Free Speech Zones: Silencing the Political Dissident

Chris Demaske

Following Sept. 11, 2001, the Bush Administration began imposing every increasing limitations on civil rights. One example is the implementation of free speech zones, a practice in which political dissidents are cordoned off from the President during public appearances. While these zones originated in the 1980s, the use of them has grown considerably in the past few years. Critics argue that moving protesters to a remote location during Presidential events gives the impression that there is no dissent. This paper explores the constitutionality of free speech zones, ultimately demonstrating the shortcomings of the true threats doctrine, a legal framework for analysis in cases dealing with speech that may be threatening. This article suggests an alternative framework for analysis that would 1) better balance national security interests with speech protection for political dissidents and 2) clear up some of the doctrinal confusion in the application of the true threats doctrine in general.

First Amendment scholars have shown us that historically anti-government political speech comes under attack by government officials more during wartime than peacetime.[1] In the current U.S. climate created by the so-called "war on terror," coupled with the physical war in Iraq, the political dissident again has become subject to speech restrictions. These infringements are far ranging – from issues of academic freedom to restriction of once public information to invasions of privacy. The need to find a balance between protecting national security and protecting freedom of speech in this new climate requires that one think more complexly. One cannot underestimate the real threat of terrorist attacks. As legal scholar Frederick Schauer noted recently:

Even the briefest look at the Internet will confirm that exhortations to violence and instructions for terrorism are all around us, and it would be hard to label all of them – or, certainly, their cumulative effect – as inconsequential or exaggerated. In light of this, it would be hard to maintain that everyone who worries abut the fact that virtually anyone can learn how to make a bomb on the Internet is a paranoid hysterical zealot.[2] However, while not everyone is a "paranoid hysterical zealot," that does not mean that we should allow our First Amendment rights to disintegrate under the pressure of fear.

For the purposes of this article, I focus on the creation of "free speech zones" at presidential appearances to illustrate one area in which fear of terrorism is leading to the censoring of what in the past had been considered protected political speech. Ultimately, I demonstrate the shortcomings of true threats doctrine, the legal framework for analysis in cases dealing with possibly threatening speech, and offer an alternative framework for case analysis that may create a better balance between acknowledging the very real threats of terrorism with the right (and the absolute need in a democracy) for protection of the views of the political dissident.

In this article, I first lay out contemporary issues concerning dissident political speech and then review the history of the suppression of political speech in the United States. The history will illustrate that this is not the first time that political speech has come under attack from the government. It also will help to distinguish those past moments from contemporary issues. I then specifically outline the ruling in *Watts v. United States*, the key Supreme Court cases dealing with true threats doctrine, following with a discussion of current court rulings concerning free speech zones. In the process of analyzing the free speech zone cases, I elaborate on the problematic nature of current legal interpretations of true threats doctrine. Finally, I address those same cases using an alternative framework for case analysis that will add context to those tests, thus allowing for a more nuanced way to consider the difference between the true threat of terrorist speech and the protected right of dissident speech.

The Post-9/11 Culture

The most recent governmental assault on free speech rights began almost immediately following the 9/11 attacks. On the morning of September 12, 2001, President Bush set the tone for what would and would not be acceptable behavior for Americans: "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror, they were acts of war. This will require our country to unite in steadfast determination and resolve."[3] In that statement, President Bush implied a need for complete agreement on response to the attacks. What Bush implied, Attorney General John Ashcroft made clear in December of 2001: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies."[4]

Government leaders did more than just talk; they took action. Five days after the attack, the U.S. Patriot Act was proposed.[5] President Bush signed the Act into law on October 26 after only six weeks of congressional deliberation.[6] On September 21, 2001, only ten days following the attack, Chief U.S. Immigration Judge Michael J. Creppy issued a memorandum ordering the blanket closure of all deportation hearings for "special interest" cases.[7]

In 2002 in a statement before Congress, ACLU President Nadine Strossen urged, "We cannot allow the government to silence the voice of one dissenter without weakening the core of our democracy."[8] According to studies conducted by the ACLU and the Freedom Forum's First Amendment Center, Strossen had reason to

be concerned.[9] For example, the ACLU produced a report titled "Under Fire: Dissent in Post-9/11 America," which outlined attacks of free speech across the country by federal, state and local government members, as well as by non-state actors.[10] Occurrences reported in that document and other reports outlined a broad array of instances in which a range of different types of political speech were restricted. For example, in Denver the ACLU found that the Denver Police Department was monitoring the peaceful protests of activists belonging to the Noble Peace prize-winning organization American Friends Service Committee.[11] In St. Louis and Baltimore police did more than monitor protests; they interfered with them.[12]

Silent, individual protests were also grounds for government intervention. On college campuses, students have been reprimanded by police for hanging a U.S. flag upside down[13] and have been visited by the FBI for displaying anti-war posters.[14] In high schools, officials suspended two teachers and guidance counselor for displaying posters with anti-American sentiments[15] and in another incident a student was suspended for wearing a t-shirt critical of President Bush.[16]

A History of Suppression

The Alien and Sedition Acts were established by the Federalists at time when war with France seemed imminent.[17] Thomas Jefferson, a Republican, pardoned all of those convicted when he took office.[18] During the Civil War period, the government again attempted to curtail speech rights. This assault on speech, however, was not an open one. Instead, the Lincoln administration found other ways to suppress speech, primarily through suspension of the writ of habeas corpus.[19] In his recent book *Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism*, Geoffrey Stone reported more than 13,000 people were detained without being charged.[20] In addition to these federal laws, states used criminal anarchy and criminal syndicalism laws to restrict speech at the state level.

