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‘TERRORIST SPEECH’: DETAINED PROPAGANDISTS AND THE ISSUE OF EXTRATERRITORIAL APPLICATION OF THE FIRST AMENDMENT

MICHAEL J. LEBOWITZ*

INTRODUCTION

In November 2008, Ali al-Bahlul was sentenced by a United States military commission to life in prison. The Yemeni was convicted of material support to terrorism, conspiracy, and solicitation. Al-Bahlul was certainly a devoted and trained al Qaeda member, but his role in the terrorist organization was anything but typical. Instead of dabbling directly in bombs and kidnappings, al-Bahlul dealt with video production equipment, cameras, and video-editing software. This is because al-Bahlul was the head of As-Sahaab, al Qaeda’s in-house media foundation. Tasked directly by Osama bin Laden, al-Bahlul produced propaganda and recruiting videos while essentially serving as bin

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2. Id. at 847.
4. Id. at 1.
Laden's "Public Relations Secretary." As such, al-Bahlul was more Sean McManus (head of CBS News) than Khalid Shaykh Muhammad (purported 9/11 mastermind) as he performed his duties in a manner more akin to Michael Moore (controversial documentary filmmaker). But despite the First Amendment protections offered to U.S. citizens, it was these media activities that ultimately served to condemn al-Bahlul to life in U.S. military custody as a convicted war criminal.

In the summer of 2010, a military appeals court heard the appeal of al-Bahlul's conviction as required in military commissions cases. Based on al-Bahlul's boycott of the U.S. legal system — which continued throughout nearly his entire trial — it appears unlikely that he will authorize further appeals. But the prosecution and conviction of al-Bahlul for his media activities is notable because it raises the question of whether the government, through the U.S. military, can capture a non-citizen during an overseas operation, detain him for many years, and ultimately prosecute him for what, in a different situation, could amount to First Amendment-protected speech. In fact, although al-Bahlul mostly


6. See KOHLMANN, supra note 3, at 7; Trial Transcript, supra note 1, at 992.

7. Jenny Percival, Guantanamo Jury Jails Bin Laden Media Chief for Life, GUARDIAN, Nov. 4, 2008, http://www.guardian.co.uk/world/2008/nov/04/guantanamo-bin-laden-bahlul. Al-Bahlul had called his military commission a "legal farce" and sat silently at his defense table until the last moment. Al-Bahlul also instructed his detailed military defense counsel to refrain from speaking or even answering questions from the judge. Id.


   Mr. Bahlul’s conduct in making this documentary — his prosecution for that conduct — was a violation of the U.S. First Amendment. Not that Mr. al-Bahlul had particular First Amendment rights, but that the constitutional restrictions on the U.S. government prosecuting someone for speech made the prosecution itself illegal. Mr. al-Bahlul’s conduct in making
stuck to his silent boycott at his trial, he did engage in a few political rants as well as other provocative courtroom gestures such as making paper airplanes to symbolize the 9/11 attacks. During one courtroom statement, al-Bahlul declared the following: "I want you to know that you are prosecuting a media man . . . . [Y]ou are prosecuting a media member of al Qaeda and you are not prosecuting an al Qaeda member who is about to do an operation."9

This article seeks to analyze the notion of constitutional free speech as it applies to "terrorist speech" that is conducted by overseas enemy combatants who are ultimately detained and prosecuted by U.S. forces. Part I analyzes the issue of enhanced constitutional rights relating to foreign terror suspects detained by U.S. forces. Part II looks into the notion of bypassing typical First Amendment arguments and instead relying on a circumstance theory in prosecuting alien enemy combatants engaged in propaganda activities. Part III offers a comparison between al Qaeda propagandist al-Bahlul's war crimes case that was prosecuted under U.S. domestic law with that of a similar propagandist convicted in the International Criminal Tribunal for Rwanda (ICTR).


Id. Al-Bahlul's appellate counsel added the following statement:

There is little doubt that Mr. al-Bahlul is not a sympathetic defendant. He embraces an ideology that glorifies violence, justifies terrorism and opposes constitutional democracy. Charge II, however, unconstitutionally conflates offensive behavior with criminal behavior. As offensive as it may be, State of the Ummah is speech that falls within the core protections of the First Amendment, which forbids the prosecution of "the thoughts, the beliefs, the ideals of the accused . . . ."

I. PROPAGANDISTS & THE FIRST AMENDMENT

Enemy propagandists who use speech as opposed to more traditional direct action are not a new phenomenon. \(^{10}\) Julius Streicher, for example, established the primary Nazi propaganda newspaper, as well as other notorious anti-Semitic publications. \(^{11}\) Muhammad Saeed al-Sahhaf, perhaps better known as “Baghdad Bob,” was the information minister for Saddam Hussein’s Iraqi government during the 2003 invasion. \(^{12}\) In fact, virtually every wartime government has a spokesperson and every military has units designated for psychological operations. \(^{13}\) Terror organizations are no different. Al Qaeda notoriously employs media

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10. World War II propagandist cases include: D’Aquino v. United States, 192 F.2d 338 (9th Cir. 1951) (addressing charges of treason against a woman who worked as a radio broadcaster in Japan); Best v. United States, 184 F.2d 131 (1st Cir. 1950) (discussing charges of treason against a man who worked as a radio broadcaster in Germany and Austria); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950) (addressing charges of treason against a woman and finding the radio program she produced constituted “psychological warfare”); United States v. Burgman, 87 F. Supp. 568 (D.D.C. 1949) (denying a new trial to a man convicted of treason for working with the German government after having been a member of an American Embassy in Berlin); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948) (affirming the treason conviction of a man for conduct as a radio broadcaster of German propaganda).


