

1-1-2009

Madison in Post-9/11 Cyberspace: Applying Federalist No. 10 to the Online Battle for 'Hearts and Minds'

Dawinder S. Sidhu

University of New Mexico - School of Law

Follow this and additional works at: https://digitalrepository.unm.edu/law_facultyscholarship



Part of the [Law and Race Commons](#)

Recommended Citation

Dawinder S. Sidhu, *Madison in Post-9/11 Cyberspace: Applying Federalist No. 10 to the Online Battle for 'Hearts and Minds'*, 13 *Journal of Internet Law* 3 (2009).

Available at: https://digitalrepository.unm.edu/law_facultyscholarship/267

This Article is brought to you for free and open access by the UNM School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

Madison in Post-9/11 Cyberspace: Applying *Federalist* No. 10 to the Online Battle for “Hearts and Minds”

Dawinder S. Sidhu*

INTRODUCTION

The creation of the American experiment in government may be considered by Americans -- from the founding era to the present day -- to be a particularly special, if not divinely ordained, moment in the history of mankind.¹ George Washington himself observed that “the foundation of our Empire was not laid in a gloomy age of Ignorance and Suspicion, but at an Epoch when the rights of mankind were better understood and more clearly defined, than at any former period.”² The citizens of the young nation, he added, are “to be considered the Actors on a most conspicuous Theatre, which seems to be peculiarly designated by Providence for the display of human greatness and felicity.”³ The establishment of an independent republic was by no means a foregone conclusion, but was a rather improbable outcome that even Washington acknowledged was a “standing miracle.”⁴

In this seemingly inspired and undoubtedly precarious time, the leaders of the nation seized upon their destiny and overcame practical struggles to prepare a Constitution that succinctly defines the limited powers of the government and the rights of the people to whom all remaining power is reserved. For its part, the

¹* J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania. Mr. Sidhu is presently a visiting researcher at Georgetown University Law Center, served as a fellow at the Center for Internet and Society, Stanford Law School. I extend my deepest thanks to my parents for their limitless support and for bringing our family to this amazing land. The views expressed herein, and any errors, are to be attributed solely to me and are regretted.

See Steven G. Calabresi, “*A Shining City on a Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1400-1404 (2006) (describing the “public reverence” for the Constitution and the Framers).

² Joseph J. Ellis, *AMERICAN CREATION* 4 (2007).

³ *Id.* at 5.

⁴ *Id.* at 8.

Constitution is regarded as “the best political document ever made,” in the words of respected jurist Learned Hand.⁵ For their part, the Framers of the Constitution were quickly -- and continue to be -- lionized. For example, Alex de Tocqueville, in his seminal study of the American Constitution, referred to them as “the men of greatest intelligence and noblest character ever to have appeared in the New World.”⁶

The Framers are thought to embody the best in American thought and character. They are, in other words, the standard by which future generations of American public figures aspire towards, both in terms of the quality of their ideas and the temperament by which they are to conduct themselves when in service of the people. Thomas Jefferson, for example, is likened to a “sensitive reflector, through several generations,” of American identity.⁷

It should therefore come as no surprise that, in order to remain faithful to our principles and values, and given our affection and reverence for the Framers, we call upon them to help us resolve our society’s most vexing problems. Doing so helps us determine whether the course of action we are proposing comports with what is our true American selves. “If Jefferson was wrong, America is wrong. If America is right, Jefferson was right.”⁸ Indeed, the courts have invoked the Framers in a number of contentious national issues, from determining the content of the Second Amendment⁹ and the permissibility of religious displays

⁵ Learned Hand, *Morals in Public Life*, in *THE SPIRIT OF LIBERTY*, 251-52 (Irving Dillard ed., 1960).

⁶ Alex de Tocqueville, *DEMOCRACY IN AMERICA* 114 (J. Mayer ed. 1969).

⁷ Merrill Peterson, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* vii (1960).

⁸ *Id.* at 234. The subject of this Article, James Madison, was no slouch either. See, e.g., Gordon S. Wood, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 156 (2006) (“Since Madison was central to the creation of the United States Constitution . . . he and his ideas have come to bear an exceptional responsibility for the character of American politics and society. . . . According to many political theorists, to understand Madison is to understand American politics.”).

⁹ See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008) (citing to Jefferson and Madison in interpreting the meaning of a “well-regulated militia”).

on public grounds¹⁰, to the constitutionality of criminal sentencing¹¹ and whether a state may maintain an all-male public military academy¹².

