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First Amendment Tension: Advocacy and Clear and Present Danger

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A conflict exists in the U.S. legal tradition between protecting national security while securing the freedoms promised under the First Amendment. This paper reviews those two lines of legal logic in light of the demand by the American people to be protected from terrorists after the Boston bombing and from the federal government after the criticism of the NSA that ensued from the Snowden releases.

On April 15, 2013, two brothers set off two bombs at the finish line of the Boston Marathon. On May 8, the House Committee on Homeland Security met to determine if the bombing was preventable. The public wanted to know why the federal government did not protect the public from a terrorist attack. On June 1, 2013, Edward Snowden began telling world newspapers about secret wiretapping and surveillance of citizens and world governments by the U.S. government (Greenwald, 2014). By June 11, the National Intelligence Committee wanted a review of the activities of the National Security Agency. Public anger grew as the extent of governmental surveillance became known and the major technology corporations met with President Barack Obama to discuss National Security Agency activities (Talev, 2013). Within U.S. jurisprudence, the U.S. Supreme Court has searched since 1919 for the point when free speech has all of the force of action. That point is so elusive that the administrative branch of the U.S. government has created a huge government apparatus to identify people who are done talking and are ready to commit an act of terrorism.

Since 1919 the U.S. Supreme Court has searched for the line that delineates when speech is mere advocacy and when speech triggers a cause and effect relationship that harms society. This paper explores the legal issues of what happens to free speech in a time of terrorism. Justice Oliver Wendell Holmes argued in *Schenck v. U.S.* (249 U.S. 47, 1919) that the First Amendment was not an absolute right, regardless of the wording of the First Amendment, that "Congress shall make no law...." Holmes explained that the writers of the constitution never intended to allow someone to falsely shout fire in a crowded theater. "The

most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," explained Holmes (249 U.S. 47, 53). Holmes' example claimed a cause/effect relationship between the speech act and the harmful consequence, and that is what created the "clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (249 U.S. 47, 53).

Holmes could use the crowded theater analogy to overcome the bar of the First Amendment. However, Holmes could not make a cause/effect argument against Charles Schenck because Schenck may have wanted to have his materials lead to mass opposition to World War I, but, in fact, Holmes admitted that the court record was clear that no one responded to Schenck's writing. Holmes had the same problem with the two First Amendment companion cases of *Frohwerk v. U.S.* (249 U.S. 204 (1919) and *Debs v. U.S.* (249 U.S. 211, 1919). Instead of cause/effect, Holmes argued that the government only had to wait until the intent of the speech was clear to prosecute the speaker; the government did not have to wait for the effect. Legal scholars Zechariah Chaffee (1964) and Ernest Freud (1919), both friends of Holmes and fellow justice Louis Brandeis, argued in national publications that the natural extension of Holmes' line of legal reasoning was to prosecute people for their beliefs and not because they actually presented a clear and present danger.

Holmes and Brandeis revised their thinking from *Schenck* when the U.S. Supreme Court decided the case of *Abrams v. U.S.* (250 U.S. 616, 1919). The two justices argued that Abrams was an "unknown man" with a "silly leaflet" (250 U.S. 616, 629). Abrams lacked the resources to carry out his intent to harm the government's war effort in World War I. Accordingly, they argued, Abrams was being prosecuted for his beliefs and not the effect his speech would create in the immediate future. Brandeis fully developed the reasoning of clear and present danger in his concurrence in *Whitney v. California* (274 U.S. 357, 1927). Brandeis in his concurrence re-stated the original point from *Schenck* that the First Amendment was not absolute. The right to free speech "is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral." Brandeis then explained when those restrictions can be applied. "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some

substantive evil which the state constitutionally may seek to prevent has been settled" (274 U.S. 357, 373).

Finally, in *Brandenburg v. Ohio* (395 U.S. 444, 1969) the majority of the Supreme Court justices sided with Brandeis' concurrence in *Whitney*. *Brandenburg* remained the landmark clear and present danger court decision for 32 years. The opinion in *Brandenburg* made it clear that mere advocacy was protected by the First Amendment. The State of Ohio had prosecuted Brandenburg and fellow members of the Ku Klux Klan for vague threats made in a farm field where they burned a cross. In a *Per Curiam* decision, the Court overturned their convictions, stating that syndicalism laws were unconstitutional under the First Amendment because the law punished "mere advocacy" (395 U.S. 444, 449). The Klansmen firing their guns into the air in the Ohio farm field might have wanted to have a violent change in the government of the United States, but the justices recognized that Brandenburg's cause had no chance of success; ergo, the speech did not create an effect. Justice Douglas in his concurrence argued that applying a clear and present danger during a time of peace was definitely unconstitutional and even applying it during a time of war might be (395 U.S. 444, 451). Douglas' decision came in the context of those demonstrating in 1969 against the War in Vietnam. Douglas laid out a new legal line for when government could prosecute speech: "The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts" (395 U.S. 444, 456). Douglas then returned to Holmes' analogy of yelling fire in a crowded theater, pointing out it was not the content of the person's speech that was illegal, but the overt act of yelling.