savvy personnel in its hierarchy to help spread the organization’s propaganda and recruitment messages.\textsuperscript{14} Al-Bahlul, for example, was responsible for crafting a video boasting al Qaeda’s involvement in the deadly maritime attack against the USS Cole.\textsuperscript{15} In addition, al-Bahlul produced and directed some of the videotaped wills created on behalf of the soon-to-be 9/11 hijackers.\textsuperscript{16} He also performed various technical duties, including media equipment maintenance.\textsuperscript{17} Moreover, al-Bahlul was tasked by bin Laden before the 9/11 attacks with establishing a mobile news feed so that the organizational leadership could monitor news of the attacks as they transpired.\textsuperscript{18} Another al Qaeda propagandist is Adam Pearlman, a U.S. citizen from California.\textsuperscript{19} Pearlman, who changed his name to Adam Yahiye Gadahn after converting to Islam in the 1990s, served as al Qaeda’s English-language spokesman for most of the post-9/11 decade.\textsuperscript{20} Gadahn issued numerous videotaped statements spreading the al Qaeda message and touting other provocative missives directed toward American citizens and others.\textsuperscript{21} Because of his propaganda work with al Qaeda, Gadahn was indicted in a California court on charges of treason.\textsuperscript{22}

\section*{A. Enhanced Constitutional Rights}

Based on the fact that al Qaeda uses speech as a part of its operations, the question then becomes whether designated enemy combatants have some sort of enhanced First Amendment protections. The First Amendment provides that “Congress shall make no law . . .

\begin{itemize}
\item \textsuperscript{14} Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024 at 17, http://www.defense.gov/news/transcript_isn10024.pdf (last visited Mar. 17, 2011) (describing that Khalid Shaykh Muhammad announced under oath that he was al Qaeda’s Media Operations Director).
\item \textsuperscript{15} KOHLMANN, \textit{supra} note 3, at 3.
\item \textsuperscript{16} Trial Transcript, \textit{supra} note 9, at 319-20; KOHLMANN, \textit{supra} note 3, at 6.
\item \textsuperscript{17} Trial Transcript, \textit{supra} note 9, at 194.
\item \textsuperscript{18} \textit{Id.} at 321; KOHLMANN, \textit{supra} note 3, at 6.
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.}
\end{itemize}
abridging the freedom of speech."\(^{23}\) The First Amendment, however, leaves unspecified the scope of "the freedom of speech" that Congress may not abridge.\(^{24}\) This unspecified nature is even more pronounced when it relates to issues of wartime propaganda and enemy combatants captured overseas. In the al-Bahlul case, for instance, defense attorneys based much of their appellate argument on the contention that their client was entitled to First Amendment protections due to his role as al Qaeda's "media man."\(^{25}\)

The central argument in that case related to the fact that al-Bahlul was detained under U.S. military jurisdiction at the Guantanamo Bay Naval Station.\(^{26}\) This U.S. military detention of an al Qaeda propagandist is slightly different than the more traditionally cited case, *United States ex. rel. Turner v. Williams*, involving an anarchist who was excluded from the country based on his political views.\(^{27}\) *Williams* dealt

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23. U.S. CONST. amend. I.


> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words those which by their very utterance inflict or tend to incite an immediate breach of the peace. It has been well observed that such 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.

*Id.* at 571-72.

25. Brief on Behalf of Appellant, *supra* note 8, at 10-12 (explaining that the free speech issue also played a role, along with ex post facto arguments, during the oral arguments in front of the U.S. Court of Military Commission's Review in January 2010).

26. *Id.* at 14.

27. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (explaining that an excludable alien is not entitled to First Amendment rights, because "[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law").
with administrative measures within immigration law, whereas the case with al-Bahlul relates to punishing propaganda activities via prosecution as a war crime. In fact, al-Bahlul’s appellate counsel argued that because the U.S. Supreme Court extended certain other constitutional rights to those detained at Guantanamo Bay, the other fundamental constitutional rights also should apply. Of course, some of those other fundamental rights are protected by the First Amendment. The prospect of establishing such rights for detained enemy combatants is highlighted by the fact that the Court has not directly undertaken a detailed analysis of the extraterritorial application of the First Amendment when applied to persons held in U.S. military detention.

Perhaps the closest the Court has come to addressing this issue is in *Holder v. Humanitarian Law Project*. That case was brought by U.S.-based citizens and organizations wishing to end prohibitions that made it a federal crime to support or provide resources to government-designated terrorist groups, including the Kurdistan Workers’ Party (PKK). Ultimately, the Court ruled that speech-related activities can be prosecuted when such advocacy is coordinated or otherwise is in direct material support to an overseas terrorist organization. In addition, the Court stated that the content of the speech is irrelevant, meaning that whether such speech is philanthropic advocacy or religious or political speech is not taken into account; the only thing that matters is whether the activity engaged in by the U.S.-based citizen or organization constitutes material support under terrorism laws.

The utility of *Holder v. Humanitarian Law Project* is that it firmly offers a standard when dealing with the nexus between propaganda and the material support of terrorism charge that has become so prevalent in U.S. courts since 2001. However, the case still does not

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28. *Id. See also* Trial Transcript, *supra* note 9, at 313-14.
32. *Id. at* ___, 130 S. Ct. at 2712-14.
33. *Id. at* ___, 130 S. Ct. at 2713.
34. *Id. at* ___, 130 S. Ct. at 2720-21.
directly relate to extraterritorial application of the First Amendment in the context of a terrorist propagandist such as al-Bahlul, a detainee under U.S. custody and control.

Another relevant free speech case from the First Circuit, Chandler v. United States, was related to Nazi propagandist Douglas Chandler, who went by the name “Paul Revere.” In that case, a U.S. citizen was charged with treason after preparing broadcasts and producing recordings for the Nazi war effort. The Chandler court cited an earlier case where the Sixth Circuit acknowledged that “one cannot, by mere words, be guilty of treason.” However, in Chandler, the court noted that:

[Chandler] trafficked with the enemy and as their paid agent collaborated in the execution of a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully . . . . It is preposterous to talk about freedom of speech in this connection; the case cannot be blown up into a great issue of civil liberties.

The court also added that:

Trafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment. Congress may make criminal any type of dealing with the enemy which in its judgment may have the potentiality of harm to our national interests, including acting as a commentator on the enemy’s short wave station.