The next round of Federal speech regulation would come about in the midst of World War I with the passage of The Espionage Acts of 1917 and 1918.[21] These acts would lead to a trilogy of Supreme Court cases in 1919 and the birth of the clear and present danger doctrine. Justice Holmes wrote the opinion for a unanimous Court in the first of these cases, *Schenk v. United States*.[22] This case looked at the conviction of Charles Schenk, general secretary of the Socialist party. Schenk had been convicted in trial court of violating the 1917 Espionage Act by circulating an antidraft leaflet. Both the Court of Appeals and the U.S. Supreme Court upheld his conviction. Justice Holmes noted that while the leaflets likely would be protected speech in certain time periods "the character of every act depends upon the circumstances in which it is done."[23] Words that created a "clear and present danger" could be constitutionally proscribed.

One week later, the Court would hear the next two Espionage cases. First, the Court heard the case of *Frohwerk v. United States*.[24] Jacob Frohwerk had been charged and found guilty for publishing a newspaper critical of the U.S. government's involvement in the war. The Supreme Court penned a unanimous decision upholding the conviction. On the same day, the Court ruled on *Debs v. United*

States.[25] Again the U.S. Supreme held that Socialist Party leader Eugene Debs had violated the Alien and Sedition Acts, this time by delivering an anti-war speech.

Eight months later, Justices Holmes and Brandeis took their clear and present doctrine to fruition, writing dissenting opinions in *Abrams v. United States*.[26] In this case, the Court in a 7-2 decision affirmed the conviction of Russian immigrants who circulated leaflets critical of the U.S. government's intervention in the Russian Revolution. While the conviction was upheld, what are most significant about this case are the dissents. Justice Holmes argued in *Abrams*, and repeated several more times in dissenting opinions throughout the decade that followed, that in most circumstances the answer to threatening speech is more speech, not restriction.[27] However, he found that some speech "so imminently threatens immediate interference with lawful and pressing purposes of the law" that it does not qualify for First Amendment protection. Key to Holmes' conception of the clear and present danger doctrine was this notion of imminence. Holmes and Brandeis would repeat this idea in minority opinions several more times in cases throughout the next decade; however, it would be 1969 before it would become part of the central argument in a majority opinion.[28]

The next sedition law would come in response to fears of the impending World War II. Congress approved the Smith Act more than one year before the war actually started.[29] Not one case based on the Smith Act reached the U.S. Supreme Court during the war, but with the Cold War looming, the Act would become significant in the following decade. Almost immediately following the war, a series of events fell into place that would lead ultimately to a Communist witch hunt. The Soviet Union, a former ally in the fight against Nazi Germany, exerted its authority over the nations of Eastern Europe. By 1949, despite financial efforts by the United States, China fell under Communist rule.[30] That same year, the USSR exploded its first nuclear bomb. It was in this environment that Eugene Dennis and ten other members of the Central Committee of the Communist Party were indicted in New York under the Smith Act.[31]

Dennis v. United States is of particular significance given the similarities between the climate of that period and today's climate. Just like today, the focus of the U.S. was on fighting an ideology more than a war. In *Dennis*, the Supreme Court in a 6-2 decision found the conviction under the Smith Act to be constitutional. Chief Justice Vinson wrote the plurality opinion in which he distinguished the act of studying ideas about advocacy from the actual advocacy itself. Pointing to the language in the act itself, Vinson deduced: "Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of government sanction."[32] However, Vinson did not add any further context to where to draw the line between studying about advocacy and pure advocacy except to state that any member of the Communist party is advocating violent overthrow based strictly on their membership. The Court found that Dennis and his associates crossed the line into advocating the overthrow of the U.S. government simply because the very purpose of the Communist Party is the overthrow of non-Communist governments.[33]

In the 1957 decision in *Yates v. United States*, however, the Court applied a more detailed definition of the difference between advocating ideas and advocating

illegal action.[34] Justice Harlan, in comparing *Dennis* to *Yates*, wrote: "In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough."[35] With that ruling, the Court began to move away from the fear-induced rulings concerning advocacy of Communism toward a more defined doctrine of determining the line between ideas and action.[36] Also with the *Yates* ruling, the period of the U.S. Supreme Court allowing the restriction of pro-Communist speech ended. As noted previously, however, anti-government speech has again come under attack post-9/11. None of these attempts to restrict speech have made their way to the Supreme Court yet. When they do, some of those incidents that fall under the auspice of threats (to political leaders or to national security) will be held to the "true threats" definition established in *Watts v. United States*.

Watts v. United States

During an anti-war demonstration in the late 1960s, an 18-year-old made the following statement:

> They always holler at us to get an education. And now I have already received my draft classification as I-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get into my sights is L.B.J. They are not going to make me kill my black brothers.[37] This statement would lead to the case, *Watts v. United States*, the case that added the true threats doctrine to the pre-existing clear and present danger test.

Robert Watts was arrested and subsequently convicted of violating a 1917 statute that prohibits any person from "knowingly and willfully…[making] any threat to take the life of or to inflict bodily harm upon the President of the United States…"[38] The per curium opinion stated that the statute is constitutional on its face but "must be interpreted with the commands of the First Amendment clearly in mind."[39] The Court's opinion focused on the "willfulness" requirement in the statute.[40] It concluded "whatever the 'willfulness' requirement implies, the statute initially requires the Government to prove a true 'threat.'"[41]

In order to determine whether or not the comments made at the rally constituted a true threat, the Court struck a balance between the language in the statute and "the background of a profound national commitment to the principle that debate on public issues should be uninhabited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on the government and public officials."[42] The Court concluded that Watt's comments did not constitute a true threat, that they were in fact merely a "very crude offensive method of stating a political opposition to the President."[43]

