

Is Terror Winning in the Courts?

By Richard Minter

Executive Summary

America is losing the War on Terror in the courts.

- Since 2002, the total number of prosecutions of terrorists has fallen every year and is now approaching pre-9-11 levels.
- The percentage of terror cases that federal prosecutors refused to prosecute has climbed to 90% in 2006, up from 34% in 2002.

Part of the reason: the landmark Supreme Court case *Brandenburg v. Ohio* is now being used to thwart the convictions of individuals linked to al Qaeda and other foreign terrorist outfits. The 1969 domestic free-speech case effectively safeguards suspected terrorists from prosecutions. Sometimes *Brandenburg* is invoked by defense attorneys; more often it is employed by prosecutors as a reason to decline prosecuting a case against suspected terrorists.

Critics of the war on terror consistently contend that terrorism is a crime that should be combated in the courts, with the full panoply of civil rights for suspected terrorists. Sadly, the *Brandenburg* precedent—set in a starkly different time—makes it almost impossible for the government to prevail against terrorists, who are caught in planning stages, in the federal courts.

If our system of justice is to play a vital role in the war on terror, the Supreme Court should narrow the scope of *Brandenburg*.

Methodology

While statistical information on terror cases is public, it usually requires a Freedom of Information Act request, followed by months or even years of waiting to obtain the requested information. Even then, the records delivered are often old or incomplete (some important information is classified and not releasable). The Justice department does not routinely release statistics on terrorist prosecutions.

Fortunately two major universities have been quietly tracking the federal government's anti-terrorism efforts. One is the New York University Law School. The other, a far more exhaustive storehouse of federal data, is at Syracuse University.

Since 1989, Syracuse University's Transactional Records Access Clearinghouse (TRAC), has systematically used the Freedom of Information Act to gather and organize Justice department statistics. TRAC, a joint program of the S.I. Newhouse School of Public Communications and Martin J. Whitman School of Management, is supported by an array of foundations including: the Rockefeller Family Fund, the New York Times Company Foundation, the Ford Foundation, and the Open Society Institute, founded by George Soros.

The federal statistics cited in this paper were accessed through TRAC. The analysis and conclusions are my own.

In addition, I consulted a number of lawyers who are directly involved in terror cases. Their input was extremely valuable in shaping the research for this paper.

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Section 1. Terrorist Prosecutions Decline

By every conceivable measure, the Justice department is failing in its fight against terrorists in the federal courts: the number of prosecutions has fallen every year since 2002; federal prosecutors are refusing to try terror cases in record numbers; and, among the handful of terror cases they do prosecute, the feds are losing more cases than ever before. Let's look at each of these worrisome trends in detail.

Lost Cases: Federal prosecutors were more likely to win terrorism cases in the ten years *before* the September 11 attacks than they are now.

Prosecutions: The Syracuse University Transactional Records Access Clearinghouse (TRAC) data shows a sharp rise in prosecutions after the September 11 attacks on New York and Washington, D.C. The number of cases brought under the U.S. department's Program of International Terrorism climbed to an all-time high in 2002 and then sharply and relentlessly declined every year thereafter. (Figure 1.)

Cases: Three hundred fifty-five cases were brought in 2002. Then, suddenly, the caseload plunged off a cliff. Only sixty-six cases were brought in 2003, less than one-fifth of the 2002 total. In 2004 – a presidential election year – prosecutions climbed to 93. In 2005, prosecutions fell to 46. During the first eight months of 2006, TRAC found only 19 terrorist prosecutions—the lowest level since 1998.

There are two possible explanations: either terrorist activity – everything from recruiting and financing to plotting attacks – is actually declining. Or suspected terrorists have found a strong defense.

Referrals: The prospect that terrorist activity is declining seems unlikely, given that the FBI and other law enforcement agencies are referring near record numbers of

cases to the Justice department. (See figure 1). While, the FBI and other federal agencies have referred more terrorism cases to the Justice department than ever before—federal lawyers have declined to prosecute a growing number of them. In 2002, the Justice Department declined to prosecute 34.5 percent of referred terror cases¹ In 2005, it declined 83 percent of terror cases.