To be sure, there are at least a few problems with the approach of drawing upon the Framers for guidance with respect to the issues of the day. First, the Framers did not reach consensus on all matters. The famous rivalry between the Alexander Hamilton, a staunch nationalist from New York who favored a strong federal banking system and central government, and Jefferson, a republican from Virginia who preferred an agrarian lifestyle and trusted the people to do right by American society, perhaps best illustrates the fact that the Framers themselves were not in lockstep as to the makeup of the American government.¹³ Second, the essence of the American constitutional design was not to provide definitive responses to all circumstances of American life, but rather set in motion a peaceful process by which those answers could be developed by way of democratic participation.¹⁴ The Constitution, historian Joseph Ellis noted, “did not resolve the long-standing political disagreements that existed,” but instead established a “context with which they could be argued out.”¹⁵ The Constitution, in short, did not offer substantive formalisms applicable to all situations, but rather supplied the procedural structure within which such answers could be formulated.¹⁶

¹⁰ See, e.g., *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 878 (2005) (citing to Jefferson, Madison, and Adams in addressing the principle of neutrality for Establishment Clause purposes).

¹¹ See, e.g., *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (citing to Jefferson and Adams in the context of determining the importance of the right to a jury trial in our constitutional structure).

¹² See, e.g., *U.S. v. Virginia*, 518 U.S. 515, 531 n.5 (1996) (citing to Jefferson for his view on the role of women in public affairs).

¹³ See, e.g., Wood, *Revolutionary Characters* at 136-38 (describing the Republicans’ opposition, led by Jefferson’s protégé Madison, against Hamilton’s aggressive Federalist program).

¹⁴ See Charles J. Cooper et al., *Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts: What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 188-89 (1988) (“[T]he Constitution . . . is a short, clear, general outline of the structure and principle of government” and “a most appropriate starting place for the evolution of a body of law.” It “leaves ample room for growth and adaptation as its general principles are applied to the necessities of governance in a constantly changing world.”).

¹⁵ Joseph J. Ellis, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 143 (1996).

¹⁶ The Framers’ punting of the slavery issue is perhaps most representative of the fact that they did not divine definitive resolutions to all pressing social issues. As President Barack Obama noted, slavery “divided the colonies and brought the convention to a stalemate until the founders chose to allow the slave trade to continue for at least twenty more years, and to leave any final resolution to

Third, and relatedly, though the Framers' views are invoked in the context of contemporary issues, it is impossible for the Framers to have foreseen the scientific advancements and technological conveniences which have come to define the modern Information Age.¹⁷ Perhaps the most glaring example of a feature of present Americana that would have eluded the wide imagination of the Framers is the advent of the Internet -- a global network that enables information of many formats to be transmitted from one corner of the globe to another in seconds and with the simple clicks of a mouse or strokes of a keyboard.¹⁸

These cautionary observations, however significant, do not dissipate the interest in determining how the Framers of the nation may have resolved legal disputes that arise in the modern day. Constitutional law scholar Erwin Chemerinsky notes, "Justices continue to invoke the framers' views as authoritative," not just as instructional or informative.¹⁹ Indeed, according to one school of interpretive judicial philosophy, commonly referred to as originalism, the "intentions of the framers should be binding on contemporary interpreters of the Constitution."²⁰

future generations." Barack Obama's Speech on Race, N.Y. TIMES, Mar. 18, 2008, available at: <http://www.nytimes.com/2008/03/18/us/politics/18text-obama.html> (last visited: Nov. 17, 2009).

¹⁷ See, e.g., Dale Carpenter, *Keeping Secrets*, 86 MINN. L. REV. 1097, 1107 (2002) ("The Framers . . . could not have imagined computers or the system that allows computers to communicate with each other, the Internet."); see also *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (describing the Internet as "a unique and wholly new medium of worldwide human communication.") (citation omitted).

¹⁸ See, e.g., 59 Am. Jur. Internet Presence as a Basis for Personal Jurisdiction § 8 (2007) (defining the Internet as "an ever-changing global agglomeration of linked computer networks. Once a computer is linked to the Internet, it can quickly, and at minimal expense, communicate and exchange data and programming with nearly every other computer linked to the Internet."); Winston P. Lloyd, *What's the Frequency Uncle Sam?: Will the Government Hold Up the Information Superhighway in the Name of Competition?*, 30 WAKE FOREST L. REV. 233, 233 (1995) (defining the Internet as "a vast system of interconnect networks operating under common protocols, yet operating independently and without any centralized authority.").