However, after the events of September 11, 2001 Congress defined at what point speech becomes so proximate to action that the speech becomes illegal. The Patriot Act permits the federal government to investigate people whose speech or actions advocate terrorism (Section 806, 115 STAT. 378; Section 807, 115 STAT. 379; Section 501, 115 STAT. 287) so that the government can determine if individuals present a clear and present danger (Section 2702, 115 STAT. 285) at which point they are subject to arrest (Goodman 2008). Among the behaviors that can lead to an investigation under the Patriot Act are the books the individual reads, communication with individuals considered potential threats,

money or assistance provided to groups identified by the federal government as terrorist organizations, or visits to web sites associated with terrorist ideology. If any of these conditions exist, the federal government can search library records, tap telephone calls and internet usage, track banking transactions, or monitor/restrict travel without a court order. Potentially, anyone communicating with "terrorist threats" could be investigated by the FBI. Any Facebook friend or any contact in an email account could be the basis for a person to be investigated by the federal government, regardless of the nature of the original contact.

Many First Amendment advocates have opposed the Patriot Act because the law is so broadly written. The Patriot Act has been criticized for vagueness (Chang, 2002). Patriot Act critics Sidel (2007) and Mark Abele (2004) contended that the Patriot Act no longer requires probable cause as the basis for a federal investigation. Because the Patriot Act is so vague and probable cause is no longer required, one of the deterrents of the Patriot Act is intimidation because people fear traveling to the Middle East, making charitable contributions, and even making telephone calls and emails because they believe the government might then place them on the watch list (Lichtblau and Risen, 2005). What made a loss of civil liberties politically acceptable to the American public, argues Heymann (2003), was that the people losing their liberties were "limited to discrete groups to which most [Americans] do not belong." The Patriot Act allows the federal government to search for advocates of terrorism in hopes of finding the people who would carry out the next terrorist attack *before* the attack. The U.S. Supreme Court found this approach constitutional in *Holder v. Humanitarian Law Project* (130 S. Ct. 2705, 2010).

Holder v. Humanitarian Law Project

The Humanitarian Law Project (HLP) sought to provide humanitarian aid and training to the Liberation Tigers of Tamil (LTT) and the PKK, a Kurdish independence movement in Turkey. The Tigers were the first terrorist organization to use suicide vests. HLP, out of fear of violating the Patriotic Act, sought a ruling from Attorney General Eric Holder before providing assistance. When Holder rejected the HLP request under the Patriot Act, the HLP sued, claiming its First and Fifth Amendment rights had been violated. Chief Justice Roberts wrote the opinion on a 6-3 decision. Justice Breyer wrote the dissent.

Roberts in his decision argued that any kind of assistance to either the LTT or the PKK would further their terrorist goals. "Material support meant to 'promot[e] peaceable, lawful conduct' ...can further terrorism by foreign groups in multiple ways," explained Roberts because material support provides value to the terrorists, perhaps enabling them to use other resources for violent attacks. "It also importantly helps lend legitimacy to foreign terrorist groups legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds all of which facilitate more terrorist attacks" (130. S. Ct. 2705, 2725). This argument acknowledges that the Law Project assistance would not lead directly to terrorist attacks and, therefore, the contributions did not create a clear and present danger. Rather, the efforts of HLP would free up resources, allowing those resources to create the potential that one of the organizations might initiate a new act of violence that would be a clear and present danger. In effect, the Law Project wanted to be advocates for the LTT and the PKK without crossing over into action. Justice Roberts argued that in this case advocacy would be the cause that would likely produce the terrorist effect based upon the past history of the organizations.

Justice Stephen Breyer pointed out in his dissent (130. S. Ct. 2705, 2732) that "All the activities involve the communication and advocacy of political ideas and lawful means of achieving political ends." Breyer went on to argue that Roberts would allow the HLP to speak out in favor of these organizations and to provide training in general, just as long as the training was not coordinated with the terrorist organizations. "It is inordinately difficult to distinguish when speech activity will and when it will not initiate the chain of causation the court suggests--a chain that leads from peaceful advocacy to 'legitimacy' to increased support for the group to an increased supply of material goods that support its terrorist activities" (130. S. Ct. 2705, 2736), wrote Breyer. In effect, Breyer is arguing that Roberts has returned to *Schenck v. U.S.* (249 US 47) when advocacy equals a clear and present danger. Or, as Breyer put it, the majority opinion seems to be worried that the benefits rendered by HJP would give the terrorist organizations the opportunity to put their time to a "bad use" (130. S. Ct. 2705, 2738).