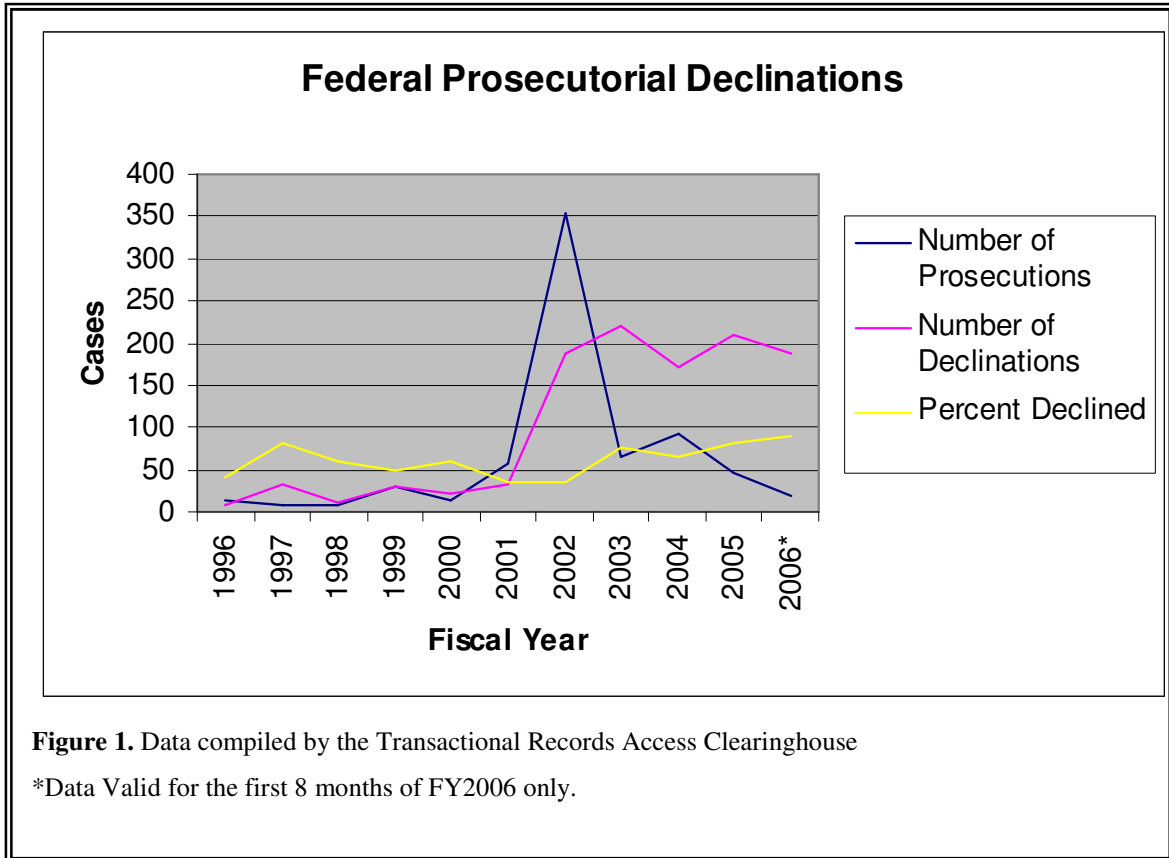
By the first half of 2006, more than 90 percent of these cases were declined. Out of 206 cases referred to the Justice department in 2006, 187 were declined.

Veteran prosecutors say the high number of prosecutor declinations is the result of many factors. Many are cases where the investigation simply failed to turn up strong evidence of wrongdoing or the cases concerned people tangential to the main suspects in a separate case file. Sometimes cases are closed because an investigator retires or is promoted and his successor wants to open “new” cases.

Many of the terrorism cases opened in the wake of the September 11 attacks concerned illegal immigrants (expired or fraudulent visas, no visa at all, bogus asylum cases and so on.) The Justice department aggressively prosecuted these cases because officials believed it disrupted potential terrorist operations, albeit indirectly. (Most of the 9-11 hijackers illegally overstayed their visas.) But, by 2003, the system was clogged with immigration cases. At the same time, Bush critics charged that the Justice department was trying to make itself look good by inflating its “terrorism” cases with “petty immigration cases.” As a result, enforcement actions against suspect aliens fell after 2003.