While the significance of Watts in relationship to protection of political speech

should not be underestimated, how much strength does it carry in today's world where fears of terrorist attack are very intense and very real?[44] The combination of a long history of governmental attempts to suppress oppositional political speech, combined with the vagueness of the *Watts* ruling, places government officials and the lower courts in the position to determine who gets to speak their political views and who doesn't. For example, while the Court did distinguish political hyperbole from an actual true threat, it did not offer a concrete definition of what types of speech might constitute true threats.[45] As one legal scholar noted recently: "Despite *Watt's* speech-protective language, the Supreme Court's failure to articulate a clear standard in that case or subsequent cases for what constitutes a true threat has contributed to the doctrinal confusion that has persisted for more than thirty years."[46] Lower courts have applied the standard inconsistently.[47] This lack of clarity could lead to the prosecution of political speech that under normal circumstances wouldn't occur. As legal scholar Linda Gilbert noted, "In light of current doctrinal confusion in this area, and without a strong reaffirmance from the Supreme Court, the decisions in *Brandenburg* [and] *Watts*…could be the latest victims of the war on terrorism."[48]

Free Speech Zones

Free speech zones are areas set aside in public places, primarily during political events, in which protestors are removed to a secured, cordoned off space. These zones are supposedly designed to allow protestors a place to express their views free of interference from law enforcement officials. While free speech zones at political events have a history starting in the late 1980s, use of the zones has grown considerably following the September 11 attacks.[49] Specifically, the United States Secret Service now routinely forces protestors who are critical of President Bush into free speech zones during presidential appearances. According to critics of these zones, protestors are removed to remote locations where those opposed to the President are quarantined away from both the view of the President and of the media.[50] Political activists and groups supporting the President are permitted to remain closer to the event and thus to media coverage. Secret Service members and local law enforcement officials have arrested protestors refusing to adhere to the free speech zone restrictions.

Three of those arrests have resulted in court rulings in the past three years. In the first instance, 65-year-old retired steel worker Bill Neel was arrested at a presidential appearance during a 2002 Labor Day picnic in Pittsburgh.[51] Supporters of Bush were permitted to stay along the route of the motorcade, while protestors were removed to a free speech zone 500 feet away from the site of the President's speech. Neel, one of the protestors, refused to go to the free speech zone and instead stood with the Bush supporters. Neel held a sign that read: "The Bush Family Must Surely Love the Poor, They Made so Many of Us." Neel was charged with disorderly conduct for refusing to move to the free speech zone.

At Neel's trial in 2002, a Pittsburgh detective testified that local police were directed by the Secret Service to confine people "that were making a statement

pretty much against the President and his views." District Court Justice Shirley Trkula threw out the charges against Neel, stating: "I believe this is America. Whatever happened to 'I do not agree with you, but I'll defend to the death your right to say it.'"

Two later cases did not end as favorably for free speech rights. On July 24, 2003, President Bush appeared in front of the Treasury Financial Facility in Philadelphia.[52] ACORN, The Association of Community Organizations for Reform Now, attended the event to picket the President's visit in an attempt to draw attention to what they felt were discriminatory tax benefit laws. When they arrived, they were informed by Secret Service members that "no one except police personnel would be allowed directly in front of the [Treasury Financial Facility]." ACORN agreed to move their protest across the street; however, they soon discovered that citizens supporting the President were permitted to remain directly in front of the building. ACORN's legal council on site complained to the Secret Service, and according to some reports, were retaliated against further by having "several large police vans directly in front of [the protestors]," in effect blocking them from the President's (and the media's) view.

The ACLU filed suit, claiming that ACORN's First Amendment rights had been violated. In addition, the ACLU sought a permanent injunction against the Secret Service to enjoin them from ever establishing free speech zones at presidential appearances. The ACLU raised three issues in its lawsuit: 1) that free speech zones prohibit protestors from gathering in places where other members of the public are permitted to gather; 2) that free speech zones keep the President from viewing or listening to protestors; and 3) that, as result of the first two issues, free speech zones give the impression that there is less political dissent than is actually true.

The United States District Court for the Eastern District of Pennsylvania rejected the ACLU's claims, stating that they were "too amorphous to be justicable at [that] point in time." The court did add, however, that "the defendants may indeed have violated [the] plaintiff's First Amendment rights." Thus, the court simply denied to rule on the overall constitutionality of free speech zones.

The third court case grew out of a presidential appearance at an airport in Columbia, South Carolina, on October 4, 2002.[53] On the day of the rally, law enforcement officers were assigned to patrol the perimeter of an unmarked restricted area.[54] Vehicles and people were allowed to travel through the restricted area until shortly before the President arrived. The only pedestrians allowed to stay in the area were those waiting in line with tickets to enter the hangar for the rally. Brett Bursey, the director for the Progressive Network, went to the rally with the intent of protesting the Bush administrations call for war against Iraq. Bursey proceeded to go into the restricted area with signs and a megaphone. Law enforcement offices requested Bursey leave the restricted area. He did move his location, but stayed inside of the area. After a 25-minute confrontation between Bursey and the officers, he was arrested for trespassing, a charge that was later dropped.[55]

More than four months following his initial arrest, Bursey was charged by the United States Attorney with violating Title 18, Section 1752 (a)(1)(ii).[56] Following a two-day bench trial in November of 2003, Bursey was convicted and sentenced to a $500 fine and a $10 special assessment. Bursey appealed but his sentence was

subsequently upheld by the Court of Appeals for the Fourth Circuit. Bursey argued in court that he was not aware that he was in a federally cordoned off area. He stated that the law enforcement officers never told him such and that the free speech zone was not clearly demarcated. The Fourth Circuit disagreed, finding that "Bursey thus took a calculated risk when he defied the orders of the officers to leave the restricted area, thereby intending to act unlawfully."[57] Bursey appealed to the U.S. Supreme Court but on January 17, 2006, the Justices declined to hear the case, thus leaving the constitutionality of free speech zones still in question.