¹⁹ Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 5 (2001).

²⁰ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886 (1985); see also Antonin Scalia, A MATTER OF INTERPRETATION 22 (1997) ("The text is the law, and it is the text that must be observed"); Robert H. Bork, *Slouching Towards Miers*, WALL ST. J., Oct. 19, 2005, at A12 (writing that originalism "means that the judge must discern from the relevant materials . . . the principles the ratifiers understood themselves to be enacting . . . [and] apply

Invoking the Framers in an effort to illuminate or work through twenty-first century legal questions is precisely what law professor and Volokh conspirator²¹ David G. Post did in his creative book, *In Search of Jefferson's Moose: Notes on the State of Cyberspace*.²² Specifically, Post addressed how Jefferson's perspectives on the roles of the government and the people, and individual rights (e.g., speech and property rights), may inform and advance the existing conversation on how the Internet should be regulated.²³

As Post notes, governance of the Internet and of the "New World" were affected by an identical problem -- rapid expansion.²⁴ Such growth in the colonies was something the early leaders of the nation were compelled to make sense of. Post focused on Jefferson; however it is James Madison who may have penned the most insightful treatise on governance in an expansive territory. While the traditional thinking dictated that a large society made effective governance more difficult, to Madison an extended republic was an advantage -- the varying factions in the States would balance each other out in that no one large faction would be permitted to dominate the rest, whereas in a smaller republic such oppression would be more likely to result.²⁵ Similarly, the constituents would elect representatives who reflected the broader views of the people, and as such fringe candidates unwilling to compromise would be unable to garner sufficient electoral support and would be marginalized.²⁶ These concepts, captured in *Federalist* No. 10, are considered to be Madison's greatest contribution to the United States and to intellectual history.²⁷

those principles to unforeseen circumstances.”).

²¹ Post is a regular contributor to the popular legal affairs web-log, The Volokh Conspiracy. It is available at: <http://www.volokh.com>.

²² David G. Post, *IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE* (2009).

²³ See *id.* at 17-18 (“I want to put Jefferson’s ideas to work. I want to use them to help think about cyberspace. . . . The goal is to explore, to try and understand something about the way life proceeds there, so that we can begin the process of imagining, and perhaps bringing them into being, the new structures and institutions that can help to govern it wisely and well.”).

²⁴ See *id.* at 31-46 (describing the growth of both the Internet and the young nation); *Reno*, 521 U.S. at 850 (“The Internet has experienced extraordinary growth.”) (internal quotes and citation omitted).

²⁵ See footnotes 87-89 and accompanying text, *infra*.

²⁶ See footnote 86 and accompanying text, *infra*.

²⁷ See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 378 (1992) (calling *Federalist* No. 10 “perhaps the greatest document of political theory penned on this side

If these writings on the expansive and expanding nation were so useful, the question becomes whether they can be applied with meaningful force to the Internet, another widening entity with wholesome and not so attractive members? The purpose of this Article is to explore the application of Madison's political theory to the Internet as it exists in the post-9/11 context. It will be my central contention that Madison's views are not only relevant to the Internet, but can be of significant assistance to the American prosecution of its campaign against transnational terrorism.

In particular: Part I will provide an overview of the concept of factions as contemplated by Madison in *Federalist* No. 10. Part II will note that factions are present online, including a terrorist faction that not only spreads its doctrinal views, but also communicates operational directives by way of the Internet. As Madison suggests that factions can effectively check each other, this Part will argue that the United States may be able to robustly compete with and diffuse the appeal of the terrorists' views by forging an online faction that disseminates messages that attract readers to the United States and that therefore counteracts any rhetorical pull of the online messages of the terrorists. This part will also discuss ways in which social and legal norms can support this uniquely American online faction.

Applying Madisonian political philosophy to the Internet is not an academic exercise or thought experiment. The American conflicts in Iraq and Afghanistan are ongoing and success in both theatres is proving elusive.²⁸ This Article offers an idea that may improve the American image abroad and its ability to deaden the appeal of adverse ideological speech. Any proposals that may enhance, however modestly, the American prospects for fulfilling our goals overseas should be entertained. Relatedly, it is clear that military might and economic coercion are insufficient tools to prevail against the will of the terrorists.²⁹ The United States therefore must turn to an alternative to arms and

of the Atlantic."); *see also* Wood, *Revolutionary Characters* at 161 ("*Federalist* No. 10 has become the most famous document in the history of American political thought.>").