¹ According to TRAC, “Criminal Terrorism Enforcement in the United States During the Five Years Since the 9/11/01 Attacks,” September 4, 2006, Syracuse University <http://trac.syr.edu/tracreports/terrorism/169/>

All that said, the high declination rate suggests that prosecutors believe it is tougher to win terrorism cases today than it was in 2001.



Indeed, the Bush Justice department is prosecuting fewer terrorism cases than the Clinton Justice department ever did. The highest declination rate in the Clinton years was 80.5% in 1997,² the year before the bombings of U.S. embassies in East Africa.

While case referrals declined slightly in 2005 and 2006, that doesn't necessarily indicate that terrorism cases are declining. It seems that the FBI has gotten the message

² ata compiled by the Transactional Records Access Clearinghouse

that the Justice department isn't interested in prosecuting terror cases and, as a result, is submitting somewhat fewer cases. Preparing a terrorism case takes months of work. The frustration of FBI agents is intense. "Why waste your time?" one FBI agent asked me. "It is easier to go after drug dealers."

However, as dangerous as drug dealers may be, they haven't killed 3,000 people on a single September morning.

So we are faced with a mystery: Why were federal prosecutors so willing to try terror cases in the first year after the 9-11 attacks and so unwilling to do so now?

Section 2. Why?

Like the Mississippi River, the decline in terrorist prosecutions has many contributing sources.

The Easy Cases have been prosecuted. After 9-11, federal law-enforcement investigated and the Justice department lawyers prosecuted the clear-cut cases—the so-called "low hanging fruit." The remaining cases are harder.

Juries and Grand Juries have changed. Before the September 11 attacks, there was little public skepticism of federal terror cases. Terrorism was seen as something that all civilized people opposed. Juries were fairly apolitical. As the opposition to the Iraq war grew from 2003 onward, federal prosecutors saw grand juries and trial juries turn against government officials. Indictments became harder to secure and convictions harder to win.

Perhaps the most startling example of this shift—among many—is seen in the Holy Land Foundation case. The Holy Land Foundation is alleged to have sent more than \$12 million to Hamas, a terror group which has a long record of bombings and

kidnappings. The prosecution provided miles of documents, showed thousands of feet of video and audio tape, and produced almost one hundred witnesses.

The case was tried in Dallas, Texas. It was supposed to be an easy one. But, it didn't work out that way.

The jury couldn't reach a verdict on all counts. One juror, William Neal gave an interview to the "Ernie and Jay" show on Texas radio station KRLD in which he inadvertently revealed just how polluted by politics the jury pool has become:

Host "...They've announced they're going to retry the case. Do you think they can do any better the second time around?"

Neal: I think they're going to come to the same conclusion. Wait 'till George Bush is out of the office [sic] and it will be a different story.

Host: You don't think it will be tried again?"

Neal: Uh, I think they will have a hard time, I think it's going slowly downhill from this point, it's all, I mean, it's all George Bush shut 'em down and he is trying to make sure that he gets that case closed."³

Federal prosecutors say that William Neal is not a uniquely politicized juror. He is part of a growing trend; one that prosecutors are unsure how to address.

The type of cases has changed.

Before the September 11 attacks, prosecutors dealt with dead bodies and captured perpetrators. Federal officials brought to trial the 1993 World Trade Center bombers – who killed seven people (including the unborn son of Monica Smith) – as well as the

³ William Neal interview on the KRLD radio station on the Ernie and Jay Show. Available at: http://www.krld.com/play_window.php?audioType=Episode&audioId=1087447

perpetrators of the 1998 embassy bombings that killed 224 people (including 12 American diplomats). In both cases, prosecutors had actual victims and thousands of catalogued pieces of physical evidence.

Post-9-11, the Justice department and other federal law-enforcement bodies have focused on early detection of terrorist threats and apprehension of potential perpetrators earlier in their planning process. The goal was to capture terrorists before they killed or maimed innocents. This is not to suggest that federal officials are going off in the direction of “Minority Report”—arresting people before they commit crimes—but that federal agents aim to stop terrorists while they are conspiring to commit attacks as well as those who inspire, fund or plan those future attacks.

