

**“SPEECH-CENTRIC TARGETING”: TOWARD A NORMATIVE  
FRAMEWORK FOR TARGETING SPEECH IN ARMED  
CONFLICTS**



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## ***ABSTRACT***

*When speech promotes violence, tension forms between liberty and security. Nowhere is this more evident than in the context of an armed conflict where States target individuals based on their speech. Although States agree that speech-centric targeting is lawful, few guidelines exist as to what types of speech represent an imminent threat and are therefore targetable. The lack of guidelines means that, as a test, speech-centric targeting is not currently imposing adequate limits on State action, which in turn undermines the legitimacy of the test. In order to create limits on State action and further legitimize speech-centric targeting, this article proposes a three-part test for speech-centric targeting based on US First Amendment standards.*

## *INTRODUCTION*

Freedom of speech is considered one of the most fundamental human rights, but it is not without limits. In the context of an armed conflict, certain types of speech can form the legal basis for lethal targeting by States. Consensus exists in international humanitarian law (IHL) that targeting based on speech constitutes a lawful use of force under *jus in bello* standards. For example, a civilian who communicates the position of targets, or broadcasts tactical intelligence for a specific military operation has, by their speech, made themselves a lawful target. States and scholars agree that while targeting based on speech is lawful, there has been little discussion as to the requirements that form the basis for this type of targeting. The lack of content surrounding what this article has named “speech-centric” targeting means that, as a test, speech-centric targeting is not currently imposing adequate limits on the use of force by States against one of the most fundamental human rights. To address this lack of content, this article proposes a three-factor test for speech-centric targeting based on US First Amendment case law.

To understand why the three-factor test is moored in First Amendment standards, section one examines US court decisions and academic arguments regarding how and when First Amendment protections and principles apply outside the US. Section two then uses established First Amendment standards to enhance existing IHL guidance in the arena of speech-centric targeting. Doing so creates the following three-factor test that States would have to satisfy in order to legally conduct speech-centric targeting: (1) is the speech *likely* to cause an attack, (2) is the speech *intended* to incite an attack, and (3) does the speech call for an *imminent* attack. This three-factor test is superior to current justifications for speech-centric targeting.

To justify speech-centric strikes currently, States and international law commentators generally use traditional tests such as those based on a person’s actions to determine whether an

individual has forfeited their protected civilian status, and is therefore targetable. These action-based tests are problematic because they were designed to assess an individual's *actions* as opposed to their *speech* and therefore lead to an inconsistent application of the use of lethal force against speech. While the focus of this article is on US policy and law, freedom of speech is recognized as a universal human right and is not exclusive to the United States.<sup>1</sup> Therefore, while the speech-centric targeting factors have been developed based on US Constitutional standards, they are crafted in such a way that they are adaptable to any liberal interpretation of free speech. A properly developed speech-centric targeting test should serve as an essential check on States' use of force against speech, but to do so requires a test with greater substantive content than exists at present. This article provides that content.

### ***BACKGROUND***

On September 30, 2011, President Barack Obama announced that an American drone strike in Yemen killed US citizen Anwar al-Awlaki. While Awlaki was a self-professed extremist and vocal leader in the al-Qaida terrorist network, he never personally conducted a violent attack or used armed force against the United States. Instead, Awlaki attacked America via speech, by "calling on individuals in the U.S. and around the globe to kill innocent women and children to advance [his] murderous agenda."<sup>2</sup> Based on Awlaki's violent speech, as opposed to actions, the Department of Justice (DoJ) determined that Awlaki posed an "imminent threat" of violent attack against the United States.<sup>3</sup> Based on the imminent threat, created by

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<sup>1</sup> United Nations, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), Article 19, (Dec. 10, 1948).

<sup>2</sup> President Barack Obama, Address at Fort Meyer, Virginia (Sep. 30, 2011).

<sup>3</sup> U.S. Department of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force, U.S. Department of Justice, (Nov. 8, 2011).

Awlaki's speech, the DoJ determined that targeting Awlaki based on his speech was "not unlawful."<sup>4</sup>

Unfortunately, neither the United States, nor IHL have provided substantial guidance as to what factors are relevant when declaring speech an "imminent threat." However, the stakes are high: freedom of speech is considered one of the most fundamental human rights, and using lethal force is the most extreme response. Without meaningful limits on what speech is targetable, speech-centric targeting could be used to suppress speech that is critical of leaders, governments, or policies. If States can decide that any dissident speech can be met with lethal force, the results for the marketplace of ideas created by the freedom of speech would be devastating.

