1:04cr385).

home to Virginia with glorified stories of their training, exhorting the paintball group back home.[254] The important fact is that they returned home instead of being killed waging jihad. Had anyone been killed during one of these excursions, it is highly probable that the effect would have been dramatic on these men. Without the threat of death, traveling to the LET camp had no dire consequences and was an exotic diversion from the routine of daily life in America.

Although the government contends that the *Khan* defendants were a dedicated group of terrorists, in actuality, they were a bunch of wannabes propped up by their own boasting. There is testimony that Royer desperately tried to get involved in actual fighting in Bosnia, but the locals would not let him fight and sent him home. Although the government contends that al-Hamdi fired a weapon at Indian troops, there is no indication how serious the firefight with Indian troops was, if there even was a firefight. In all probability, Al-Hamdi was miles from away from an actual Indian soldier. Male pride and boasting motivated these men far more than al-Timimi speeches.

b) 9/11

One cannot describe the effect that 9/11 had on this country. Without belaboring a well-discussed topic, it is still important to portray the days after 9/11 from the viewpoint of a Muslim. While many Americans were still shell-shocked after 9/11, some vented their frustrations on Muslims, Sikhs, and anyone who looked Middle Eastern.[255] These reactions, though shameful, are examples of the frailty of human nature because the victims of these crimes almost assuredly had nothing to do with the 9/11 attacks. Nonetheless, the effects of the conduct

[254] Aatique April 5th direct, at 69. Aatique testified that, "and personally for me . . . I like military things and I like to be militarily trained . . . it was sort of an extension of the paintball training that we were doing . . . and when Ibrahim Al-Hamdi came back and described his experience, it was very encouraging to the other people there."
[255] Phuong Ly, *Montgomery Steps Up Its Fight Against Hate*, The Washington Post, October 3, 2001, B4.

on the Muslim community were devastating.[256] Consequently, the role that 9/11 played in the *Khan* defendant's decision to take up jihad training cannot be underestimated.

c) Cabela's Jackets[257]

The defense elicited testimony that Khan and Kwon discussed the necessity of purchasing the jackets from Cabela's on or about September 15th.[258] Khan had already purchased a jacket for himself and brought the Cabela's catalog to the September 16 meeting.[259] Kwon later purchased three Cabela's jackets based on Kahn's recommendation. Kwon purchased the jackets for himself, Hasan, and Hammad Adbur-Raheem.[260]

d) Intent and "Strongly Corroborative Circumstances"

The government did not elicit testimony or introduce any other evidence that any of the "strongly corroborative circumstances" from *Gabriel* were present in the *Al-Timimi* trial. However, those circumstances merely indicate the intent of the solicitor and the government is free to introduce other evidence of intent. While no one would deny that al-Timimi is a devoted adherent to his faith and fully intended that his advice be followed, it is another matter entirely that al-Timimi had a personal stake in the *Khan* defendants' endeavors to take up jihad. Furthermore, al-Timimi always spoke in generalities and rarely spoke about specific details about the manner in which someone might follow his advice. In contrast to al-Timimi, Rahman's taped conversation reveal his intent to wage a jihad in downtown New York City.[261]

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[256] Phuong Ly, *Montgomery Steps Up Its Fight Against Hate*, The Washington Post, October 3, 2001, B4.
[257] Cabela's is an outdoor outfitter. The jacket under discussion are cold-weather jackets suitable for jihad trainiing in the mountains of Pakistan
[258] Kwon cross at 73, United States v. Al-Timimi, (No. 1:04cr385).
[259] Kwon direct at 18-19, United States v. Al-Timimi, (No. 1:04cr385).
[260] Transcript, Pleading 98, Testimony of Yong Ki Kwon at 18, United States v. Al-Timimi, (No. 1:04cr385).
[261] *Rahman*, 189 F.3d at 117.

Rahman directly commanded his followers to assassinate Egyptian President Mubarak.[262] Rahman's intent can be drawn from these statements, whereas al-Timimi's intent is not as obvious.

e) Solicitation Conclusion

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" them to action at the meeting itself. However, al-Timimi did not cross over the line of speech and commit any overt physical acts of aiding and abetting. Likewise, as previously asserted, al-Timimi did not aid and abet the *Khan* defendants through instructional speech. Furthermore, there is scant authority for the proposition that someone can be punished solely on the basis of "steeling" speech. Accordingly, al-Timimi should not be sentenced to life in prison plus 70 years for averring his religious convictions.

At this point, a simple analogy might be helpful. Suppose the Khan defendants are sitting on a toboggan at the top of a big snow-covered hill. Did al-Timimi push them over the edge or did he merely stand on the side and give them a "thumbs up" sign? There is more than sufficient evidence to conclude that al-Timimi gave them spiritual advice and nothing more. Yet, after deliberating for seven days, the jury was convinced beyond and reasonable doubt that al-Timimi pushed that toboggan over the edge.