Roberts assigns to the Executive branch the authority to determine which groups American citizens cannot support with their speech or their association. Roberts argues, "In

this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government" (130. S. Ct. 2705, 2728). The courts cannot balance national security interests with freedoms, and so that authority needs to rest with Congress, explained Roberts. The Executive branch is in a better position than the courts to identify external threats to the security of nation. Accordingly, writes Roberts, "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not" (130 S. Ct. 2728).

Breyer in his dissent believed Roberts had gone too far. "...[C]ourts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national defense, and that it grants particular authority to the President in matters of foreign affairs," wrote Breyer. "Nonetheless, this Court has also made clear that authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals" (130 S. Ct. 2743).

Snowden

The release of classified materials by former National Security Agency analyst Edward Snowden indicate that the Executive branch under both Presidents George W. Bush and Barrack Obama has created a huge bureaucratic structure, which permits the federal government to search everywhere for advocates in hopes of finding whoever is ready to move from speech to acts. Further, these revelations indicate that thousands of federal employees and private contractors, maybe more than a million, are needed to shift through the data (Greenwald, 2014, 101). In his decision in *Klayman v. Obama* (957 F.Supp.2d 1, 2013) Judge Leon spelled out the full extent of government surveillance based on evidence presented by the federal government during the trial. To provide national security, the federal government seeks to follow the digital trail of known terrorists. To discover the terrorists' contacts, the National Security Agency on a daily basis downloads all telephone calls, all wireless communications, all internet activities, and other digital communications. Glenn Greenwald (2014), the reporter who interviewed Snowden, estimates that the government has access to 75% of the digital traffic in the world (99). Computers search the data for

anyone who has made contact with a known terrorist. The government concentrates its efforts on those contacts. However, the government keeps the data for years so that the government can go back and search past records if contact is made between someone in the U.S. and a person identified as being a potential threat to the U.S. The federal lawyers argued that this "metadata" is not unconstitutional because no one is listening to the phone calls.

Judge Leon disagreed in his opinion. He pointed out that the government search must be comprehensive in order to find the contacts that exist between a terrorist and someone in the U.S. "When the U.S. runs a query, its systems must necessarily analyze metadata for *every* phone number in the data base to determine which U.S. phones, if any, have interacted with the target number" (957 F.Supp.2d 1, 40). These metadata searches open up an individual's life to surveillance. As Judge Leon stated: "Results that once would have revealed a few scattered tiles of information about a person now reveal an entire mosaic—a vibrant and constantly updating picture of the person's life" (957 F.Supp.2d 1, 54). The point of law raised in the case goes beyond the collection of data. As Judge Leon argues, "Rather, the question I will ultimately have to answer when I reach the merits of this case someday is whether people have a reasonable expectation of privacy that is violated when the Government, without any basis whatsoever to suspect them of any wrongdoing, collects and stores for five years their telephony metadata for purposes of subjecting it to high-tech querying and analysis without a case-by-case judicial approval" (957 F.Supp.2d 1, 56). Judge Leon goes on to note the government contends that only speed allows the federal government to identity the next imminent threat before the next terrorist attack occurs. Then, Judge Leon notes that the government presented no evidence of a single instance when the government program of surveillance prevented even one terrorist attack (957 F.Supp.2d 1, 61).

Discussion

Justice Roberts argued that only the executive branch of the U.S. Government was in a position to identify and track terrorists and terrorist organizations. To do that job, the spy masters have argued in *Klayman v. Obama* (957 F.Supp.2d 1, 2013) that they need the power to search everywhere. The power of allowing computer systems to connect the less obvious dots

through machine learning supports this connection. The spymasters have to be allowed to identify the people whose speech and behaviors indicate that they seek to create harm. Catching the terrorists after the attack is not enough. Stopping them before the attack requires the government to conduct all inclusive searches. Evidence of a clear and present danger may be too late because by the time the government has evidence that the speech presents clear and present danger, the attack may be over.

However, the legal history that began in 1919 with *Schenck* warns that advocacy is a dangerous path to follow, even in the limited way articulated by Justice Roberts. Maybe from a security perspective the spy agencies have to train all of their technology and resources on the people who have stated opinions that indicate intent to do harm. However, in open court the federal agents have testified that they cannot find people with those opinions unless they search everyone, unless they examine everything, and unless they do so forever. This approach presumes that the terrorists do not know that the Americans have the technology to listen in. It presumes that the terrorists will not use this technological juggernaut against the spies by creating deceptive trails and false threats. One set of intercepted messages can send the world scrabbling for million dollar solutions to prevent an attack that would never come. Meanwhile, the plotters rely upon encryption and innocuous messages to bury the real plans under the billions of bytes collected by the National Security Agency.