The lethal strike on Awlaki is but the most recent manifestation of speech-centric targeting. Other prominent examples of speech-centric targets include propagandists like Wa'il al-Fayad in 2016,<sup>5</sup> planners like Osama-bin Laden in 2011,<sup>6</sup> and coordinators like Qasem Soleimani in 2020.<sup>7</sup> While all of these individuals verbally advocated for violence, each did so in a unique way. While some, such as bin-Laden, gave specific orders and directions on how to carry out attacks, others like al-Fayad, only advocated violence in general terms. Under the current paradigm of speech-centric targeting it is unclear which of these various forms of speech constitute targetable behavior and which, if any, are untargetable rhetoric. In order to ensure that strikes like these are carried out in a manner that protects freedom of speech and preserves

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<sup>4</sup> Id.

<sup>5</sup> BBC, *US says it killed IS information minister al-Fayad*, BBC, September 16, 2016, <https://www.bbc.com/news/world-middle-east-37390408>.

<sup>6</sup> Helene Cooper, *Bin Laden Dead, U.S. Official Says*, NYTIMES, May 1, 2011, <https://web.archive.org/web/20110502033900/http://thelede.blogs.nytimes.com/2011/05/01/bin-laden-dead-u-s-official-says/>

<sup>7</sup> Michael Crowley, Falih Hassan and Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, NYTIMES, January 7, 2020.

States' ability to act in self-defense, there must be commonly accepted speech-centric targeting standards.

### ***WHEN THE FIRST AMENDMENT APPLIES***

The focus of this article is not on domestic and foreign applications of First Amendment case law to citizens and non-citizens. There is a rich debate among scholars on this topic that is beyond the scope of this article.<sup>8</sup> However, an understanding of how the First Amendment might apply to targeting decisions outside of the US is required. This understanding is necessary in order to understand why speech-centric targeting decisions, regardless of location or nationality of the target, should be moored in First Amendment standards. While the First Amendment usually applies to actions by the government inside the United States, an argument exists that the First Amendment applies extraterritorially if: (1) a US citizen is conducting the speech<sup>9</sup> or (2) a US citizen is consuming the speech<sup>10</sup> and (3) the US government is acting as a sovereign regulator (e.g., the US government is taking action against the speech).<sup>11</sup> If condition (1) or (2) exists, and is accompanied by condition (3), then the First Amendment arguably applies, and there should be heightened scrutiny regarding the targeting.

These restrictions would be substantially diminished however, if the targeted speech fell into a category of speech that was “unprotected” by the First Amendment such as fighting words, incitement, true threats, or solicitations to commit crimes. Current state practice, although vague

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<sup>8</sup> For an excellent discussion on how the First Amendment applies abroad see Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. Cal. L. Rev. 259, 287 (2009) (Arguing that the First Amendment protections may apply abroad depending on such factors as “where the speech originated, where its intended audience was, and the location of detention and trial.”) Compare Neuman, with Kermit Roosevelt, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2066 (2005) (Expressing doubt that communications abroad are protected under traditional First Amendment justifications).

<sup>9</sup> *Haig v. Agee* 453 U.S. at 308 and Timothy Zick, *Territoriality And The First Amendment: Free Speech At - And Beyond - Our Borders*, 85 Notre Dame L. Rev. 1543, 1549 (2010), *Reid v. Covert*, 354 U.S. 1, 5 (1957).

<sup>10</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

<sup>11</sup> Conduct by a government official is, as a general rule, government action, if it is related to the official's governmental duties, *West v. Atkins*, 108 S. Ct. 2250, 2255, 2258 (1988).

and ill-defined, best aligns with the First Amendment body of law defining incitement to commit imminent lawless action. Thus, understanding how the First Amendment arguably applies to US targeting, and how categorizing certain forms of speech as “unprotected” helps develop targeting criteria that would be supported by IHL, as well as US laws and policy regarding the freedom of speech.