²⁸ *See* footnotes 100-03 and accompanying text, *infra*.

²⁹ *See, e.g.*, Lindsey J. Borg, *Communicating With Intent: The Department of Defense and Strategic Communication*, Program on Information Resources Policy, Harvard University vii, Feb. 2008, available at: http://pirp.harvard.edu/pubs_pdf/borg/borg-i08-1.pdf. ("Increasingly, conflict takes place in a population's cognitive space, making sheer military might a lesser priority for

sanctions, “soft power,” which consists of attaining beneficial foreign policy results by way of attraction.³⁰ Winning hearts and minds through online speech would be an aspect of this other form of power.

Moreover, the terrorist elements are using the Internet, quite successfully, to propagate their messages and coordinate attacks.³¹ The focus of existing scholarship has addressed, sensibly in response, the need to thwart the terrorist factions through disabling their access to and use of the Internet.³² Attention has not been paid, however, to how we can battle the terrorists online through speech, rather than through disruption or surveillance. To the extent that the terrorist faction cannot be brought down and thus remains in cyberspace, it would be prudent to address how the Americans can “fight” in that same space.³³

Finally, there is little doubt that the Internet is ubiquitous and the online/mobile media is becoming an integral, seamless part of our every day lives, from shopping and obtaining information to expressing opinions and sharing pictures.³⁴ Its reach is outpacing our ability to decide how issues arising in

victory in the Information Age. Use of the nation’s hard power is inadequate as the sole — or even primary — means to address an insurgency.”).

³⁰ See, e.g., *id.* (“Instead, national decision makers must create a synergistic approach that emphasizes the country’s soft power capabilities while drawing on complementary efforts of its hard power if necessary.”). For a discussion of the meaning of “soft power,” please see footnotes 126-27 and accompanying text, *infra*.

³¹ See footnotes 104-112 and accompanying text, *infra*.

³² See, e.g., Orin S. Kerr, *Internet Surveillance Law after the USA PATRIOT Act: The Big Brother that Isn’t*, 97 NW. U. L. REV. 607, 636 (2003) (arguing that because “terrorists groups such as Al-Qaeda were known to favor the latest Internet technologies to communicate with each other,” Internet surveillance laws could be updated to “assist law enforcement in terrorism-related cases.”);

³³ “[T]he Internet has now become a new battleground for terrorists like al-Qaeda.” Fletcher N. Baldwin, Jr. & Robert B. Shaw, *Down to the Wire: Assessing the Constitutionality of the National Security Agency’s Warrantless Wiretapping Program: Exit the Rule of Law*, 17 U. FLA. J.L. & PUB. POL’Y 429, 433 n.26 (2006).

³⁴ See *United States v. Voelker*, 489 F.3d 139, 145 (3rd Cir. 2007) (“The ubiquitous presence of the internet and the all-encompassing nature of the information it contains are too obvious to require extensive citation or discussion.”); *United States v. Peterson*, 248 F.3d 79, 83 (2nd Cir. 2001) (“Computers and Internet access have become virtually indispensable in the modern world of communications and information gathering.”); see also Steven A. Augustino, *The Cable Open Access Debate: The Case for a Wholesale Market*, 8 GEO. MASON L. REV. 653, 656 (2000) (“The stage is set for the Internet to become a ubiquitous information and communications system that

cyberspace should be adjudicated.³⁵ In a search for persuasive instruments to help steer policymakers and others through this new terrain, it would be eminently reasonable to consult the Framers for guidance. It is hoped that Post's book and similar efforts will help serve as triggers for other scholarship that will draw a nexus between the Framers and cyberspace issues.³⁶ In the universe of possible resources, we could do a lot worse.

For these reasons, and those that follow, it is hoped that the American legal and political communities will embrace Madison's vision of an extended republic as well as the proposal that an online American faction can frustrate or perhaps even neutralize harmful ones in cyberspace.

delivers high-quality real-time audio, video and information services to consumers throughout the United States and is the backbone for everyday commercial transactions.”).