However, from a prosecutor’s point of view, these post-September 11 cases have three weaknesses: no victims; less compelling physical evidence (fewer suspects with bomb residue); and a strong argument that the suspect was simply exercising his constitutional free-speech rights. Where does free speech end and terrorism begin?

Defense attorneys have seized on these weaknesses to claim that defendants, who were accused to recruiting or training people for terror operations, didn’t really mean any harm. They were simply dissenting from President Bush’s War on Terror, and so on.

A Powerful Legal Defense

Defense attorneys have a powerful U.S. Supreme Court precedent which gives as much constitutional protection to a terrorist recruiter urging jihad to madrasa students as a Boy Scout leader reading the Declaration of Independence (which justifies war and revolution) to his troop on July 4.

How did this happen? It’s time to meet Clarence Brandenburg.

While leading the Cincinnati Klux Klan, Brandenburg invited a television reporter to tape a KKK rally at a farm in Hamilton County, Ohio. The reporter was met by twelve hooded men, some of whom were armed. At the rally, and later on television, Brandenburg threatened “revengeance” against blacks and Jews. He did not specify when or how his vengeance would be taken. After his words were broadcast, Brandenburg was prosecuted under the Ohio Criminal Syndicalism Statute, which makes it a crime to publicly advocate violent criminal action.

(Criminal Syndicalism laws were adopted by twenty states and two territories between 1917 and 1920. These measures were passed to prevent union leaders, communist activists, and others from instructing mobs to attack “scabs,” boycott breakers, police, or other members of unpopular groups. The U.S. Supreme Court upheld the constitutionality of Criminal Syndicalism laws in the landmark 1927 case, *Whitney v. California*.)

That 1927 decision did not sit well with the American Civil Liberties Union, whose leaders believed it unconstitutionally restricted the free-speech rights of labor leaders and homegrown radicals. The ACLU believed the laws were the product of the “Red Scare,” and, as a result, were suspect. By the 1960s, as an increasing number of “hippies” and other activists faced the specter of punishment under the Syndicalism laws, the federal courts began to agree with the ACLU. In *Noto v. United States* (1961) and *Bond v. Floyd* (1966), the U.S. Supreme Court made it more difficult for states to prosecute speakers advocating the violent overthrow of the government. The Supreme Court’s ruling in *Noto v. United States* made it especially clear that it intended to shift the balance between free speech and public safety firmly in the direction of free speech: “the

mere abstract 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.” In practice, this would prove to be an exceedingly fine distinction.

The ACLU sensed that the Supreme Court was near a tipping point. Any test case might trigger the activist court to overturn *Whitney v. California* and make the country safe for speakers who advocate violence, at least in the abstract. Clarence Brandenburg provided the perfect case.

Brandenburg’s legal team was a collection of ACLU all-stars: Allen Brown, general counsel of the ACLU of Cincinnati (1970-1985); Norman Dorsen, general counsel of the ACLU (1969-1976) and president of the ACLU (1976-1991); Melvin L. Wulf, national legal director of the ACLU (1962-1977); and Eleanor Holmes Norton, assistant legal director of the ACLU.

Brandenburg was charged with violating the Ohio Criminal Syndicalism, which bars “Advocat[ing]... the duty, necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform “and forbids associating with any group that teaches or advocates such doctrines.” He faced a \$1,000 fine and up to 10 years imprisonment.

The ACLU lost in the Ohio appellate court and the Ohio Supreme Court dismissed the Brandenburg appeal *sua sponte* “for the reason that no substantial constitutional question exists herein.” The Ohio Supreme Court did not consider the case important enough to file a written opinion, just a judgment.

However, the ACLU found a more receptive audience at the U.S. Supreme Court in 1969—“the Warren Court”. The court overturned its earlier precedent and reversed

Brandenburg's conviction. Along the way, the Warren Court turned Brandenburg, the KKK leader, into history's most improbable civil rights hero.