### ***Is a US Citizen Conducting the Speech?***

The protections and ideals enshrined in the First Amendment are at the zenith of their power when the US government takes action against a US citizen speaking to US citizens inside the United States. As the speaker, listener, and location of the speech move outside the borders of the United States, the Constitutional protections diminish, but they never entirely disappear.<sup>12</sup> Action against a person conducting targetable speech inside the United States falls under the jurisdiction of domestic law, therefore the analysis would take place under a law enforcement paradigm and International Human Rights Law and is thus beyond the scope of this article. Therefore, the analysis of First Amendment protections begins with speech-centric targeting of a US citizen speaking beyond the borders of the United States.

If a US citizen is conducting the speech, then there is an argument that the First Amendment applies, regardless of the speaker’s location. The location is irrelevant because the US Supreme Court has largely rejected the idea that “when the United States acts against citizens abroad it can do so free of the Bill of Rights.”<sup>13</sup> Furthermore, the Court has also specifically held that other constitutional rights, including the Fourth, Fifth and Sixth Amendments apply to US

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<sup>12</sup> *Haig* 453 U.S. at 308 and Timothy Zick, *Territoriality And The First Amendment: Free Speech At - And Beyond - Our Borders*, 85 Notre Dame L. Rev. 1543, 1549 (2010).

<sup>13</sup> *Reid v. Covert*, 354 U.S. 1, 5 (1957).



citizens, regardless of location.<sup>14</sup> Therefore, when the United States targets a US citizen like Awlaki, case law supports the argument that the First Amendment, and its associated protections, would apply.<sup>15</sup> Because the First Amendment arguably applies, any speech-centric targeting divorced of a First Amendment analysis could result in a Constitutional violation of Free Speech.

### ***Is a US Citizen Consuming the Speech?***

Even if the speaker is not a US citizen, there is still an argument to be made that if a US citizen is the *consumer* of the speech, some First Amendment constraints could apply. These protections would still apply because the First Amendment exists not only to protect speakers but also to protect the free flow of speech within the marketplace of ideas.<sup>16</sup> Therefore, First Amendment protections extend to the consumption of speech as well as production.<sup>17</sup> Because the First Amendment protects both US speakers and US consumers of speech, if the US government acts to limit the speech available to US citizens via speech-centric targeting, again there is an argument to be made that First Amendment principles apply.<sup>18</sup>

The Supreme Court has stated that “in a variety of contexts, this Court has referred to a First Amendment right to ‘receive information and ideas.’”<sup>19</sup> Furthermore, the Court has held that this right is transnational. Specifically, the Court has held that the First Amendment applies to the rights of US citizens to exchange ideas with specific foreign speakers, as well as receive

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<sup>14</sup> Department of Justice White Paper Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force p. 5 citing *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *U.S. v. Verdugo-Urquidez*, 494 U.S. 259,269-70 (1990); see also *In re Terrorist Bombings of US Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008).

<sup>15</sup> While beyond the scope of this article, if the standards outlined herein were applied to Awlaki’s speech it is clear that by verbally directing specific attacks against the US Awlaki’s speech fell outside of First Amendment protections, thus making his speech-centric targeting lawful under IHL and US domestic standards..

<sup>16</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

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

<sup>18</sup> Timothy Zick, *Territoriality And The First Amendment: Free Speech At - And Beyond - Our Borders*, 85 Notre Dame L. Rev. 1543, 1549 (2010).

<sup>19</sup> *Kleindienst*, 408 U.S., 762.

general information from foreign sources.<sup>20</sup> This concept is of particular importance in the information age where American citizens can view videos posted on the internet by someone like bin-Laden even if the videos are aimed at fighters in Afghanistan. The question of whether a single viewing by a US citizen would be sufficient to trigger First Amendment standards is beyond the scope of the article; however, it is worth noting how far First Amendment standards could arguably extend based on current Supreme Court case law.

### ***Is the US Government Acting as a Sovereign Regulator?***

Even though the text of the First Amendment states, “*Congress shall make no law... abridging the freedom of speech, [emphasis added]*” the Supreme Court has applied the First Amendment to Executive Branch actions on numerous occasions.<sup>21</sup> Deadly force, applied through speech-centric targeting is not the typical “governmental action” considered in most First Amendment cases. Regardless, it is undeniable that when the US government uses force against a speaker under a First Amendment analysis, the government is acting as a sovereign regulator, thereby satisfying the third and final prong to trigger First Amendment standards.