4. Imminent Lawless Action

When trying to understand the rationale of "imminent lawless action," it is helpful to think of the pressure salesman. Everyone has been pressured by a salesman and is thankful to

[262] *Rahman*, 189 F.3d at 117.

get out from under that pressure in order to make an informed purchasing decision. Similarly, "imminent lawless action" under *Brandenburg* evolved with the realization that anyone can be incited to lawless action in the heat of the moment. In contrast, when the incited person goes home, thinks about the proposition, tests the incitement speech in the "marketplace of ideas", and then commits a crime the next day, it should be assumed that the incited person acted on his own volition. Even though "imminent lawless action" is not an issue in this case, there are a few points worthy of discussion.

a) Long Distance Influence

While it may be conceded that al-Timimi did in fact exert significant influence over the *Khan* defendants, there remains considerable doubt that al-Timimi exerted enough influence over these men to have them drop their lives here in America, travel to foreign lands, wait for several weeks in the foreign land, obtain military training for another several weeks, and then possibly sacrifice their lives waging jihad based on one two-hour meeting. Kwon testified that he and Hasan spent the first two weeks in Pakistan at Hasan's uncle's house.[263] They passed the time by shopping and taking in the sights.[264] Moreover, one can only imagine the array of anti-American influences present in Pakistan. However, the jury never considered this evidence in under the *Brandeburg* rubric. All they had to do was keep the criminality contained to the events of the September 16 meeting. Nonetheless, it is clear that lawless action was not imminent.

b) Probability of Success

Al Timimi's speech equally fails the *Hess* test for the reason that the action was to be conducted at some "indefinite time in the future." *Brandenburg* and *Hess* require less

[263] Kwon April 7 direct at 45, United States v. Al-Timimi, (No. 1:04cr385).

speculative lawless action. The possibility that the Khan defendants could actually fight along side of the Taliban was very slim. At the time of the September 16 and October meetings, the United States was not even engaged in hostilities with the Taliban.[265] Although an attack was imminent (more so in October), any number of events could have circumvented the armed conflict. Eventually the hostilities started on October 20th and were finished soon afterward on December 7th.[266] In a post trial motion, Royer related his conversation about joining the Taliban when the topic was raised at the September 16 meeting.[267] He said that if they went to Afghanistan that they would be most assuredly been shot as American spies.[268] Added to this are a whole host of hurdles such as being able to cross the Afghan-Pakistani border, which was closed shortly after the conflict began.[269] The Khan defendant's chances to enter that conflict were almost zero. Consequently, the lawless action would be "indefinite" according to *Hess* and too speculative to warrant punishment under *Brandenburg*.

IV. Conclusion

The terrorist attack on the United States on 9/11 was one of the worst disasters in our history. Furthermore, it was preventable but for the bumbling ineptitude of our security agencies, chiefly the FBI, the CIA, and the Department of Justice. No one can refute that these agencies had the actionable intelligence and the capability to thwart 9/11, but because of a number of factors ranging from downright incompetence to interagency turf battles, 9/11 was

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[264] 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.
[265] Hostilities between the United States and the Taliban began on October 20, 2001. Presentencing Report for Muhammed Aatique at 10, United States v. Khan, (No. 03-296-A).
[266] John Pomfret, *Taliban Begins To Surrender In Kandahar*, The Washington Post, December 7, 2001, A1.
[267] 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).
[268] 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).
[269] Transcript, Pleading 97, Testimony of Yong Ki Kwon at 58-60, United States v. Al-Timimi, (No. 1:04cr385).

smashing success for the terrorists. Billions of dollars spent on research, technology, and salaries for these agencies and for the mere cost of $500,000, al-Qaeda outfoxed them all. Without a doubt, these revered institutions of our government looked like amateurs.

Railed against the might of the United States government is a ragtag assortment of radical Muslims, Usama bin Laden, Ayman Al-Zawahiri, Mullah Omar, and Abu Musab al-Zarqawi. Usama bin Laden has slipped through our fingers on several occasions and continues to stymie our government's best efforts to catch him. All of these men continue to be more than just an irritant, they are directing terrorist activities this very day in an attempt to kill or maim Americans, especially our soldiers in Iraq.

In fairness, there have been success stories as well. The United States hunted down and captured Kalid Sheik Mohammed, the mastermind of the 9/11 attacks. The United States dislodged the Taliban and helped establish a stable government in Afghanistan, with relatively minor collateral damage. And there has not been a terrorist attack within the United States since 9/11. To the government's credit, these are solid accomplishments.

Eager to demonstrate to the world the effectiveness of our system of justice, the United States began to zealously prosecute terrorists after 9/11. But, instead of success, the government has encountered numerous problems prosecuting terrorists. In fact, contrary to government's claim that it has successfully prosecuted over 200 terrorism cases, reporters at the Washington Post uncovered data that puts the number closer to 39.[270] Add to this the missteps by the government in the Zacarias Moussaoui trial,[271] problems with ill-conceived statutory construction of 18 U.S.C. § 2339B,[272] and other related problems, and the government's record is

[270] Dan Eggen and Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, The Washington Post, June 12, 2005, A1.
[271] *A Way Out*, Editorial, The Washington Post, October 4, 2003, A18.
[272] Andrew C. McCarthy, *Cutting their Support*, National Review Online, April 21, 2005.

less than stellar. Any successful terrorism prosecution is welcome.

Against this backdrop, the trials of *Khan* and *Al-Timimi* unfolded. No matter what the government claims, the *Khan* defendants did nothing more than play army in the foothills of Pakistan. While there was a remote possibility for violence, the fact remains that they did not harm anybody. Yet, Kahn received a life sentence plus 30 years and Chapman received 65 years. Unsatisfied, the government went after the *Khan* defendant's spiritual leader, al-Timimi. With the full might of the FBI and the Department of Justice, the same organizations that "dropped the ball" on 9/11, the government descended upon al-Timimi like a "pack of wolves on an elk carcass." The lead prosecutor, Mr. Kromberg, 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 Unites States soldiers, regardless of the actual truth. Sadly, in the process, the First Amendment has taken another beating.