³⁵ See Rodney A. Smolla, *The Life of the Mind and a Life of Meaning: Reflections on Fahrenheit 451*, 107 MICH. L. REV. 895, 909 (2009) (“While the internet is not a lawless space, it is a space in which law is always several steps behind invention.”); Noam Cohen, In Britain, Web Leaves Courts Playing Catch-Up, N.Y. TIMES, Mar. 29, 2009, available at: <http://www.nytimes.com/2009/03/30/technology/internet/30link.html> (“Technology is way ahead of the law, and the law is limping along trying to make sense of it.”).

³⁶ It is worth noting that others have sought to use the Framers' views as guides for examining current legal issues. See, e.g., Christine G. Heslinga, Note, *The Founders Go On-line: An Original Intent Solution to a Jurisdictional Dilemma*, 9 WM. & MARY BILL RTS. J. 247 (2000). No article, however, has discussed how Madison's *Federalist* No. 10 applies to cyberspace, let alone to cyberspace as an instrument of diplomacy in the specialized post-9/11 climate.

I. MADISON AND THE EXPANSIVE REPUBLIC

The political minds of early America were confronted with a confluence of two realities -- the nation was expanding while human nature dictated that the people and their leaders will be interested in only their regional and particular affairs. In other words, the Framers were forced to figure out how it may be possible to keep the United States together and keep it from splitting apart into a collection of city-states. This section discusses these problems and Madison's ingenious solution.

1. The Practical and Theoretical Problems

Just as users and networks continue to expand the Internet, settlers and speculators of the eighteenth century moved out into the frontier, enlarging the budding nation in terms of population and territorial size.³⁷ In 1790, the year of the first officially recorded census, America held 3,929,214 individuals, slaves included.³⁸ A decade later, it had 5,308,483 people total, an increase of 26%.³⁹ In 1810, during Madison's presidency, the population stood at 7,239,881, an increase of 26% over 1800 levels and 45% over 1790 levels.⁴⁰ Similarly, in 1790 the American borders covered an area of 891,364 square miles, whereas in 1810 it effectively doubled to 1,722,685.⁴¹ In other words, the leaders of the New World were charged with handling a people populating at an exponential rate⁴² in an area significantly larger than Great Britain (93,788 square miles)⁴³, the land from which the Americans escaped.

While the people were increasing in number and occupying new territories within the several states, the interests of the people and their political

³⁷ See, e.g., Post, at 44 ("The Internet, like [colonial] Virginia, has been growing geometrically, at a rate of just under 5 percent a month (about 80 percent per year), yielding an 'average doubling time' of about fourteen months.") (emphasis omitted).

³⁸ Population, Housing Units, Area Measurements, and Density: 1790 to 1990, United States Census, available at: <http://www.census.gov/population/www/censusdata/files/table-2.pdf>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Post at 38-41 (discussing the estimates as to the growth rate of colonial Virginia).

⁴³ United Kingdom Information and History, National Geographic, available at: http://travel.nationalgeographic.com/places/countries/country_unitedkingdom.html (last visited: Nov. 18, 2009).

representatives did not commensurately expand -- the concerns of the people and their representatives remained local. “Americans had begun the Revolution by assuming that the people were a homogeneous entity in society set against the rulers.”⁴⁴ With experience, however, it became clear that “the people” possessed, in Hamilton’s words, a “strong predilection in favor of local objects.”⁴⁵

As a result, the states protected their particular interests when dealing with other states. New York, for example, was perceived to be biased towards the merchants and bankers, whereas Virginia the farmers and tobacco trade.⁴⁶ And, within the states themselves, districts would guard their particular interests when dealing with other districts. For example, those in upstate New York were unlikely to share the same interests as those in Manhattan.⁴⁷

Madison, who served in the federal constitutional convention and in the Virginia legislature⁴⁸, was acutely aware of this phenomenon. As a delegate to the constitutional convention, he felt that the “selfish states threatened the survival of the confederation” as well as the American experiment in government itself.⁴⁹ “Internally, the states exhibited the same selfishness and pettiness they displayed on the national scale.”⁵⁰ What Madison found during his in the Virginia legislature was “not selfless patriots, but narrow-minded politicians, concerned mainly with log rolling, deal making, and satisfying their local constituencies.”⁵¹ To Madison, the legislators “seemed parochial, illiberal, small-minded, and most of them seemed to have only ‘a particular interest to serve.’”⁵² The state of politics was

⁴⁴ Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* at 606 (1998).