### ***Does the First Amendment Protect the Speech?***

Even though the First Amendment could apply to a wide range scenarios, the speech only remains protected and untargetable if the speech is in a protected class of speech. While the First Amendment protects speech, it also recognizes that not all speech is created equally and grants different levels of protection to different forms of speech. In deciding what is considered

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<sup>20</sup> *Id.* (Regarding exchanges with a specific individual), see also *Lamont v. Postmaster General* 381 U.S. 301, 307 (1965) (Regarding exchanges with foreign sources of information generally).

<sup>21</sup> *Freedom from Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1047 citing *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 465, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995); *New York Times Co. v. U.S.*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971); *Lamont v. Postmaster General*, 381 U.S. 301, 305, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965). See also *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 877, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 222, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

unprotected speech, case law has distinguished between speech that presents a danger in the abstract, as opposed to speech which presents an imminent danger.<sup>22</sup> As speech becomes more likely to present a tangible threat of violence, the protections diminish. In this regard, the First Amendment analysis is not dissimilar to the foundations of speech-centric targeting. However, at present, speech-centric targeting lacks the definitional standards provided by First Amendment case law. By mooring definitional standards for speech-centric targeting in accepted First Amendment case law, vague concepts used in speech-centric targeting decisions such as “imminent threat” assume a meaningful definition that can be used in speech-centric targeting decisions.<sup>23</sup>

As stated in the above section, while there is an argument to be made that the First Amendment applies extraterritorially to targeting decisions, no court decision or US policy has ever explicitly stated that this is the case. Thus, it is possible that First Amendment protections do not apply in some or all of the scenarios discussed above. However, even if the First Amendment does not apply directly, there are two compelling reasons why the United States should still comply with First Amendment principles. First, “the United States has historically characterized and sought to position the First Amendment as a universal human right.”<sup>24</sup> Second, the UN Universal Declaration of Human Rights recognizes the “right to freedom of opinion and expression.”<sup>25</sup> Therefore, mooring speech-centric targeting principles the principles of freedom of speech and expression is appropriate regardless of whether or not Constitutional protections strictly apply.

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<sup>22</sup> While the Supreme Court has held that political and ideological speech can be regulated by the government, it came to the same conclusions as Part I, noting that US law does not “penalize mere association, but prohibits the act of giving foreign terrorist groups material support.” *Holder* 561 U.S. 1, 6 (2010).

<sup>23</sup> Note that “imminent threat” was the language the Obama administration used to justify the targeting of Awlaki.

<sup>24</sup> *Zick Territoriality And The First Amendment*, 85 Notre Dame L. Rev. 1549.

<sup>25</sup> *Supra* note 1.

## ***PROPOSED FACTORS FOR SPEECH-CENTRIC TARGETING***

The First Amendment is a valuable starting point for establishing what kinds of speech constitute lawful targets under an imminent threat standard.<sup>26</sup> However, the First Amendment exists for domestic applications in times of peace, and therefore must be modified slightly for applicability in armed conflicts abroad. The best First Amendment test to apply in assessing “imminent threat” is the *Brandenburg* test for incitement. In *Brandenburg v. Ohio*, the Supreme Court articulated a three-pronged test to determine whether speech fell outside of First Amendment protection.<sup>27</sup> To lose protection, the Court held that the speech must consist of language directed to incite or produce imminent lawless action and it must be likely to incite such action.<sup>28</sup>

In applying this test, there are three factors used to determine whether the speech is unprotected: (1) the *likelihood* that the lawless action would occur, (2) whether there was *intent* to incite lawless action, and (3) whether the speech called for *imminent* lawless action.<sup>29</sup> These three *Brandenburg* factors find parity in IHL guidance on when a civilian has lost their protected status by directly participating in hostilities (DPH). In assessing whether a civilian’s actions constitute DPH, and therefore justify targeting, US guidance on IHL uses a non-exhaustive list of factors as guidance. The following three US factors in particular find parity in the *Brandenburg* standard: (1) is the act *likely* to adversely affect a party to the conflict, (2) is the act *intended* to advance the war aims of a party to the conflict, and (3) is the act the *proximate cause* of the attack. This article proposes a modification of the *Brandenburg* factors for *jus in bello* application as follows: (1) the *likelihood* that the speech will cause an attack to occur; (2)

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<sup>26</sup> Note that “imminent threat” was the language the Obama administration used to justify the targeting of Awlaki.

<sup>27</sup> *Brandenburg*, 395 U.S. 444.