Another weakness of the NSA mass surveillance is that the threats keep morphing into new forms. In 1919, the Supreme Court wanted to prevent people from organizing against the war effort. By 1925 in *Gitlow v. New York* (268 US 652, 1925), state and federal governments wanted to stop the syndicalists. In the midst of this legal search for a balance between free speech and national security, Holmes in *Abrams* noted that every idea is an incitement. Some of the syndicalism ideas of the unionists, the socialists, and other radicals became incorporated into law during The New Deal. Holmes and Brandeis argued that the marketplace of ideas is the best place for incitements to be tested. The Obama Administration argues that the NSA and other threat assessors must find those incitements so that military options can eliminate the dangerous inciters.

Finally, searching for potential causes of bad effects as a justification for investigating

everyone means there is a huge database of individual information collected and stored on everyone. How many government employees and contractors have access to that information? Can they all be trusted? On December 15, 2013 officials from the National Security Agency admitted on *60 Minutes* that the only way to find out what information Edward Snowden downloaded would be to grant him amnesty. And, are the American people to presume that Snowden was the only person in the spy network who would siphon off information for personal gains?

In *Brandenburg*, the Supreme Court believed that government should not interfere with free speech until the threat becomes imminent and clear. However, as Roberts pointed out, the court may not be a position to determine what constitutes a real threat and what speech creates a hostile opinion. Roberts placed the responsibility on the executive branch to differentiate between threat and opinion with guidance from Congress. Judge Leon believed that that the 4th Amendment should prevent the government from collecting personal information without a warrant, which by implication would mean that the government would be required to prove in court that a clear and present danger existed before government scrutiny would be permitted.

President Obama asked a group of citizens to consider these issues. The President's Review Group on Intelligence and Communication (2013) requested that the executive branch and Congress should provide guidelines that would "assure the safety of our citizens at home and abroad" (13) while noting that "Excessive surveillance and unjustified secrecy can threaten civil liberties, public trust, and the core processes of democratic self-government" (14).

An argument pitting the safety of the American public versus protection of civil liberties brings us back to the Tsarnaevs and the Boston bombing on April 15, 2013. The Russians warned the U.S. government that the oldest brother had connections to radical Islamists (Shane, Schmidt, & Schmitt, 2013). A federal investigation revealed no clear and present danger. Perhaps if the federal agents had connected purchases of firecrackers and pressure cookers (Durante, 2013) to the Tsarnaev brothers, then the Boston Marathon bombing could have been prevented. To make those connections, however, the government would have had to place Tamerlan Tsarnaev under surveillance for nearly three years; that

surveillance would have required surveillance of every purchase he made from the time he returned to the U.S. from Russia in 2010 until the April 15, 2013 bombing. Otherwise, the federal government would have lacked the information to identify the Tsarnaevs as a threat. Plus, someone would have had to connect firecrackers to pressure cookers. Hundreds of thousands of people are on the government watch list (Goodman and Gonzales, 2013), which indicates that these are people who have done something meeting the government definition of terrorist advocates. So, to stop the next Tsarnaev, the government would need to review millions of records from telephone calls to supermarket purchases to identify when any people on the watch list present clear and present danger.

Conclusion

That line between what is just advocacy and what constitutes speech that carries the force that creates a clear and present danger is obviously a difficult one since neither the U.S. Supreme Court nor Congress has successfully articulated a legal standard that works. However, the standard suggested by Douglas in *Brandenburg* perhaps is worth a second look. Douglas argued that free speech should be protected under the First Amendment when *ideas* are being stated, but speech that becomes an *overt act* should not be protected (395 U.S. 444, 456).

The revelations of Edward Snowden already have led to a marketplace of ideas discussion among the American people about free speech rights. Legislation could guarantee the right to express ideas under the First Amendment, which might include prohibiting government from putting those expressions under surveillance. However, speech acts that are so close to creating a cause and effect relationship, which tend to lead to a clear and present danger, could be delineated. The Patriot Act does this, for example, by stating that U.S. citizens cannot donate money directly to organizations on the list of terrorist organizations identified by the U.S. State Department.[1] As long as the State Department's list is defined by a group's history of terrorism, at least any degree of censorship would have a basis for identifying the group as presenting a clear and present danger. Legislature that spelled out what speech was censored and what were the grounds for censorship might err on the side of clear and present danger, but would protect the First Amendment right to express

ideas. The NSA or other spy organizations would be permitted under court order to spy on individuals who advocated for the goals of terrorist organizations. Since these specific acts would be identified, people would know when they were inviting governmental scrutiny of their speech acts. Of course, arrest and conviction would only occur for those people who carried out or conspired to carry out terrorism.

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[1] http://www.state.gov/j/ct/rls/other/des/123085.htm.