The Analysis

While none of the above free speech zone cases directly called into question the true threats doctrine, the reasoning employed by the Secret Service and other police officials relies on the belief that these zones are needed to protect the President. Considering the severity of the speech restriction, one would think that a more rigorous proof of threat would need to occur before placing a prior restraint on particular political views. If the Supreme Court ever were to rule on the constitutionality of free speech zones, the government would have a high burden to bear. And, given that testimony from law enforcement officials speaks to concerns of violence against the President, then true threats would be the obvious legal argument.

How would the lower court free speech zone cases look through the lens of the true threats doctrine? Would the government be forced to stop removing political dissidents from the center stage? Would the *Watts* case, which itself dealt with statements critical of the President, lead to a decision that the free speech zones as they are currently enforced are a viewpoint-based form of discrimination not permitted under the First Amendment? Because the courts have yet to deal with the constitutionality issue, these questions remain speculative, but it is based on this speculation that I will address the possibility of the true threats application to free speech zone cases.

The *Watts'* true threat standard raises problems because of its lack of clarity. As previously mentioned, the *Watts* case itself only made it clear that political hyperbole could not be considered a true threat. In 2003, the Court in *Virginia v. Black* added to the definition of true threats.[58] Justice O'Connor, writing for the majority, said that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat."[59] Despite this additional language in *Black*, the true threats doctrine still does not offer sufficient guidance. The lower courts have added to the lack of clarity, producing contradictory rulings in some cases.[60] Two recent Ninth Circuit Court of Appeals illustrate the magnitude of the confusion.

In 2002 in *Planned Parenthood of Columbia/Willamette Inc. v. American Coalition of Life Activists* the Ninth Circuit ruled that anti-abortion websites featuring abortion doctors' faces in wanted-poster style format constituted a true threat proscribable under the First Amendment.[61] Three years later in *United States v. Cassel*, the court upheld the constitutionality of a federal law that prohibited "intimidation

to hinder, prevent, or attempt to hinder people from buying or attempting to buy federal land."[62] What is most problematic about the rulings in these cases is that the court applied different standards in each case. In *Planned Parenthood*, the court applied an objective standard for intent under the true threats test. Specifically, the court defined a true threat as a statement made when a "reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm."[63] In other words, true threats are defined by whether or not a reasonable person would find them threatening. Jennifer Elrod explains:

As proscribable acts, true threats have a number of detrimental impacts on society in general and on targeted individuals in particular. Chief among these are the fear and apprehension that threats engender, the disruption prompted by such fear, and the cost of protecting against, reducing, preventing, or eliminating the threatened violence.[64]

True threats as defined through the application of the objective standard is about whether or not the words could be construed as threatening, not whether or not the speaker intended to carry out the threat. In *Cassel*, the Ninth Circuit applied a subjective standard. The appeals court determined that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."[65] In other words, the subjective test relies on attempting to determine the speaker's motive. Does he intend to or can he reasonably carry out the threat? Whether or not a reasonable person would find the words threatening is not significant.

Planned Parenthood and *Cassel* exemplify the confusion that lower courts across the country have been experiencing. Both the subjective and objective approaches as currently conceived are problematic. The subjective standard completely ignores the issue that speech can be threatening to the target even if the speaker did not actually intend physical harm. This criterion seems counter to the language in *Black* that "the speaker need not actually intend to carry out the threat." It also can be considered problematic if one agrees with Elrod that the reason for proscribing threats is largely because of "the fear and apprehension that threats engender," a position that seems reasonable in light of the ruling in *Black*. The objective standard offers significantly more context to the true threats doctrine. For example, in *Watts* the Court considered questions of both content and context. The Court took into account how the audience reacted to *Watts'* statements, the location he was in, and who was in the audience he was speaking to. In *Black*, the Court made this distinction even more pointedly, assessing that cross burnings could be used either to intimidate or as a form of ideological solidarity. As a result, the Court had to consider the location of the speaker and the make up of the audience. However, due to the fact that the Ninth Circuit ruled on *Cassel* after the *Black* decision, the true threats doctrine, even with the added discussion in *Black*, still lacks the clarity needed to distinguish critical political discourse from true threats. In other words, the question of the constitutionality of free speech zones is still open.

An Alternative Approach

One way to clear up the confusion in the lower courts would be for the U.S. Supreme Court to make explicit some of the criteria that was applied implicitly in *Black*, specifically its reliance on history as a determining factor and its acknowledgement that the same speech in different circumstances can have very different meaning. Adding those extra criteria would create a three-prong test that would consider: (1) the character, nature, and scope of the speech restriction; (2) the historical context of the cultural groups involved in the speech at issue; and (3) the individual power relations occurring in the particular speech moment.[66]

The first prong of the framework requires a consideration of the character, nature and scope of the speech. This prong takes into account the significance of considering content as a major factor in determining the First Amendment validity of speech restrictions. However, it explores more than just the basic question of whether a restriction is content-based or viewpoint-based (the nature of the restriction). It adds to that criterion two others – the character of the speech (political speech or commercial speech, for example) and the scope of the restriction (a total ban or partial ban, for example). This more contextual, complex analysis of content -based restrictions comes from Justice John Paul Stevens' concurrence in *R.A.V. v. St. Paul*.[67] He explained that by considering the multiple elements previously listed, the Court could apply "a more subtle and complex analysis" that would allow for the possibility of both content- and viewpoint-based restrictions being acceptable so long as they met strict scrutiny standards.[68] By reviewing the restriction in terms of the character of speech, the nature of the restriction, and the scope of the restriction, the Court can offer a more encompassing consideration of the government's reasons for censoring or restricting speech.