Today, the ACLU hails *Brandenburg v. Ohio* as "one of its 100 greatest hits."⁴

Section 3. The Brandenburg Test

At barely three pages, the majority opinion in *Brandenburg v. Ohio* is surprisingly short, and its key legal doctrine is a single sentence, but it has had far-reaching effects.

After citing earlier decisions, the high court found that "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 a law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁵

Thus, the *Brandenburg* test, as it is now known, emerged. It requires three things: (1) express advocacy of criminal violation; (2) the advocacy must call for an immediate violation; and (3) the immediate act must be likely to occur. Under *Brandenburg*, the resulting harm must be both imminent and likely.

Each element of this test is problematic.

"Imminent" Lawless Action: The court offers no reason to bar immediate calls to violence, while allowing long-term ones. Former Reagan Justice department official Bruce Fein says the "imminence test" is akin "to saying that lighting a fuse scheduled to trigger an explosion in five minutes can be made illegal, but that if the burn time is five

⁴ ACLU 100 Greatest Hits, http://www.aclu.org/FilesPDFs/aclu_100greatest_hits.pdf.

⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

weeks, nothing can be done.”⁶ Clearly, the court is thinking of firebrand speakers whipping up a mob, not soft-spoken teachers who encourage their students to accept the moral necessity of jihad and begin arms training for a future attack.

The predicament created by “immanency” is similar to one created by *Miranda* laws. One federal prosecutor told me, “The real problem is not the cases that we’ve lost in court on this issue, but the ones that never got brought because the prosecutors know the state of the law. We don’t bring cases that we don’t think we can win under the law as it exists. No one has time to bring a case to lose.”

“Likely to Occur”: Former judge Robert H. Bork questions whether courts are even fit to distinguish which attacks are likely to occur. In a 2005 letter to the editor of *Commentary*, Bork wrote: “The *Brandenburg* formula requires judges to estimate such

