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individual."[2] Four years later, the Chief Justice also foresaw

> Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[7]

Some who seek to curtail the use of email and websites by purported terrorists would do so by taking down websites. In order to do so, though, someone in government would have to be assigned the job of deciding what sites to censor and what sites to leave in place. Such discretion is exactly the kind of censorship that the Court has repeatedly cast aside. Justice Harry Blackmun addressed the notion of such discretionary censorship. "By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."[8] More specifically, the Supreme Court has held that Internet speech is protected to the full extent of the First Amendment.[9] "[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[10] There is simply no fair and just way to draw a line that protects the rights of those who are merely controversial from those who are pursuing a more sinister objective.[11] Accordingly, such recommendations must yield to the enduring power of our First Amendment.

II. The Right to Privacy

The Fourth Amendment to the U. S. Constitution establishes the core of our understanding of our right to privacy.[12] In short, government may not invade an individual's privacy without justifying the need for doing so to a court. Courts have applied this basic principle to different forms of communications, including letters, telephone conversations, and other more advanced

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[7] *tmey C o n* 274 U.S. 357, 375-376, (1927), (Brandeis, J., concurring).

[8] *ec et y o t te o Md M n on Co* , 467 U.S. 947, 964 n.12 (1984).

[9] *eno ACL* 521 U.S. 844, 870 (1997).

[10] *d.*

[11] "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *B nden o*, 395 U.S. 444, 448 (1969) (*pe c*) (quoting *Noto* , 367 U.S. 290, 297-98). The Brandenburg opinion set aside a state statute that barred advocacy of the propriety of violence or voluntary assembly for such criminal purposes. *d.*

[12] U.S. Const., amend. 4: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

terrorists or other criminal activity. Rather, its claimed success was in "wrecking the communist parties in this country" and shutting down "the radical press."[22]

- State investigations. The New York State Legislature initiated a two-year investigation from 1919 to 1920 into the spread of radical ideas. The Joint Legislative Committee to Investigate Seditious Activities (commonly referred to as the Lusk Committee) ultimately produced a report, *e o t on y d c t to y po e nd c t c* , which "smeared liberals, pacifists, and civil libertarians as agents of international Communism."[23] Though thousands were arrested, few were prosecuted or deported and little incriminating information was obtained during the Committee's investigation.[24]

- Smith Act. Congress outlawed the publication of any printed matter advocating the overthrow of the government and required the registration of all non-citizen adult residents in 1940. The law was used for a number of high profile political prosecutions against isolationists, pro-fascists, and communists in the 1940s and 1950s, including one of the early leaders of the ACLU. The law fell into disuse after several convictions were set aside by the Supreme Court in the late 1950s.[25]

- McCarthy hearings and House Un-American Activities Committee. The Cold War brought about a new red scare characterized by congressional witch hunts orchestrated by Senator Joseph McCarthy's Permanent Subcommittee on Investigations and the House Un-American Activities Committee, which ruined the careers of many loyal Americans based purely on their associations. In particular, their work helped to blacklist people from certain industries and in particular the entertainment industry in the late 1940s and 1950s based solely on political views of those who were targeted.[26]

- COINTELPRO. The FBI ran a domestic counter-intelligence program that quickly evolved from a legitimate effort to protect the national security from hostile foreign threats into an effort to suppress domestic political dissent through an array of illegal activities. The Senate Select Committee that investigated COINTELPRO (the "Church Committee") said the "unexpressed major premise of … COINTELPRO is that the Bureau has a role in maintaining the existing social order, and that its efforts should be aimed toward combating those who threaten that order."[27] Instead of focusing on violations of law, these investigations targeted people based on their beliefs, political activities and associations. FBI opened over 500,000 domestic intelligence files between 1960 and 1974, and created a list of 26,000 individuals who would be "rounded up" in

[22] Id. at 387.
[23] Samuel Walker, In Defense of American Liberties: A History of the ACLU (1990) at 16.
[24] The Lusk Committee: A Guide to the Records of the Joint Committee to Investigate Seditious Activities: A Guide to the Records Held in the New York State Archives, *e t*: http://www.archives.nysed.gov/a/research/res_topics_bus_lusk.shtml
[25] 18 USC § 2385. *ee o* Stone, Perilous Times.
[26] Goodman, Walter, The Committee (1968); Whitfield, Stephen J., The Culture of the Cold War (1996).
[27] CHURCH REPORT, at 7.

congressional authorization in the years following 2001. It did not exist in sufficient force to cure those unlawful executive actions, just as it did not exist in sufficient force to immediately

the Internet.[37] But such a conclusion would not be unique to the Internet. "Each medium of expression … may present its own problems."[38] Nevertheless, our "profound national commitment to the free exchange of ideas" requires that we meet those challenges to preserve