The second prong of the test to be considered is historical context. Specifically, the Court would consider the historic context based on culturally constructed group identity when reviewing whether to restrict speech. Various empirical, psychological and historical data could be used to determine the status of a group's historical disempowerment. Legal scholars have suggested ways in which psychological and social scientific studies could be used in this fashion.[69] Others, most notably Alexander Tsesis, have outlined ways in which historical data could be used to determine the level of disempowerment individuals may feel based on their group identity.[70] Most recently, in the cross burning case *Virginia v. Black*, Justice Sandra Day O'Connor writing for the majority discussed at length the history of cross burning in the United States and concluded that "to this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a 'symbol of hate.'"[71] In the *Virginia* ruling, the historic message of cross burning was a determining factor.

If speech has the power both to oppress and to resist oppression, then, depending on the history of a person's group identity, the speaker will feel more or less social power and so will feel more or less entitlement to speak. Unless the First Amendment is applied in accordance with the way this power operates, free speech laws will continue to work as part of the hegemonic process, allowing only brief moments of temporary change that ultimately will be rearticulated in terms of the

dominant group. Groups that currently are privileged by dominant power structures will continue to have more cultural and political rights than those who have been and continue to be disempowered.

The final prong of the framework is the relational nature of the power between speakers. By focusing on this relational power, this framework requires a consideration of the power dynamic of the specific speech situation. For example, does the speech take place on public property or private? Are the speakers alone or surrounded by others? The Court in *Virginia v. Black* took into consideration to some degree this particular element when they considered the intimidation factor. In that case, the Court made a distinction between a cross burning on private property at a Ku Klux Klan rally and a cross burning in someone's yard as a form of intimidation. In the case of the rally, the speech should be protected, but in the private property situation, the speech crosses the line into intimidation and so is not protected under the First Amendment. According to the majority, "[T]he act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech."[72]

Applying the Framework

The true threats test on its face takes the character, nature and scope of the speech into consideration. However, reviewing the details behind the ultimate arrests of Neel and Bursey, the application of true threats is not always content, nor viewpoint, neutral. In both of those cases, as well as the ACORN example, only protestors of the President were restricted to the free speech zones. Supporters were welcome to appear closer to the President and to the media. Equally problematic in the free speech zone cases is the nature of the speech being restricted. True threats doctrine applies specifically to low value speech. However, the free speech zones specifically target political speech, the most valued speech under First Amendment protection. Given the climate of the post-9/11 U.S., fear of attack against the President is certainly valid. Those people expressing disagreement with the President may well intend to carry out a true threat. However, without more context in the application of true threats doctrine, the ease of abuse toward those who merely are vocalizing their disagreement with governmental policy can, and in the cases mentioned above have, led to prosecution of people based solely on their criticism, not on any actual proof of intent to threaten the President. This problem could be remedied in one of two ways. Either all attendees at presidential debates, no matter their political position, could be cordoned off into free speech zones. Or, the two additional elements concerning history and the individual speech moment could be brought into consideration, thus allowing for the citizenry to continue participating at the level prior to 9/11.

The majority opinion in *Virginia v. Black* focuses at great length on the history of cross burning in the U.S. It is in the context of this history that Justice O'Connor draws a distinction between cross burning used to intimidate and those used to reinforce ideological solidarity. The former constitutes an unprotected threat and the

latter a protected form of political speech. Applying this in regard to political protestors at presidential appearances would force the courts, and in turn law enforcement agencies, to take into account the nature of the political protest in question.

The history of the political dissident in U.S. culture is extensive. Protestors routinely show up at political events, particularly those where the President is on hand. This tradition goes to the root of the town hall meeting concept in our representative government in which the people have a right to redress and hold accountable elected government officials. Given this history, the arrests of Bursey and Neel would have to be considered unconstitutional forms of prior restraint. In both of those cases, the protestors were silenced before their messages could be heard. Conversely, history could be used as a way to determine that some speakers pose a significantly higher threat than others. If, for example, protesters uttering or displaying threatening messages had a record of committing violent acts, their history of violence could be used as a factor in limiting their access to the President.

Application of the third prong of the framework – consideration of the relational nature of the power between speakers – not only adds context to the true threats doctrine but also offers a balance between the current conflicting objective and subjective standards. This prong analyzes the power dynamic occurring between the speaker and spoken to, not the objective interpretation of the reasonable person, nor, conversely, the subjective determination of the speaker's intent. Again, the Court in *Black* considers this relationship, albeit not directly. In *Black*, the majority drew a distinction between the speech moment occurring when a cross is burned in the yard of an African American and when a cross is burned at a KKK rally in a discreet location. The physical act of burning the cross is the same but the location and audience are the defining factors.

In regard to protestors at presidential appearances, the act of political dissent is the same. The individual ways in which that dissent is manifested and its location and audience makeup change. For example, one person carrying a sign at a presidential appearance saying "Overthrow the Government," might be a significantly different moment that 200 people carrying those signs. In addition, a sign that reads "The Bush Family Must Surely Love the Poor, They Made so Many of Us" is a different speech moment than a one that reads "Overthrow the Government, Now." Given the multitude of permeations that could occur, free speech zones need to be structured either more concretely or more loosely. In other words, free speech zones could avoid the current viewpoint censorship by restricting all attendees into such zones. Or, the free speech zones could be applied much in the same way that the Court in *Black* applied the Virginia statute. This reading would provide for a case-by-case determination based on individual speech moments and not simply on favor or disfavor of the President.

Conclusion

By focusing on the issue of free speech zones at presidential appearances, this article highlights just one area where speech is being restricted in the name of national security. The free speech zone restrictions in and of themselves are problematic.