The Chandler case offers guidance in terms of criminalizing speech conducted on behalf of the enemy. But a significant difference

35. 171 F.2d 921, 925 (1st Cir. 1948).
36. Id. at 928.
37. Id. at 938 (quoting Wimmer v. United States, 264 F. 11, 12-13 (6th Cir. 1920)).
38. Id. at 939.
39. Id.
is that Chandler was a U.S. citizen charged with the high crime of treason. Part of the court’s rationale was that Chandler intended to betray his country. That element certainly would not be satisfied in a case against an alien combatant. Therefore, again, the case does not directly relate to extraterritorial application of the First Amendment in the context of a terrorist propagandist detained under U.S. custody and control.

However, appellate counsel for al-Bahlul did not argue that al-Bahlul was entitled to First Amendment rights while he was producing his al Qaeda propaganda in Afghanistan. Instead, the argument related to the extent that the U.S. government could go in punishing political speech under its own auspices. This contention was exacerbated by the fact that al-Bahlul was “haled into” U.S. jurisdiction “for criminal prosecution.”41 In other words, the appellate counsel contended that the United States could not punish the political speech of a detainee held in an extraterritorial U.S. jurisdiction such as Guantanamo Bay.42

B. Determining who exactly is entitled to First Amendment protection

In analyzing whether or not an enemy propagandist detained in extraterritorial detention is entitled to some semblance of political speech protection, the first step is to review who exactly is protected by the First Amendment.

A radio broadcast as an overt act can constitute treason since it is a fallacy to argue that there must be something other than an utterance of words if those words advocate the overthrow of a government by force or to urge someone to engage in an act akin to jihad against the United States.

Id. at 23.


42. The question is not what rights al-Bahlul had in Afghanistan, but the extent to which U.S. courts can punish political speech. Cf. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (distinguishing between constitutional violations that occur abroad, and constitutional violations that occur “at trial”).
Amendment.43 In the context of terrorism, citizens are always afforded constitutional rights, as are legal resident aliens who are seized within the territory of the United States.44 In fact, with respect to overseas application, “the shield which the Bill of Rights and other parts of the Constitution provide to protect ... life and liberty” is specifically limited an actual U.S. citizens who are abroad.45 As such, the Supreme Court has consistently ruled that aliens located overseas are not protected by the First Amendment. For example, an alien anarchist was prevented from asserting his political speech rights in an immigration case relating to a government decision to prevent entry into the United States.46 In another case, the Court put it bluntly in 1950 when it specifically rejected the notion that “during military occupation irreconcilable enemy elements, guerrilla fighters, and ‘werewolves’ could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment.”47

U.S. precedent generally states that aliens located abroad are not protected by the First Amendment. But a wrinkle comes into play in regard to terror suspects who were captured overseas and brought to an extraterritorial location run by the U.S. government such as Guantanamo Bay. Throughout the post-9/11 decade, the Supreme Court has gradually

43. The Constitution and its amendments are, first and foremost, a political compact among the people of the United States, adopted “in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” U.S. CONST. pmbl. (emphasis added).

44. See Al-Marri v. Pucciarelli, 534 F.3d 213, 219 (4th Cir. 2008) (Motz, J., concurring), vacated and remanded sub nom., Al-Marri v. Spagone, 129 S. Ct. 1545 (2009). See also Padilla v. Hanft, 423 F.3d 386, 396 (4th Cir. 2005) (reversing the lower court in finding that the petitioner was legally designated and held as an “enemy combatant”). In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), a former Guantanamo Bay inmate was deemed to have all constitutional rights after it was determined that he held not only Saudi citizenship but also U.S. citizenship. Id. at 508.

45. Verdugo-Urquidez, 494 U.S. at 270 (quoting Reid v. Covert, 354 U.S. 1, 5-6 (1957)).


afforded detainees various enhanced rights traditionally limited to U.S. citizens and those seized within the nation’s borders. For example, the Court ruled that all Guantanamo Bay detainees have the right to challenge their detention in federal court via habeas corpus. More specifically, the Court in Boumediene v. Bush and Hamdi v. Rumsfeld afforded the alien detainees certain due process protections of the Fifth Amendment. These decisions raise the question: Can these Fifth Amendment protections for alien detainees be construed as a sort of slippery slope toward other constitutional protections?

The answer is likely geared toward what is not included within the Boumediene decision rather than what is contained in the ruling.
The *Boumediene* Court did not address issues such as First Amendment rights. Instead, the Court conducted an extensive analysis of the history and Court precedent relating specifically to the issue of habeas corpus rather than to the larger issue of constitutional rights of detainees; this approach is similar to the one that played out in *Hamdan v. Rumsfeld* in regard to the character of the military commissions system. This means that the due process rights afforded to detainees are limited to the holdings in those cases and consequently do not speak to the issue of First Amendment protection for detainees.

C. Key elements for enemy propagandists to achieve Constitutional protection

If one accepts that *Boumediene* and *Hamdan* do not extend First Amendment rights to detainees, then it appears that a detained propagandist would have to satisfy one of three key elements in order to be provided First Amendment protections. The first of the three options to be considered, as mentioned above, is that the detainee would need to be a U.S. citizen or U.S. national. Al-Bahlul clearly fails this test because he is a citizen of Yemen. Contrast this with the case of Adam Gadahn, the al Qaeda propagandist. Gadahn was born in California and consequently will be afforded First Amendment rights if he is arrested and brought to trial. However, an interesting aside to Gadahn’s case is that he publicly destroyed his passport as he renounced his U.S. citizenship. While this could develop into an interesting twist to his

Court’s opinion: it was only mentioned twice in an opinion that spent considerably more time describing the practical difficulties of extending the writ (and constitutional rights) to persons held in another country during active hostilities.

Id.

51. See *Boumediene*, 553 U.S. at 739-52.

52. See *Hamdan*, 548 U.S. at 590-613.


54. See Kash, *supra* note 40, at 2, 23 (finding that as a U.S. citizen, Gadahn will be entitled to constitutional rights, although the criminal elements of treason will likely overtake any First Amendment claims pertaining to propaganda activity on behalf of al Qaeda).

potential trial claims relating to the First Amendment and other constitutional protections, Gadahn’s renunciation of his citizenship was indeed merely symbolic under U.S. domestic law. The reason is because in order to technically renounce U.S. citizenship, one must go through various administrative procedures as prescribed by law. Therefore, Gadahn would go through a potential trial armed with full constitutional protections because he is a U.S. citizen as a matter of law. Al-Bahlul, meanwhile, failed this first element on the basis of citizenship.