<sup>28</sup> *Id.* at 447.

<sup>29</sup> *Id.*

whether there was *intent* to incite an attack; and (3) whether the speech called for an *imminent* attack. These three modified factors from *Brandenburg* provide a metric for assessing what speech is targetable.

### ***Is the Speech Likely to Cause an Attack***

The first factor in assessing whether an individual has participated in hostilities is whether or not their actions meet the “threshold of harm.” In providing clarity to this factor, the DoD Law of War Manual states that threshold of harm is determined by, “the degree to which the act is *likely to adversely affect* the military operations or military capacity of a party to an armed conflict.”<sup>30</sup> This requirement from the Manual finds parity in the *Brandenburg* likelihood factor, which measures whether the speech is “*likely to incite or produce* lawless action.”<sup>31</sup> Both of these tests emphasize how likely the action or speech is to bring about a violent act. The more likely the speech is to cause an attack, the more imminent the danger, therefore, the less protected the speech. In this respect, the *Brandenburg* likelihood factor finds parity and provides guidance to the IHL factors for speech-centric targeting.

In *Brandenburg*, the words in question were uttered by a Ku Klux Klan (KKK) leader who encouraged violence against black and Jewish people and taking back states’ rights by force. In protecting the KKK leader’s words, the Court found the likelihood of incitement was low and that, “a mere abstract teaching . . . for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”<sup>32</sup> Although *Brandenburg*’s words were reprehensible and inflammatory, the Court found that because they were abstract and general, they were unlikely to incite or produce lawless action. Applying this standard to

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<sup>30</sup> DoD Law of War Manual ¶ 5.8.3.

<sup>31</sup> *Brandenburg*, 395 U.S. 444 at 447.

<sup>32</sup> *Id.* at 448.

speech-centric targeting would mean that before speech could be targeted it would have to be *likely* to produce an attack.

In the context of an armed conflict, if an extremist leader were to generally encourage violence against American forces in Iraq and to take the Iraqi government back by force, the analysis from *Brandenburg* is insightful in deciding whether this speech is targetable. Under a *Brandenburg* type analysis, the language in question is unlikely to produce an imminent attack because the speech is abstract as opposed to preparing a specific person or group for violent action against a specific target. As a result, the speaker would maintain their protected civilian status, just as the Court found the speech to be protected in *Brandenburg*.

In contrast to the exercise of speech noted above, if *Brandenburg* or the extremist leader had gone beyond advocacy and been more direct, the likelihood of violence would have increased. As the likelihood of violence increases, so does the imminence of an attack. In determining the line between protected and unprotected speech, *Brandenburg* states that the more specific the language is in preparing a group for an attack the more imminent the threat.<sup>33</sup> Continuing the example of the extremist leader, his speech would fall outside *Brandenburg*'s standards and become targetable if the leader made specific calls for violence against specific targets. Specific language that could make the speech targetable would be directing particular followers to attack at a certain time, location, or against specific units or individuals. Thus, *Brandenburg* is instructive in considering how likely an attack is and provides granularity in defining likelihood. Regardless of how likely an attack is to occur based on speech, there must also be an assessment of whether the speaker *intended* to incite an attack. If the speaker was

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

merely careless and did not intend to incite an attack, then it is unlikely that the speaker possesses the requisite intent to be considered a lawful target.

### ***Is the Speech Intended to Incite an Attack***

According to *Brandenburg*, not only must speech be *likely* to produce lawless action, but the speech must also be *intended* to produce lawless action.<sup>34</sup> The DoD Law of War Manual contains a similar requirement in determining whether or not an individual has participated in hostilities and states there should be an assessment of the “specific purpose underlying the act, such as, whether the activity is *intended to advance the war aims* of one party [emphasis added].”<sup>35</sup> With the DoD Law of War Manual’s intent requirement in mind, the *Brandenburg* standard provides amplifying guidance in line with state practice.

In 1989 the US Supreme Court provided clarification to *Brandenburg*’s intent standard in *Texas v. Johnson*.<sup>36</sup> In *Johnson*, a man was convicted of burning the American flag at a political rally while onlookers chanted, “America, the red, white, and blue, we spit on you.”<sup>37</sup> In overturning the conviction and clarifying the intent prong of *Brandenburg*, the Court held that not only must the speech be likely to cause violence, but that the speaker must also *intend* to cause violence. Specifically, the Court stated,

we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression is directed to inciting or producing imminent lawless action... To accept Texas’ arguments that it need only demonstrate “the potential for a breach of the peace... would be to eviscerate our holding in *Brandenburg*. This we decline to do. [internal quotations and citations omitted]”<sup>38</sup>

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<sup>34</sup> *Id.* at 447

<sup>35</sup> DoD Law of War Manual at 230.