When political dissidents are cordoned off away from the President, the public and the press, it creates the illusion that there is no dissent, silencing the dissenters and leaving the general public ignorant of alternative political opinions. This restriction, particularly if reified through a U.S. Supreme Court ruling, can have long-term ramifications. As illustrated in this article, historically when First Amendment rights have come up against concerns about national security during times of crisis, free speech has lost out. For example, the clear and present danger standard developed in the trilogy of Supreme Court cases in 1919 allowed for continued suppression of dissident political speech until the *Yates* ruling in 1957. For almost 40 years, the U.S. government passed legislation restricting the expression of certain anti-government ideology, and the U.S. Supreme Court continued to uphold these restrictions through a series of rulings. What this history demonstrates is that regulations established during times of national crisis can have an impact long after the immediate crisis has passed.

Focusing on the free speech zone issue also helps to bring to light the inconsistencies in the application of the true threats doctrine. While *Black* appeared to further define the scope of the true threats doctrine, subsequent conflicting Ninth Circuit Court of Appeals rulings show that this is not the case. Gilbert's concern that the standard developed in *Watts* contributed to thirty years of doctrinal confusion remains valid today despite the additional language in *Black* intended to clarify the parameters of the standard. The implications of this confusion extend far beyond the issue of free speech zones. Until the Court develops a test that can be applied more consistently, dissident political and social discourse will remain vulnerable to the temperament of the particular court applying the true threats standard.

This article has offered a constitutionally sound solution that would add depth to the true threats standard. Application of this three-prong analysis to free speech zone shows them to be a form of viewpoint-based prior restraint. By law enforcements' own testimony, only those who disagree with the President are removed from the location of his appearance, leaving only one side of the political spectrum allowed to participate and be visible. However, by adding the elements of history and the relational power between speakers, free speech zones could be constructed and applied in a more neutral fashion that promotes political participation while simultaneously taking into account the safety of the President and others in attendance.

Notes

1. For a recent book focused on speech restrictions during six war or war-related time periods, see Geoffrey Stone, *Perilous Times: Free Speech in Wartime, From the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. & Norton Co, 2004). See also, Harry Kalven, *A Worthy Tradition: Free Speech in America* (New York: Harper & Row, 1988) and Leonard Levy, *Freedom of Speech and Press in Early American History: A Legacy of Suppression* (New York: Harper & Row, 1963).

2. Frederick Schauer, "The Wily Agitator and the American Speech Tradition: Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism," 57 *Stanford Law Review* 2157 (2005), 2167-2168.
3. Robert M. Entman, "Cascading Activation: Contesting the White House's Frame After 9/11," *Political Communication*, 20:4 (2003), 415 (citing President Bush's address to the nation on Sept. 12, 2001).
4. Department of Justice Oversight, "Preserving Our Freedoms While Defending Against Terrorism," Hearing Before the Senate Committee on the Judiciary, 107th Congress 313 (Dec. 6, 2001).
5. The Patriot Act, a 342-page long document, was created to "deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools and for other purposes," Congressional Record, USA Patriot Act of 2001, 107th Cong., 1st sess., H.R. 3162, 147 no. 144: S10990 (2001). In 2005, Attorney General Alberto Gonzales commended the Patriot Act for enabling law enforcement officials to "identify terrorist operatives, dismantle terrorist cells, disrupt terrorist plots and capture terrorists before they have been able to strike." Attorney General Alberto R. Gonzales Highlights Success in War on Terror at the Council on Foreign Relations, Department of Justice, December 1, 2005.
6. Id., Department of Justice.
7. *See*, memorandum from Michael J. Creppy, Chief Immigration Judge of the United States, to Immigration Judges and Court Administrators (Sept. 21, 2001), available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf (last visited May 7, 2007). For a review of the subsequent implications of this memo, see Dale L. Edwards, "If it Walks, Talks and Squawks Like a Trial, Should it be covered Like One? The Right of the Press to Cover INS Deportation Hearings," 10 *Communication Law and Policy*, 10:2 (2005).
8. Nadine Strossen, Forum on National Security and the Constitution, (January, 24, 2002), available at http://www.aclu.org/congress/1012402a.html.
9. For more detailed discussions concerning First Amendment infringement, *see ACLU, Freedom Under Fire: Dissent in Post-9/11 America* (2003) and http://www.firstamendmentcenter.org.
10. Id. For a government response to one of the ACLU allegations, see State of James B. Comey, Deputy Attorney General, United States Department of Justice, Before the Committee on the Judiciary, United States House of Representatives, 13 (June 8, 2005).
11. American Friends Service Committee et al v. City and County of Denver (Col. District Court, March 28, 2002), complaint available on-line at http://www.aclu-co.org/news/complaints/complaint_spyfiles.htm.
12. *Freedom Under Fire*, at 8-10. In St. Louis, dozens of protestors were injured by police at an anti-war rally. In Baltimore, police stopped eight people from holding a silent vigil protesting the war because they did not have a permit.
13. Id. at 5. Two students at Grinnell College in Iowa hung an American flag upside in their dorm room window. The students were accused of violating an Iowa state law concerning "flag etiquette." The students filed suit in federal

district and subsequently were cleared after authorities conceded that the students' actions constituted protected speech under the First Amendment.