If a detainee is deemed not to be a U.S. citizen, the next element to review is the location of where the detainee was seized. In order to achieve enhanced constitutional rights for a non-citizen in a criminal prosecution, the detainee must have been seized within the United States. For example, a non-citizen who was a notoriously militant union advocate was detained within the United States and was consequently deemed to have First Amendment protections. In a more recent instance, Ali Saleh Kahlah al-Marri, an al Qaeda sleeper agent and citizen of Qatar, was seized within the United States and, therefore, afforded similar constitutional protections. As a result, al-Marri

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56. 8 U.S.C. § 1481(a)(5) (2006) (requiring “making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State . . .”).

57. Id.

58. Id.


satisfied the constitutional rights rule established in *Verdugo-Urquidez* of actually residing within the "borders of the country."

The common thread with all such precedent is that it involves non-U.S. citizens located within the United States at the time of their seizure. In *al-Marri*, the court specifically objected to military detention of a civilian "in this country" as opposed to an alien detained abroad. As such, al-Marri fails the first test as a citizen of Qatar but passes the second test due to the fact that he was captured within the United States. As a result, al-Marri would have been afforded enhanced constitutional rights. In regard to al-Bahlul, while it is undisputed that al-Bahlul has been held under the authority of the U.S. government, the fact remains that he was captured outside the borders of the country and held outside the borders of the country through the duration of his trial. As a result, al-Bahlul fails this second test and is only entitled to the benefits afforded to him by cases such as *Boumediene*.

It should be noted that the appellate counsel for al-Bahlul attempted to argue that al-Bahlul was entitled to First Amendment protections under the assertion that it was the U.S. government that brought him into a U.S. military commission at Guantanamo Bay. However, this argument also does not carry much weight because in instances where the U.S. government reaches abroad against an individual, the Constitution only applies when that overseas individual is a U.S. citizen. Furthermore, the facts indicate that government personnel captured al-Bahlul under the good faith (and accurate) belief that al-Bahlul was not protected by the U.S. Constitution on the basis that

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64. The Court acknowledges that prolonged detention under U.S. military control does have an effect in terms of levying more rights upon alien detainees. *Boumediene*, 553 U.S. at 793 ("[I]t likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody."). *See also* *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring) ("Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.").

he was not a U.S. citizen and consequently a legitimate alien enemy combatant. As such, the Verdugo-Urquidez standard applies to enemy propagandists who are extraterritorially detained and prosecuted by the U.S. government. The key factor for non-citizens is whether the detainee was captured within the United States or abroad.

If the previous two elements fail, the third and least reliable measure is to look into whether an alien detainee captured overseas holds substantial connections to the United States. This is because, in some instances, additional forms of constitutional rights have been afforded to people holding a substantial nexus to the country. However, in the instances where enhanced constitutional rights were afforded to a substantially connected alien, the offending activity occurred within U.S. borders. For the small amount of instances relating to overseas application of this substantial connections test, individuals were limited to due process rights under the Fifth Amendment similar to those granted to Guantanamo Bay detainees in Boumediene.


67. See Plyler v. Doe, 457 U.S. 202, 212 (1982) ("[W]e reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State."); Reid v. Covert, 354 U.S. 1 (1957); Nat’l Council of Resistance of Iran v. Dep’t of State, 251 F.3d 192, 201 (D.C. Cir. 2001) ("[W]e have reviewed the entire record including the classified information and determine that NCRI can rightly lay claim to having come within the territory of the United States and developed substantial connections with this country.").

68. See, e.g., Al-Aqeel v. Paulson, 568 F. Supp. 2d 64, 69 (D.D.C. 2008) ("Aliens who have ‘come within this country’ . . . are entitled to constitutional protections.") (quoting Nat’l Council of Resistance of Iran, 251 F.3d at 201).

69. See, e.g., Al-Aqeel, 568 F. Supp. 2d at 70-71. The Al-Aqeel court explained:

Plaintiff has standing to raise claims under the due process clause of the Fifth Amendment. The same cannot be said concerning Plaintiff’s Fourth Amendment claim. It is settled law that the Fourth Amendment does not “restrain the actions
In *Al-Aqeel v Paulson*, a Saudi citizen was deemed to have a “sufficient nexus with the United States” that included frequent travel to the United States, acquiring property in Missouri, and serving as president of an Oregon corporation. While this sufficient nexus served to provide certain due process rights under the Fifth Amendment at trial, claims to assert Fourth Amendment rights were outright rejected. From this result, it is fair to surmise that under similar conditions involving an overseas alien, other non-trial-based fundamental constitutional rights such as the First Amendment will be similarly rejected.

One other aspect to consider is the issue of extraterritorial detention. Guantanamo Bay was deemed by the Supreme Court in the major detainee cases to be a location that allowed for certain rights. However, a 2010 decision in the D.C. Circuit determined that there was a difference between a secure U.S. controlled environment, such as Guantanamo Bay, and a recognized warzone as is the case of the U.S.-run Bagram airbase outside of Kabul, Afghanistan. As a result, detainees held at Bagram are not entitled to the enhanced protections that are afforded to those detainees housed at Guantanamo Bay.