⁴⁵ *Federalist* No. 15 (Hamilton).

⁴⁶ See Christian C. Day, *Partner to Plutocrat: The Separation of Ownership from Management in Emerging Capital Markets – 19th Century Industrial America*, 58 U. MIAMI L. REV. 525, 535-36 (2004).

⁴⁷ See Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1008 (2007) (commenting on this possibility).

⁴⁸ See The James Madison Timeline 1774-1783, The Library of Congress, available at: http://memory.loc.gov/ammem/collections/madison_papers/mjmtime2.html; The James Madison Timeline 1784-1807, The Library of Congress, available at: http://memory.loc.gov/ammem/collections/madison_papers/mjmtime3.html (noting Madison’s service at the federal and state levels).

⁴⁹ Edward J. Larson, *Building a Nation from Thirteen States: The Constitutional Convention and Preemption*, 33 PEPP. L. REV. 7, 9 (2005).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Wood, *Revolutionary Characters* at 148 (citation omitted).

such that legislators “were reluctant to do anything that might appear unpopular” and they pandered to “prevailing sentiments” even if these sentiments did not advance the greater good.⁵³

How, then, would the United States, work as a cohesive political entity? The Framers struggled with how it may be possible to govern people with increasingly different and regional interests. Conventional political wisdom held that the greater these interests, the more difficult it will be for a centralized government to rule effectively and the more likely that the majority will oppress the minority. Montesquieu, a political luminary whom the Framers studied, best explained this theory:

In an extensive republic there are men of large fortunes, and consequently of less moderation; there are trusts too considerable to be placed in any single subject; he has interests of his own; he soon begins to think that he may be happy and glorious, by oppressing his fellow-citizens; and that he may raise himself to grandeur on the ruins of his country.

In an extensive republic the public good is sacrificed to a thousand, private voices; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent[.]⁵⁴

More to the point, “It is natural for a republic to have only a small territory; otherwise it cannot long subsist,” he wrote.⁵⁵ In short, Montesquieu “believed that in larger republics impartial dedication to the common good was less likely than in smaller ones”⁵⁶ and that “large republics to be the most likely candidates for democratic tyranny.”⁵⁷

⁵³ *Id.*

⁵⁴ Baron de Montesquieu, *The Spirit of Laws* bk. VIII, ch. 16 (1752).

⁵⁵ *Id.*

⁵⁶ Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1133 (2004).

⁵⁷ Norman R. Williams II, Note, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 *N.Y.U. L. REV.* 963, 971 (1994). See Post at 111 n.3, 112 (describing Montesquieu’s views with respect to governance of small communities).

A large, growing nation was not only problematic in terms of theory, but it in practice as well. For example, the expansion complicated, if not rendered impossible, any workable situation in which the United States could honor the natives' sovereign borders by migrating elsewhere -- there were just too many settlers and no ability to patrol those borders.⁵⁸ Disappointed that respect for the native lands could not be practically maintained, Washington is quoted as saying, "scarcely anything short of a Chinese wall will restrain the Land jobbers and the encroachment of settlers upon the Indian Country."⁵⁹

As it turns out, Madison would offer an innovative and brilliant solution to the realities of a growing republic seemingly mindful only of local concerns. In doing so, "Madison reversed the conventional logic" and "essentially turned a core assumption" that large republic's were unfit for sustainable governance "on its head."⁶⁰

2. *The Solution: Federalist No. 10*

In *Federalist No. 10*, Madison proposed how the United States may persist despite the dominant view that local squabbling and populist politics would cripple large governments. First, the concessions -- he accepted as true the "[c]omplaints . . . that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."⁶¹ These conflicts have "divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good."⁶² The conflicts may be premised on less than important grounds -- "[s]o strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts."⁶³

⁵⁸ See Ellis, *AMERICAN CREATION* at 159 ("polic[ing] the borders . . . was like stopping a flood with a bucket of sponges.").

⁵⁹ *Id.* (citation omitted).

⁶⁰ Wood, *Revolutionary Characters* at 105-06.

⁶¹ *Federalist No. 10*.