14. Id. A.J. Brown, a freshman at Durham Technical College in Raleigh, North Carolina, was visited by the U.S. Secret Service after someone called in an anonymous tip that Brown had an anti-American poster on her wall. The poster was an anti-death penalty poster that featured George W. Bush holding a rope and numerous hanging victims in the background. Brown was questioned by the Secret Service about whether she had information on Afghanistan or the Taliban. She was asked to sign a form; no other action was taken.
15. Id. at 14. In Albuquerque, New Mexico, a guidance counselor and two teachers were suspended without pay for displaying posters critical of the War in Iraq.
16. Id. at 15. In Dearborn, Michigan, a sixteen-year-old was suspended for wearing a t-shirt to school that showed a picture of President Bush with the words 'International Terrorist' underneath. School officials claimed that they thought the t-shirt would cause disturbances at the school.
17. Laura K. Donohue, "Terrorist Speech and the Future of Free Expression," 27 *Cardoza Law Review* 233, 240-241 (2005).
18. Id.
19. Id. at 241.
20. Stone at 124.
21. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917). The Espionage Act of 1917 focused primarily on acts of sabotage and the protection of military secrets; however, it also made it illegal to encourage insubordination in the military or to promote resistance of the draft.
22. 249 U.S. 47 (1919).
23. Id. at 52.
24. 249 U.S. 204 (1919).
25. 249 U.S. 211 (1919).
26. 250 U.S. 616 (1920).
27. Id. at 630.
28. See, *Gilbert v. Minnesota*, 254 U.S. 325 (1920); *Schaefer v. United States*, 251 U.S. 616 (1920); and *Gitlow v. New York*, 268 U.S. 652 (1925).
29. Thomas L. Tedford, *Freedom of Speech in the United States* (Carbondale: Southern Illinois University Press, 1997): 61.
30. Michael J. Hampson, "Protesting the President: Free Speech Zones and the First Amendment," 58 *Rutgers Law Review* 245, 245-246 (2005).
31. *Dennis v. United States*, 341 U.S. 494 (1951).
32. Id. at 502.
33. Id. at 499. "Congress was concerned with those who advocate and organize for the overthrow of government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow."
34. 354 U.S. 298 (1957).
35. Id. at 320.
36. Robert S. Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?" 55 *American University Law Review* 789, 802-803 (2006). "The *Dennis* and *Yates* decisions illustrate the Court's approach to free speech in a time

of another variable struggle that, like the War of Terror, seemed to advance with no foreseeable end in sight. However, hindsight reveals the flaws of *Dennis* and the significance of *Yates*. In both cases, to the extent that criminals sowed a conspiracy, those actors could have been punished. But, the *Dennis* defendants merely advocated their party's doctrine."

37. *Watts v. United States*, 394 U.S. 705 (1969).
38. Id, quoting 18 U.S.C. § 871 (a).
39. Id. at 707. "What is a threat must be distinguished from what is constitutionally protected speech."
40. Id. at 707-708. The statute reads: "Whoever knowingly and willingly deposits for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive or document containing any threat to take the life of or to inflict bodily harm upon the Presiding of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officers next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both."
41. Id. at 708.
42. Id., quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).
43. Id.
44. Legal scholar Laura Donohue raises a similar concern about *Brandenburg* in her article, "Terrorist Speech and the Future of Free Expression," 27 *Cardoza Law Review* 233 (2005). She states: "The importance of the *Brandenburg* test in protecting persuasive political speech ought not to be underestimated. But its strength in the face of modern terrorism remains less clear. The persistence of *Schenk v. United States, Dennis v. United States, Yates v. United States* and the clear and present danger test suggest a rockier base than one otherwise might expect. Confronted by possible terrorist acquisition of biological weapons, courts may well lower the bar."
45. See, Jennifer Elrod, "Expressive Activity, True Threats and the First Amendment," 36 Connecticut Law Review 541, 561 (2004). "To date, the delineation of the true threats doctrine and the relevant test of factors has been the role of the lower federal courts."
46. Lauren Gilbert "Mocking George: Political Satire as 'True Threat' in the Age of Global Terrorism," 58 University of Miami Law Review 843 (2004), 868.
47. For an in depth discussion of lower court application of the true threats doctrine, see id. at 869-871. Also, Robert Blakey and Brian J. Murray, "Threats, Free Speech, and the Jurisprudence of Federal Criminal Law," 2002 *Brigham Young University Law Review* 829.
48. Id. at 857.
49. For discussions of free speech zones prior to September 11, see Andrew Blake, "Atlanta's Steamy Heat Cools Protests: More than 25 Groups Rally in Demonstration Area," *Boston Globe*, July 20, 1988. Retrieved from ProQuest; Nicho-

las Riccardi, "Convention Planners Wary of New Style of Protests," *Los Angeles Times*, June 23, 2000. Retrieved from Lexus/Nexus; and Heidi Boghosian, "The Assault on Free Speech, Public Assembly and Dissent – A National Lawyers Guild Report on Government Violations of First Amendment Rights in the United States," *The National Lawyer's Guild*, 2004. Retrieved from www.nlg.org.

50. Hampson at 256.
51. "Judge clears Bush Opponent," *Pittsburgh Post-Gazette*, November 1, 2002, www.post-gazette.com/localnews/20021101protester3.asp, retrieved May8, 2007.
52. *ACORN v. City of Philadelphia*, civil action No. 03-4312 (E.D. Penn.) (2003).
53. *U.S. v. Bursey*, 416 F.3d 301, 2005.
54. Id. at 304.
55. Id. at 305.
56. Id. at 305. Title 18, Section 1752 (a)(1)(ii) states that it shall be unlawful for any person or group of persons to willfully and knowingly enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting.
57. Id. at 309.
58. 538 U.S. 343 (2003).
59. Id. at 359.
60. Elrod at 541.
61. 290 f.3d at 1074, 1088 (2002).
62. 408 F.3d 622 (9th Cir. 2005).
63. 290 f.3d at 1074, 1088 (2002).
64. Elrod at 547-548.
65. 408 F.3d 622 (9th Cir. 2005).
66. For a more detail discussion of this three-prong framework, see Chris Demaske, "Modern Power and the First Amendment: Reassessing Hate Speech," *Communication Law and Policy*, 9:3 (2004).
67. 505 U.S. 377, 428 (1992) (Stevens, J., concurring in judgment).
68. Id. at 428.
69. For example, see Richard Delgado and Jean Stefancic, *Must We Defend Nazis: Hate Speech, Pornography, and the New First Amendment* (New York: New York University Press, 1997).
70. Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York: New York University Press, 2002): 9-79.
71. 538 U.S. 343 (2003) at 357.
72. Id. at 356.