**D. National security factor**

Taking it further, the Supreme Court in *Verdugo-Urquidez* also rejected the extension of constitutional rights to aliens residing overseas

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70. Id. at 70.
71. Id.
72. See generally *Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (“[T]he Government has not established that the detainees’ access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus.”).
73. *Al Maqaleh v. Gates*, 605 F.3d 84, 97 (D.C. Cir. 2010) (“It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war . . . . [A]ll of the attributes of a facility exposed to the vagaries of war are present in Bagram.”).
74. Id. at 97-98.
due to the potential effect on national security.\textsuperscript{75} The national security
dynamic often has been raised in domestic cases relating to U.S.
entities.\textsuperscript{76} However, the standard is extremely high to justify national
security trumping First Amendment rights of someone located within the
United States.\textsuperscript{77} The standard is much lower when applied to law
enforcement operations occurring overseas against non-citizens. Coupled
with the fact that the Court has consistently limited First Amendment
rights to apply mainly to U.S. citizens and other individuals residing
within the United States,\textsuperscript{78} it seems quite likely that overseas alien
propagandists cannot hang their hats on First Amendment protections.

According to the Court, offering constitutional rights such as the
Fourth and Sixth Amendment to overseas aliens "would have significant
and deleterious consequences for the United States in conducting
activities beyond its boundaries."\textsuperscript{79} The cited activities include law
enforcement operations as well as "other foreign policy operations which
might result in searches or seizures."\textsuperscript{80} Although the Court did not
directly address First Amendment protections, it appears from a practical
standpoint that a propagandist working with an international terrorist
organization still would be considered an enemy combatant due to the
fact that the propagandist uses words and media equipment instead of
bombs and rifles.

II. Bypassing the First Amendment for a Circumstance Theory

One way to avoid the pure political speech aspect of a
propagandist's work is to view the facts of the case in the prism of the
purported crime itself. U.S. case law does provide exceptions to First

\textsuperscript{75} United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) ("[T]he
result of accepting his claim would have significant and deleterious consequences
for the United States in conducting activities beyond its boundaries.").

\textsuperscript{76} See generally New York Times Co. v. United States, 403 U.S. 713 (1971)
(per curiam) (holding that the United States could not enjoin The New York Times
and The Washington Post from publishing information about U.S. strategy during
the Vietnam War).

\textsuperscript{77} Id. at 714 (finding that the Government failed to meet its substantial
burden in justifying prior restraint of the so-called Pentagon Papers).

\textsuperscript{78} See discussion supra Part I.C.

\textsuperscript{79} Verdugo-Urquidez, 494 U.S. at 273.

\textsuperscript{80} Id.
Amendment rights, even those pertaining to its own citizens. Perhaps the most widely cited test is that articulated in *Brandenburg v. Ohio*, in which the Court offered a limited standard where "acts and statements that instruct, solicit, or persuade others to commit crimes of violence" are generally not protected by the First Amendment.81 However, the First Amendment is so revered in U.S. society that *Brandenburg* presents a lofty standard before releasing First Amendment protections.82 This means that it would be very difficult to prosecute propaganda disseminators that use platforms such as video or the Internet. Moreover, the *Brandenburg* test includes an imminence requirement; applying this requirement to terrorist speech, the prosecution must show that the propagandist intended to cause violent incitement in cases where no practical assistance is conveyed in the message.83 So, if al-Bahlul was

81. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *See also* Hess v. Indiana, 414 U.S. 105 (1973) (per curiam) (holding that an antiwar demonstrator's speech did not fall within the scope of the speech left unprotected by *Brandenburg* because it was not advocating action). One scholar explained:

The [*Brandenburg*] Court held that advocacy of the use of force or unlawful activity was unprotected only where (a) it is directed at inciting (b) imminent, lawless action, and (c) is likely to incite or produce such action. This test means that the actor must intend the action to produce a certain effect — but it does not require that that effect become manifest. In a subsequent case, the Court suggested that imminent lawless action amounted to a matter of hours — or at most, several days; it did not open the door to indefinite action.


The First Amendment's freedom of speech is one of the most cherished rights protected by the U.S. Constitution and it has helped the United States to stand apart as a free nation in this world for centuries. Therefore, if there should be any barrier at all to prosecuting the creators and operators of terrorist Web sites, no nobler or worthier obstacle exists than the right to free speech.

*Id.*

afforded full First Amendment protection, he could have defended himself on the basis that he was merely disseminating an open-ended, innocuous propaganda message as opposed to a succinct, nuanced directive constituting actual incitement.4

But again, take a look at some of the charges in the al-Bahlul case. Al-Bahlul was convicted of solicitation. While the speech related to a solicitation charge has been deemed to be a “sometimes hazy line,” the crime of solicitation has a long history of being enforced.8 In al-Bahlul’s case, he was actively advocating violence and terrorism against the United States. Furthermore, evidence presented at trial indicated that al-Bahlul’s proactive and targeted message was indeed bearing fruit in the form of serving as the call-to-arms for other al Qaeda recruits.8 This gives no practical assistance, the prosecution should be required to show intent, as under the Brandenburg test.”). But see generally Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (holding that that Internet postings targeting abortion doctors were not protected speech under the First Amendment, and instead were “true threats” under the intent to intimidate portions of the federal Freedom of Access to Clinics Entrances Act).

84. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (“An advocate must be free to stimulate his audience with spontaneous and emotional appeals . . . . When such appeals do not incite lawless action they must be regarded as protected speech.”). See also Rice v. Paladin Enters., Inc., 128 F.3d 233, 244-45 (4th Cir. 1997) (finding that the Brandenburg test was inapplicable in a case where a book author provided detailed instructions on how to conduct a contract killing).

85. Brown v. Hartlage, 456 U.S. 45, 55 (1982) (“[W]hile a solicitation to enter into an [criminal] agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation . . . may properly be prohibited.”); Cox v. Louisiana, 379 U.S. 559, 563 (1965) (“[A] man may be punished for encouraging the commission of a crime.”); Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) (“The freedom to speak is not absolute; the teaching of methods of terror . . . should be beyond the pale.”); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.”); United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) (“[S]peech is not protected by the First Amendment when it is the very vehicle for the crime itself.”).