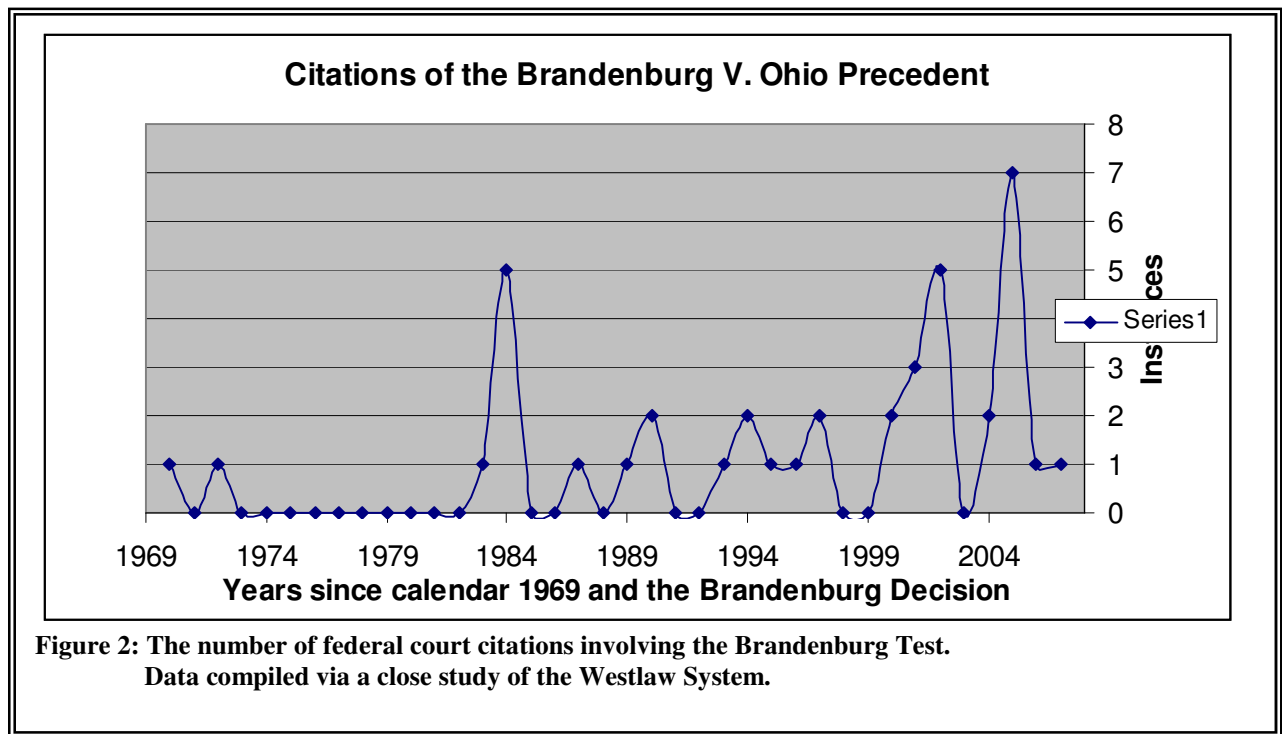


Figure 2: The number of federal court citations involving the Brandenburg Test. Data compiled via a close study of the Westlaw System.

⁶ Bruce Fein, “Squelching...the Inciters,” *Washington Times*, August 9, 2005, p. A14.

matters as the danger posed by an al Qaeda leader's call for jihad in America, or the mood of a crowd hearing incitement to racial violence. These are tasks for which the judiciary is the least qualified branch of government."⁷ Courts have access to intelligence, aside what is entered into evidence, and little experience studying the development of jihadi groups.

Aside from the problems associated with the *Brandenburg* test, the decision itself makes little sense.

Defenders of the *Brandenburg* decision say it is a bulwark defending free speech. But what kind of speech is it defending? In *Chaplinsky v. New Hampshire* (1942), the Supreme Court ruled that "[some] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁸ "Advocacy of terrorism surely fits that description," Bork writes, "What social value is served by the fatwas of a Sheik Omar Abdel Rahman?"⁹ .

Whatever it merits, the *Brandenburg* decision was rarely cited between 1969 and 2001. An exhaustive study of the Westlaw system shows that *Brandenburg* was cited only 41 times – and more than half of those occurred after 1992. In the 1970s and 1980s, *Brandenburg* was cited in cases involving illegal drugs and tax evasion. (As a defense in those cases, *Brandenburg* generally failed.) After 9-11, *Brandenburg* citations increased sharply, almost entirely suspected terrorists (See Figure 2).

If *Brandenburg* is such an essential free-speech case for protection, why is it primarily used by terrorists?

⁷ Robert H. Bork, letter to editor, *Commentary*, June 2005, p. 16.

⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁹ Robert H. Bork, letter to editor, *Commentary*, June 2005, p. 16.

Section 4. The Brandenburg Effect

U.S. v. Ali Al-Timimi

Less than a week after the September 11 attacks, Ali Al-Timimi gathered with some supporters in Fairfax County, Virginia. As an Islamic spiritual leader, he encouraged the young men to go to Afghanistan, train with the Taliban and wage jihad against Americans.

“The time has come,” Al-Timimi told his followers on September 16, 2001, for them to join the “violent jihad” in Afghanistan, adding that American soldiers “would be legitimate targets.” Several of them went to Afghanistan and received terrorist training.

When he was put on trial in federal court in Alexandria, Virginia, Al-Timimi’s supporters were quick to invoke *Brandenburg*. “He is not accused of anything except talking. It’s all about him saying something,” Shaker Elsayed, an executive committee member of the Falls Church Dar Al Hijrah mosque, told the *Washington Post*. “If this isn’t a first amendment issue, I don’t know what is.”¹⁰

Following the indictment in September 2004, U.S. Attorney Paul J. McNulty told the press that Al-Timimi was urging his followers to join the jihad against America “while bodies were still being pulled from the rubble of the World Trade Center and the Pentagon.”¹¹

Al-Timimi awaits a final verdict, but his invocation of *Brandenburg* was not lost on George Washington Law School Professor Jonathon Turley, who quickly rallies to its defense as some mystical constitutional protection:

¹⁰ “Terrorism Case puts words of Muslim Leader on trial in V.A.” by Jerry Markon, *Washington Post*, p. B01, April 4, 2005.

¹¹ “Terrorism Case puts words of Muslim Leader on trial in V.A.” by Jerry Markon, *Washington Post*, p. B01, April 4, 2005.