<sup>36</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>37</sup> *Id.* at 399

<sup>38</sup> *Id.* at 409.

Reading the holding in *Johnson* in conjunction with *jus in bello* standards, in order to comply with First Amendment protections, a speech-centric targeting test would require that the speaker demonstrate an intent to incite an attack.

For example, if during an armed conflict, an Afghan civilian burned an American flag, this speech would not be targetable. Even if disparaging language towards US troops accompanied the burning of the flag, the speech is protected by both a First Amendment and *jus in bello* analysis. Furthermore, even if the act of burning the flag emboldened others to attack American troops, the flag burning in isolation demonstrates insufficient intent to be targetable speech. If, on the other hand, specific calls for violence accompanied the flag burning, the speech expressed by burning the flag would be targetable. *Johnson*, therefore, clarifies that not only must an attack be likely, but the speaker must also intend for an attack to occur.<sup>39</sup>

The first two factors focus on how likely the speech is to cause an attack, and whether the speaker intended to cause an attack. First Amendment case law, however, shows that a third factor is required before speech is considered unprotected. The third and final factor requires that the speech is in some way linked to the lawlessness or attack. This final factor again finds parity in First Amendment case law and IHL.

### ***Does the Speech Call for an Imminent Attack?***

Under traditional targeting standards, in order to decide what actions constitute an imminent threat, and therefore warrant targeting under DPH standards, the United States looks at whether an action is the proximate cause of an attack. In assessing whether an act meets this standard, the DoD Law of War Manual states that an act must be “the proximate or ‘but for’

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<sup>39</sup> Id.



cause of death, injury, or damage to persons or objects belonging to an opposing party.”<sup>40</sup> This language, requiring a proximate causal link, finds a similar factor in the *Brandenburg* test, where the Supreme Court required that the speech be linked to *imminent lawlessness*.<sup>41</sup>

The Court clarified the imminence prong of the *Brandenburg* test in the 1973 case *Hess v. Indiana*. In *Hess*, after the police forcibly removed the defendant and other protestors from the street, Hess yelled, “we’ll take the [expletive] street later.”<sup>42</sup> In protecting the speech, the Court held that “there was no evidence that [his words were]...likely to produce imminent disorder.”<sup>43</sup> Because Hess’ speech was not directed at a specific person or group of persons and only advocated illegal action at some indefinite time, the speech remained within First Amendment protections.<sup>44</sup>

Similarly, in 2015, members of the Islamic State Hacking Division posted a list of Americans working in the military and government, stating that the information was provided “to the soldiers of the khilafah [caliphate], who soon with the permission of Allah will strike at your necks in your own lands!”<sup>45</sup> Although the group called for action by soldiers of the caliphate, they were not speaking to an actual group of individuals, but rather a notional group of radicalized individuals in the West. Furthermore, the call for action was not accompanied by specifics.

Much like Hess’ use of the words “take the street later,” the verbiage, “soon will strike,” is a “the mere abstract teaching [and] is not the same as preparing a group for violent action and

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

<sup>41</sup> Martha A. Field, *Holder v. Humanitarian Law Project: Justice Breyer, Dissenting*, 128 Harv. L. Rev. 434, 442 (2014).

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

<sup>43</sup> *Hess v. Indiana*, 414 U.S. 105, 108, (1973).

<sup>44</sup> *Id.*

<sup>45</sup> Dugald McConnell, Brian Todd, *Purported ISIS militants post list of 1,400 U.S. ‘targets,’* CNN, August 13, 2015, <https://www.cnn.com/2015/08/13/world/isis-militants-american-targets/index.html>.

steeling it to such action."<sup>46</sup> While this speech is close to being targetable, because it is not directed towards a specific action or a specific group, it is too many casual steps removed to be deemed the proximate cause of an attack. Because a would-be attacker would have to find the list online, locate individuals on the list, plan an attack, then commit an attack, there are too many intervening steps to make the posting of the list the proximate cause or "but for" cause of the attack. Therefore, the speech would not represent an imminent attack and would not be targetable.<sup>47</sup>

However, if the group had communicated the list of names to specific individuals *and* provided instructions for people on the list to be attacked, the hackers would have demonstrated a clear intent to incite an imminent attack. Thus, by calling on specific individuals the hacker's speech would be "preparing a group for violent action and steeling it to such action,"<sup>48</sup> and the hackers would become lawful targets. However, without this specificity in the hacker's language, US guidance on IHL, coupled with amplification from *Brandenburg* and *Hess*, demonstrates that this kind of speech would not be targetable.