86. Carol Rosenberg, Ex-U.S. Jihadists Testify at Guantanamo Terror Trial, MIAMI HERALD, Oct. 30, 2008, available at 2008 WLNR 20710509 (including testimony of Buffalo, NY terrorist sleeper agents describing the reactions of various al Qaeda recruits upon viewing the recruitment video, including shouts of “Allahu Akbar” and weeping at the perceived mistreatment of Muslim women). Although the
targeted effort to solicit others into the al Qaeda enterprise of terrorist operations certainly offers a more compelling argument against recognizing First Amendment protection than in the most typical cases of political or hate speech rants. Still, the First Amendment standard remains especially high when applied in the traditional sense that the words themselves are rarely enough to move the speaker outside of First Amendment protection. This is particularly true based on the notion that not all terrorist speech emanating from enemy propagandists will meet the imminence requirements of the *Brandenburg* test.

### A. Circumstance Theory

Al-Bahlul’s crimes were material support to terrorism, conspiracy, and solicitation. This means that a circumstance theory similar to the “aid and comfort prong” of the test in treason cases may be more useful than looking to traditional First Amendment jurisprudence. Circumstance theory contends that it is not the words that are being punished, but rather the overall circumstances and/or venue in which these words were contained. For example, al-Bahlul was not punished per se for advocating hatred for America. Instead, he was punished for providing support to a designated terrorist organization because of his direct involvement with al Qaeda. This means that al-Bahlul maintained the equipment of al Qaeda’s Media Committee. He also carried out orders from the al Qaeda leadership to operate this equipment. Al-Bahlul worked with al Qaeda senior leadership to disseminate elements of terrorist operations in order to spread the

sleeper agents claimed in trial that they were turned off by the video’s content, they ultimately were convicted for establishing their al Qaeda operations in Buffalo. They were collectively known as the Lackawanna Six. *Id.*

87. See supra note 10 and accompanying text.


89. Ekaratne, supra note 83, at 220 (describing the case of Ali Al-Timimi, who was sentenced to life in prison for verbally inducing Islamic students to use firearms in a crime of violence, inducing others to carry explosives in order to commit a felony, and inducing others to levy war against the United States).

90. Trial Transcript, supra note 1, at 814-15.
viability and "terror" dynamic that was to accompany al Qaeda's unlawful operations. Since the terror message and recruiting are part and parcel with the mission of a terrorist group, al-Bahlul was performing his function as a terrorist and not merely as an innocuous media man or political pundit. Therefore, the content of the words coming from the terrorist group was irrelevant because the crime itself was working with al Qaeda to essentially conduct business in furtherance of the operational terrorist enterprise.

This, in some ways, is similar to income tax protesters convicted for counseling others not to pay taxes. For example, the Ninth Circuit explained that "the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." Similarly, in a civil case involving the dissemination of an instructional guide on how to conduct a murder-for-hire, the Fourth Circuit held "speech" does not enjoy First Amendment protection where the accused has the specific purpose of "assisting and encouraging" the commission of criminal conduct, and the assistance and encouragement takes a form other than "abstract advocacy."

B. Choosing Humanitarian Law Project over Brandenburg

Circumstance theory also helps distinguish a case of direct terrorist propaganda from more traditional elements of hate speech or provocative political speech that are normally protected under Brandenburg. In fact, from the perspective of the government, a direct

91. See generally Eben Kaplan, Council on Foreign Rel., Terrorists and the Internet (2009), http://www.cfr.org/publication/10005/terrorists_and_the_internet.html# ("Terrorist websites can serve as virtual training grounds, offering tutorials on building bombs, firing surface-to-air missiles, shooting at U.S. soldiers, and sneaking into Iraq from abroad."). See also Eben Kaplan, Council on Foreign Rel., Inspiring Terror (2006), http://www.cfr.org/terrorism-and-technology/inspiring-terror/p11035 ("Al Qaedaism" is the generating of individual terrorist cells by inspiring others into the ideological movement through disseminating the terrorist organization's message.).
92. United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1982).
94. See Ekaratne, supra note 83, at 207; see also Healy, supra note 82, at 193; Donohue, supra note 81, at 243. See also Chris Montgomery, Can Brandenburg v.
attack on terrorist speech has a much higher threshold due to the extremely high standards set out in *Brandenburg*. Therefore, the summer 2010 decision in *Holder v. Humanitarian Law Project* essentially affirmed the circumstance theory as an alternative to a head-on approach to the First Amendment rights to freedom of speech and association. This is because the Court determined that the content of the words was not as pertinent as the circumstance of providing material support to a designated terrorist organization.

*Humanitarian Law Project* is in part related to religious materials that, if challenged in the United States among its own citizens, would almost certainly be deemed protected speech. However, due to the circumstance that the physical documents and media items were

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Ohio *Survive the Internet and the Age of Terrorism? The Secret Weakening of a Venerable Doctrine*, 70 OHIO ST. L.J. 141, 162 (2009) ("[M]any commentators have started arguing that the *Brandenburg* test is incapable of handling the new communications framework presented by the Internet.").

95. Montgomery, supra note 94, at 166 ("A major reason why the government is leaning on the private sector to police online activity is that the *Brandenburg* doctrine makes it so difficult to secure prosecutions for inflammatory rhetoric.").

96. *Humanitarian Law Project*, 561 U.S. at ___, 130 S. Ct. at 2718 (2010). As the *Humanitarian Law Project* Court explained:

There is no basis whatever in the text of § 2339B to read the same provisions in that statute as requiring intent in some circumstances but not others. It is therefore clear that plaintiffs are asking us not to interpret § 2339B, but to revise it. Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.

*Id.* (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961)).

97. *Humanitarian Law Project*, 561 U.S. at ___, 130 S. Ct. at 2718. In his dissent, Justice Stephen Breyer rejected the majority approach, finding that:

limit[ing] the scope of its argument by pointing to some special limiting circumstance present here. That is because the only evidence the majority offers to support its general claim consists of a single reference to a book about terrorism, which the Government did not mention, and which apparently says no more than that at one time the PKK suspended its armed struggle and then returned to it.

*Id.* at ___, 130 S. Ct. at 2738.

98. *Id.* at ___, 130 S. Ct. at 2708 (citing 18 U.S.C. § 2339A(b)(1) (2009)).
knowingly distributed among a designated terrorist organization in furtherance of that organization's activities, the First Amendment did not inhibit punishment under a material support for terrorism conviction. The Court added that under this circumstance the required mental state is knowledge about the organization's connection to terrorism and not the specific intent to further its terrorist activities.