Bibliography

ACLU. 2003. Freedom Under Fire: Dissent in Post-9/11 America. Retrieved from

http://www.firstamendmentcenter.org.
Blake, Andrew. 1988. Atlanta's Steamy Heat Cools Protests: More than 25 Groups Rally in Demonstration Area. *Boston Globe*, July 20, 1988. Retrieved from Proquest.
Blakey, Robert and Brian J. Murray. 2002. Threats, Free Speech, and the Jurisprudence of Federal Criminal Law. *Brigham Young University Law Review* 829.
Boghosian, Heidi. 2004. The Assault on Free Speech, Public Assembly and Dissent – A National Lawyers Guild Report on Government Violations of First Amendment Rights in the United States. *The National Lawyer's Guild*. Retrieved from www.nlg.org.
Crane, Paul T. 2006. "True Threats" and the Issue of Intent. 92 *Virginia Law Review* 1225.
Creppy, Michael J. 2001. Chief Immigration Judge of the United States, to Immigration Judges and Court Administrators. Retrieved from
http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf
Delgado, Richard and Jean Stefancic. 1997. *Must We Defend Nazis: Hate Speech, Pornography, and the New First Amendment*. New York: New York University Press.
Demaske, Chris. 2004. Modern Power and The First Amendment: Reassessing Hate Speech. *Communication Law and Policy* 9:3: 273-316.
Department of Justice Oversight. 2001. Preserving Our Freedoms While Defending Against Terrorism. Hearing Before the Senate Committee on the Judiciary, 107th Congress 313 (Dec. 6, 2001).
Donohue, Laura K. 2005. Terrorist Speech and the Future of Free Expression. 27 *Cardoza Law Review* 233.
Edwards, Dale L. 2005. If it Walks, Talks and Squawks Like a Trial, Should it be covered Like One? The Right of the Press to Cover INS Deportation Hearings. *Communication Law and Policy*, 10:2, 217-239.
Elrod, Jennifer. 2004. Expressive Activity, True Threats and the First Amendment. 36 Connecticut Law Review 541.
Entman, Robert. 2003. Cascading Activation: Contesting the White House's Frame After 9/11. *Political Communication*, 20:4 (2003), 38-59.
Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917).
Gilbert, Lauren. 2004. Mocking George: Political Satire as 'True Threat' in the Age of Global Terrorism. 58 *University of Miami Law Review* 843.
Hampson, Michael. 2005. Protesting the President: Free Speech Zones and the First Amendment, 58 *Rutgers Law Review* 245.
Judge clears Bush Opponent. 2002. *Pittsburgh Post-Gazette*, November 1, 2002. Retrieved from www.post-gazette.com/localnews/20021101protester3.asp.
Kalven, Harry. 1988. *A Worthy Tradition: Free Speech in America*. New York: Harper & Row.
Levy, Leonard. 1963. *Freedom of Speech and Press in Early American History: A Legacy of Suppression*. New York: Harper & Row.
Riccardi, Nicholas. 2000. Convention Planners Wary of New Style of Protests. *Los Angeles Times,* June 23, 2000. Retrieved from Lexus/Nexus.
Schauer, Frederick. 2005. The Wily Agitator and the American Speech Tradition:

Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism. 57 *Stanford Law Review* 2157, 2167-2168.
Stone, Geoffrey. 2004. *Perilous Times: Free Speech in Wartime, From the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. & Norton Co.
Strossen, Nadine. 2002. Forum on National Security and the Constitution Retrieved from http://www.aclu.org/congress/1012402a.html.
Tanenbaum, Robert S. 2006 Preaching Terror: Free Speech or Wartime Incitement? 55 *American University Law Review* 789.
Tedford, Thomas L. 1997. *Freedom of Speech in the United States*. Carbondale: Southern Illinois University Press.
Tsesis, Alexander. 2002. *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*. New York: New York University Press.
USA Patriot Act of 2001, 107th Cong., 1st sess., H.R. 3162, 147 no. 144: S10990 (2001).

Cases

Abrams v. United States, 250 U.S. 616 (1920).
ACORN v. City of Philadelphia, civil action No. 03-4312 (E.D. Penn.) (2003).
American Friends Service Committee et al v. City and County of Denver (Col. District Court, March 28, 2002).
Debs v. United States, 249 U.S. 211 (1919).
Dennis v. United States, 341 U.S. 494 (1951).
Frohwerk v. United States, 249 U.S. 204 (1919).
Gilbert v. Minnesota, 254 U.S. 325 (1920).
Gitlow v. New York, 268 U.S. 652 (1925).
Planned Parenthood, 290 f.3d at 1074 (9th Cir. 2002).
R.A.V. v. St. Paul, 505 U.S. 377 (1992).
Schaefer v. United States, 251 U.S. 616 (1920).
Schenk v. United States, 249 U.S. 47 (1919).
U.S. v. Bursey, 416 F.3d 301 (2005).
U.S. v. Cassel, 408. F.3d 622 (9th Cir. 2005).
Virginia v. Black, 538 U.S. 343 (2003).
Watts v. United States, 394 U.S. 705 (1969).

Chris Demaske is an assistant professor in the Interdisciplinary Arts and Sciences Program at the University of Washington Tacoma. Her research interests include First Amendment law, feminist studies, and free press theory. She has published articles and essays in The International Journal of Media and Cultural Politics, Communication Law and Policy, *and* The Encyclopedia of the First Amendment.