“We are now forced to address this question by a person who engenders little reason for sympathy. Yet, it is never about the defendants. It was not about the racist fantasies of Brandenburg. It certainly is not about the apocalyptic fantasies of al-Timimi. It is ultimately about us and who we are. With al-Timimi's conviction, we face that moment of self-definition again as his articles of speech become the test of our own articles of faith.”

Section 5. Policy Recommendations

The dramatic decline of terrorist prosecutions and the skyrocketing increase in refusals to prosecute demonstrate the power of the *Brandenburg* precedent. So do the lost cases brought by the federal government.

While a Supreme Court precedent can only be overturned by the high court, policy makers in the other branches have a number of options.

Executive

The president has the “bully pulpit” and can jumpstart a national debate about the balance between public safety and free speech. The president, when considering judicial nominations, could ask whether nominees are open to reconsidering *Brandenburg v. Ohio* while being fully respectful of First Amendment guarantees.

The president can instruct the Justice department to challenge the *Brandenburg* precedent in the courts, if an opportunity arises, and eventually hope that the high court will reconsider its 1969 ruling. Admittedly, this is a very long and uncertain process.

An appeal in a case where the *Brandenburg* test is very difficult because “immanency” is a factual question for a jury and there is no avenue for an appeal in a test case that can then be argued before the U.S Supreme Court. The defense, however,

can appeal on the grounds of insufficient evidence, in the hopes of that a new trial and a fresh jury would have a different take on whether or not the threat was imminent.

The *Al-Timmi* case may present such a possibility, if the prosecution wins and the defense appeals. The jihad-favoring speech reportedly given by Al-Timmi is far more likely to incite violent attacks on Americans. In an appeal, prosecutors could find meaningful distinctions between the Al-Timmi and *Brandenberg* cases. A court could find that the radical Islamist mentality, created by calculated brainwashing by terror recruiters, essentially meets the “likely to occur” prong of the *Brandenberg* test. This would make it easier for prosecutors to bring (and even win) cases likely to involve a defense based on *Brandenberg*—while preserving the right, guaranteed under *Brandenberg*, of the idiot on the soapbox to call for “world revolution” without facing prosecution.

Much has changed in the past four decades. Law enforcement is no longer concerned with self-styled “revolutionaries” whose calls for armed struggle were largely flamboyant rhetoric; instead, the nation faces a welter of foreign terrorist groups who are deadly serious about their plans for mass murder.

In the 1960s, few wanted to ruin the life of a middle-class college student who got carried away at a university podium. In that context, *Brandenburg* makes some sense.

Today, *Brandenburg* safeguards those who inspire terrorists with their words. Today, *Brandenburg* protects terrorist recruiters who inspire their followers to train for a life of murder, and safeguards those who raise money for bombs to annihilate or disfigure civilians.

Legislative

The relevant committees in the House of Representatives and the Senate could hold hearings to investigate the plummeting number of terrorist prosecutions. With the aid of C-Span and the press, these hearings would reveal that America is prosecuting markedly fewer terror cases and showcase the causes, primarily *Brandenburg*.

When judicial nominees reach the Senate floor for confirmation, Senators should ask the nominees about *Brandenburg* and whether that precedent should apply in terrorism cases.

Judicial

In an ideal world, the U.S. Supreme Court would revisit *Brandenburg* and its related cases. It would replace the flawed two-prong test (imminence and likelihood of the advocated attack), with a simpler test: Does the speaker know that his words will inspire his listeners to commit a violent crime? The test could focus on the speaker's knowledge that his words will be used to commit a violent crime, without considering whether the action is imminent or likely.. This would cover everything from exhortations to join an enemy or terrorist group, to instructions for making bombs or avoiding detection by police. This test would protect radical professors who advocate violent revolution in the classroom and anti-globalization activists on the street – while condemning those who plot to murder thousands.

Conclusion:

Admittedly, crime-facilitating speech is a difficult area of law. But the cost of leaving the 1969 *Brandenburg* precedent untouched could be another 9-11.

On 9-11, terrorists turned America's airplanes into weapons against the American people. If legal reforms are not made soon, terrorists will turn America's legal system into a weapon that they use against us. Is there any reason to let them succeed?