By applying this rationale, it appears that the Brandenburg test is bypassed in favor of a more defined approach that focuses more squarely on the issue and criminal elements of material support for terrorism. From a practical standpoint, this method serves to avoid the issue of extraterritorial application of the First Amendment altogether and instead place the onus on the nexus between offering support and/or resources with knowledge of the organization's connection to terrorism.

C. Treason Precedent

In many ways, the notion of bypassing traditional First Amendment arguments in favor of a more tangible approach is nothing new. This is especially pertinent with respect to wartime cases involving propagandists. The most prominent example relates to the charge of treason. In fact, treason convictions levied against enemy propagandists have consistently been upheld against U.S. citizens working for the other side. It is that level of legal separation from traditional First Amendment arguments that demonstrates the effectiveness in pursuing an alternative to the historic speech argument that is centric to Brandenburg and its predecessors. As a result, the case against current al Qaeda propagandist and U.S. citizen Adam Gadahn

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99. Humanitarian Law Project, 561 U.S. at ___, 130 S. Ct. at 2725 ("Congress's use of the term 'contribution' is best read to reflect a determination that any form of material support furnished 'to' a foreign terrorist organization should be barred, which is precisely what the material-support statute does.").
100. Id. at ___, 130 S. Ct. at 2709.
101. See supra note 10 and accompanying text.
102. Id.
103. Id.
will certainly be less about the First Amendment and more focused on 
the criminal elements of treason.104

Historically, several courts rejected First Amendment arguments 
when upholding treason convictions of U.S. citizens who broadcast 
propaganda messages on behalf of enemy military forces during World 
War II.105 The case against Iva Ikuko Toguri d’Aquino, for example, 
involved a U.S. citizen of Japanese descent who became synonymous 
with the imperial Japan’s “Tokyo Rose” propaganda campaign.106 Aquino assisted the Japanese in broadcasting numerous radio messages 
directed at American military forces.107 During the post-war U.S. 
occupation of Japan, Aquino was captured by American personnel.108 She was subsequently interrogated and held in extraterritorial military 
detention for more than a year prior to being prosecuted for treason.109 During the trial, a jury was asked to determine the veracity of Aquino’s 
defense that her intent was merely to entertain American troops and 
prisoners of war.110 Other than the intent aspect, her prosecution revolved 
around the issue of treason and not the First Amendment. Ultimately, 
Aquino served six years in prison.111

The cases against al-Bahlul and Adam Gadahn have some 
similarities to that of Aquino. Al-Bahlul was held in extraterritorial

104. See generally Eichensehr, supra note 88 (discussing the treason charges 
brought against Adam Gadahn). In discussing the likelihood of Gadahn receiving 
First Amendment protections, Eichensher stated: “Only First Amendment free 
speech claims would remain to protect political dissenters – claims soundly rejected 
by the courts in the World War II propaganda cases.” Id. at 232.
105. See Chandler v. United States, 171 F.2d 921, 938 (1st Cir. 1948) (holding 
that one may give aid and comfort to the enemy through communication just as one 
may commit treason by the communication of intelligence); Gillars v. United States, 
182 F.2d 962, 971 (D.C. Cir. 1950) (“[W]ords which reasonably viewed constitute 
acts in furtherance of a program of an enemy to which the speaker adheres and to 
which he gives aid with intent to betray his own country, are not rid of criminal 
character merely because they are words.”).
106. D’Aquino v. United States, 192 F.2d 338 (9th Cir. 1951). See also FBI – 
Iva Toguri d’Aquino and “Tokyo Rose,” http://www.fbi.gov/about-
us/history/famous-cases/tokyo-rose (last visited Apr. 14, 2011).
108. Id.
109. Id.
110. D’Aquino, 192 F.2d at 352.
111. See “Tokyo Rose,” supra note 106.
military detention at Guantanamo Bay prior to his prosecution. This is somewhat comparable to Aquino’s pre-prosecution detention in Japan because both were held and interrogated specifically because of their propagandist roles with their respective enemy groups. Moreover, Aquino’s prosecution focused on treason and avoided the issue of First Amendment protection. Al-Bahlul, as a non-citizen, was convicted for his propagandist role under the guise of providing material support for terrorism. In addition, Gadahn would likely be prosecuted in much the same manner as Aquino. This conclusion is based on the fact that all of the claims of First Amendment protection by World War II enemy propagandists were soundly rejected by the courts.

What we learn from both the treason cases and Humanitarian Law Project is that dealings with an identified terrorist organization can make free speech arguments irrelevant. Under this logic, it appears that material support for terrorism is the non-citizen pseudo companion charge to treason when the case involves speech and propaganda activity. It is under this general theory that non-citizen al Qaeda propagandists will continue to be convicted without protection from the First Amendment.

III. COMPARING CONVICTIONS OF AL QAEDA & RWANDAN PROPAGANDISTS

Although the First Amendment relates to U.S. domestic law, it is important to briefly mention how other recent international war crimes courts have viewed the issue of propagandists. It is particularly relevant to compare the U.S. Military Commission’s conviction of al Qaeda propagandist al-Bahlul with those in other, more internationally recognized forums. Perhaps the best recent example relates to Ferdinand Nahimana, Hassan Ngeze, and Jean Bosco Barayagwiza. These media figures were convicted by the International Criminal Tribunal for Rwanda for their propagandist role, primarily through the use of radio,
The legal proceedings became known as the "media trial." In fact, the 2003 Rwandan "media trial" was the first international war crimes conviction solely involving "hate speech" since that of Nazi propagandist Julius Streicher. Al-Bahlul, meanwhile, was initially detained by U.S. forces in 2002 and convicted of war crimes in part for his terrorist speech about five years after the Rwandan trial.