### ***Utilization of the Factors Beyond US Standards***

In developing the factors above, alternative interpretations from commentators such as the International Committee for the Red Cross (ICRC) were considered, but US interpretation of IHL were used exclusively for the analysis. This exclusive use of US standards, however, should not be interpreted to mean that standards proposed by this article would only apply to US interpretations of IHL. Although every State has unique interpretations of IHL, there is consensus that IHL principles apply in an armed conflict, specifically the Geneva Conventions

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<sup>46</sup> *Brandenburg* 395 U.S. at 444.

<sup>47</sup> Even if people on the list were being killed, the use of force would be permissible against the attackers, but not the posters of the information.

<sup>48</sup> *Id.*

and the sections of the Additional Protocols that are considered customary international law. Therefore, the differences are not in the foundational standards of IHL, but rather differences in interpreting those foundational standards. Because the differences are based in interpretation, as opposed to standards, this means that the guidelines developed above could apply to a wide variety of interpretations of IHL.

To demonstrate how these factors could apply to various interpretations of IHL, it is useful to briefly apply the ICRC's factors for DPH to the factors developed above. In determining whether an individual's actions constituted DPH, the ICRC uses three factors: (1) the *likelihood* that the act will adversely affect the enemy's military capacity, (2) whether there is a *direct causal link* between the action and the harm, and (3) whether the act is specifically *intended* to cause the required threshold of harm.<sup>49</sup> Despite the slight differences between the ICRC and US factors, it is apparent that the ICRC factors also find parity in the speech-centric standards developed above. This shared parity means that the ICRC's targeting factors could be translated into the same three factors developed for US targeting.

While these three factors developed for the ICRC would be identical in language to those developed for the US, the ICRC could interpret the factors differently to provide the higher level of protection desired by ICRC standards. In particular, the second factor requiring the speech call for an "imminent attack" could be narrowly interpreted to meet the ICRC standard of direct causation. To satisfy this narrow interpretation, the ICRC, and States more aligned with the ICRC's interpretation, could require speech to directly cause an attack before it could be targeted. For example, under an ICRC interpretation, an individual would have to directly order someone to attack before the imminence standard would be satisfied. In this manner, the factors

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<sup>49</sup> ICRC Interpretive Guidance at 20.

developed by this article could be applied to a wide variety of interpretations of IHL, while still providing enhanced guidance to speech-centric targeting.

### **CONCLUSION**

As with any normative approach that puts forth a factor-based rule, there is a valid critique that creating a rule-based approach for the use of force unnecessarily constrains States' inherent right to self-defense. While a valid critique, this is a trade that, in the area of speech, liberal societies like the United States must accept and have accepted in the past.<sup>50</sup> While there are drawbacks to a more rigid rules-based standard, the benefits of protecting speech and providing clear guidelines will lead to more coherent and uniform decisions when States choose to target speech.

An enhanced speech-centric targeting test is desperately needed at this point in the history of international law. State and non-state actors employ new communication mediums and modalities via the internet and use speech to threaten the security of people and States. States must respond to these threats, yet must do so carefully lest the freedom of speech fall victim to an insatiable hunger for security. When speech promotes violence, tension forms between liberty and security.<sup>51</sup> By creating clear definitions as to where the freedom of speech ends and the right to security begins, an enhanced speech-centric targeting test will help States protect themselves and the freedoms they embody.

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<sup>50</sup> The United States on a number of occasions has declined to jam, destroy or degrade State's media due to First Amendment concerns. Jamie Metz, *Rwandan Genocide and the International Law of Radio Jamming*, 99 AJIL, 92, (1994).

<sup>51</sup> US Congress, Congressional Research Service, *Terrorism, Violent Extremism and the Internet: Free Speech Considerations*, 1 (May 2019).