Nahimana, in particular, founded a propagandist radio station as well as produced a number of anti-Tutsi publications. The radio station was known as "Radio Machete," a rather odious term considering that tens of thousands of Tutsis were slaughtered by the large machete knife. In defending himself from the incitement to genocide charge, Nahimana claimed that he merely operated the radio station but directed no editorial control. The tribunal rejected Nahimana’s arguments and ruled that propagandists were just as culpable as those physically doing the killing. The tribunal found that the media men "were the bullets and the gun." "The trigger had such a deadly impact because the gun was loaded.

Certainly the Nahimana and Streicher cases differ from al-Bahlul in that the international tribunal proceedings in the former cases related to internationally-sanctioned charges of genocide. In contrast,

115. Id. at 318 ("[T]he RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population and called on listeners to seek out and take up arms against the enemy.").
117. Id. at 51.
118. Trial Transcript, supra note 1, at 992.
120. Id. at 342. See also Betsy Pisik, Hateful Words a War Crime, WASH. TIMES, Dec. 3, 2003, at A01, available at 2003 WLNR 756719.
121. Nahimana, Judgment and Sentence, at 322-23.
123. Nahimana, Judgment and Sentence, at 319. See also Woods, supra note 116, at 92.
al-Bahlul was prosecuted under U.S. domestic law pursuant to the Military Commissions Act of 2006. However, during the sentencing phase of al-Bahlul’s trial, victim impact statements were presented directly related to the effects of al-Bahlul’s propagandist role in producing a USS Cole attack video as a recruitment and exploitation tool.

The utility of comparing Nahimana with al-Bahlul is to further enforce the notion that the 21st Century international community continues to be willing to accept that propagandists can be prosecuted for war crimes. At the same time, the U.S. has shown its own willingness to bypass First Amendment arguments for detained al Qaeda propagandists by prosecuting their terrorist speech under the guise of material support, solicitation, and conspiracy charges. Of course, this willingness does not come without trepidation. For example, Karin Karlekar, the managing editor of Freedom House’s annual media survey, warned that some governments may use such international verdicts to

/GEN/NR0/044/31/IMG/NR004431.pdf?OpenElement. See also Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 559 (Sept. 2, 1998), available at http://www.unhcr.org/refworld/publisher,ICTR,,,40278fbb4,0.html (follow “The Prosecutor of the Tribunal Against Jean-Paul Akayesu (Sentencing Judgement)” hyperlink). The International Criminal Tribunal for Rwanda explained:

[D]irect and public incitement must be defined for the purposes of interpreting Article 2(3)(c) [of the Statute of the Tribunal], as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication. To make the determination that the defendants had committed the crime of incitement, the court reviewed particular pieces of speech and determined whether or not they contributed to the poisonous climate.

Id.

126. Trial Transcript, supra note 1, at 734.
127. Id. at 923-34.
128. Id. at 916-17 (finding al-Bahlul guilty on several charges, including those related to his role as a propagandist).
clamp down on their own county’s press freedoms.129 “These (Rwandan) guys were way over the line, but it’s a gray area (of public speech) that is endangered, especially in countries with racial or ethnic tension.”130 A similar school of thought has popped up in the U.S. where some legal scholars levy concern over the use of terrorist speech as a pretext to roll back the effectiveness of Brandenburg and also create a culture of chilled free speech.131 In this regard, there are more similarities between the U.S. Military Commission’s prosecution and the Nahimana case than many might want to admit.

CONCLUSION

Free speech is undoubtedly a fundamental right afforded to U.S. citizens. There remains, however, a gray area in terms of the speech protections afforded to enemy propagandists that are detained by U.S. forces for an extended period of time. The example presented here in regard to al-Bahlul is one such case where a dedicated al Qaeda member used terrorist speech as his primary jihadist weapon against the West. He produced and distributed videos on behalf of al Qaeda. When al-Bahlul was finally captured, he was ultimately detained under extraterritorial conditions at the U.S. naval base in Guantanamo Bay for about five years until he was prosecuted by a military commission. In the end, al-Bahlul was sentenced to life in U.S. custody for his war crimes.

But in analyzing a potential war crimes prosecution against a propagandist conducted under U.S. jurisdiction, the first step is to identify whether or not the propagandist is afforded some level of

129. Pisik, supra note 120.
130. Id.
131. See Donahue, supra note 81, at 250. Donahue noted:

Perhaps of greater concern is the sense that to focus on Brandenburg is to focus on the past, and not on the more likely manner in which counterterrorism currently or will in the future affect free speech. Here, there are a range of areas in which Brandenburg has only a limited reach or where it does not reach at all, such as knowledge-based speech and counter-terrorist provisions with significant secondary effects on expression.

Id.
constitutional rights. Lengthy extraterritorial detention in places such as Guantamo Bay, but not in active warzones like Bagram airbase in Kabul, Afghanistan, is one factor in this analysis. In cases not involving an active warzone, we already know that due process, habeas corpus, and certain trial protections are afforded to the detainee. Assuming the detainee is not a U.S. citizen, one will want to take into account the location from which the detainee was seized. If the detainee was seized in the U.S., then some sort of enhanced constitutional rights will likely be available. Contrast this with a case involving a propagandist such as al-Bahlul, who was captured at the Pakistan/Afghanistan border. A detainee seized under those conditions will likely not have additional constitutional protections like those afforded under the First Amendment and Brandenburg.

However, because the Brandenburg standard is so engrained in U.S. culture, the recent decision in Humanitarian Law Project offers a more succinct option for government prosecution of propagandists. Humanitarian Law Project essentially states that the elements of a material support to terrorism charge, rather than the speech-related activities themselves, are relevant to the judicial determination. As a result, the Brandenburg test is bypassed in favor of a more defined approach that focuses on the criminal elements of material support for terrorism. Practically, this method serves to avoid the issue of extraterritorial application of the First Amendment altogether and instead highlights the nexus between knowingly offering support and/or resources to a terrorist organization, regardless of the type of support provided.

132. Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010). See also supra note 73 and accompanying text.
133. Compare Boumediene v. Bush, 553 U.S. 723, 792 (2008) (finding that the petitioner was entitled to habeas corpus) with Al Maqaleh, 605 F.3d at 97 (finding that because Afghanistan is an active "theater of war," certain constitutional protections do not apply to detainees held there).