⁶² *Id.*

⁶³ *Id.*

Madison also accepted that the human condition is such that we will hold interests that are particular to our circumstances. For example, the merchant will support low taxes on imports or exports, the religious man will resist restrictions on freedoms of expression, and beneficiary of free labor will protect the institution of slavery, etc.⁶⁴ The tendency to hold such particular interests is, according to Madison, “sown in the nature of man.”⁶⁵

Shared interests that result from this tendency is what Madison meant by “faction,” the concept at the heart of his political theory.⁶⁶ Madison specifically defined “faction” as “a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁶⁷

Second, if factions are part of human nature and if there is evidence that they had proved injurious to the general good, can we eliminate their impact on society? Madison disposed of two possible remedies. One method of removing factions would be “destroying” liberty, as factions would not exist without liberty.⁶⁸ This, however, would be “unwise” and “worse than the disease” -- because liberty gives rise to faction and is “essential to political life,” doing away with liberty would eliminate not only faction but a necessary element of civilized society.⁶⁹

The other method would be to “giv[e] to every citizen the same opinions, the same passions, and the same interests.”⁷⁰ In other words, homogeneous interests would not lead to disparate factions and partisan domestic affairs. This,

⁶⁴ *See id.* (“Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.”).

⁶⁵ *Id.*

⁶⁶ James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 867 (2004) (“Madison’s . . . reference to justice-impairing factions . . . became the core of” Federalist No. 10).

⁶⁷ *Federalist* No. 10.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

however, would be impractical -- because “the reason of man continues fallible,” there exists “diversity in the faculties of men,” and men are subject to different circumstances, it will be impossible for all men to have identical opinions.⁷¹ In short, neither the causes (liberty) nor the effects (varying opinions) of factions can be eliminated.

Third, as factions are an inevitable part of the American political community, the question becomes whether their effects can be justly mediated. To address this, Madison differentiated between a “pure democracy,” which is characterized as direct government by the people⁷², and a “republic,” which is government by elected representatives of the people.⁷³ Madison expressed skepticism that, in a “pure democracy,” the legislators, as a supervisory agent, would be able to balance competing factions -- the legislators themselves may belong to the factions, the faction with the most legislative support (the majority) would invariably prevail.⁷⁴ The result would be the oppression of the minority.⁷⁵ For example, with respect to taxes, Madison writes that, “Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.”⁷⁶ While, at least in theory, “enlightened” legislators could impartially balance competing factions, in practice such legislators could not be counted upon to reliably intercede in a “pure democracy.”⁷⁷

⁷¹ *Id.*

⁷² *See id.* (defining a “pure democracy” as “a society consisting of a small number of citizens, who assemble and administer the government in person[.]”).

⁷³ *See id.* (defining a “republic” as “a government in which the scheme of representation takes place[.]”); *see generally* Edward L. Rubin, Getting Past Democracy, 149 U. PA. L. REV. 711 (2001) (contrasting a direct democracy from other forms of democratic rule, including the republican system envisioned by the Framers); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 809-14 (1999) (summarizing the Framers’ distrust of pure democracy).

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *Id.*

⁷⁷ *See id.* (“It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.”).

Fourth, while in a “pure democracy” the majority faction would rule and have opportunity to oppress all others,⁷⁸ in a “republican” form of government, however, the ability of a single faction to oppress others would diminish and the commensurate ability of “enlightened,” balanced leaders to emerge would increase.⁷⁹ In particular: with respect to a minority faction, the majority factions would “defeat its sinister views by regular vote.”⁸⁰ With respect to a majority faction, having to put their views to a vote would compel the majority to “sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”⁸¹ In other words, in order to win votes and rule⁸², candidates would be forced to abandon any interest in oppressing the minority-interest voters and advance an agenda of broader appeal in order to garner the political support of others.⁸³ The voting public at large would be the best judge of the “true interest of their country” and what should be set aside as “temporary or partial considerations.”⁸⁴ In sum, it is more likely that the views pronounced by the “representatives of the people . . . will be more consonant to the public good than if pronounced by the people themselves[.]”⁸⁵

Fifth, and the *pièce de résistance* of *Federalist* No. 10, is Madison’s treatment of the widening republic. According to Madison, “the greater number of citizens, and greater sphere of country,” the less likely it will be that oppressive factions will rule. In particular, with respect to the greater number of citizens, the more people that vote, the increased chances that improper passions and motives

⁷⁸ *Federalist* No. 10 (stating that a pure democracy “can admit of no cure for the mischiefs of faction.”).

⁷⁹ Madison emphasized who may rule because the guarantee of equal rights in law, by itself, is insufficient to guard against the possible oppression of majority rule. *See id.* (rejecting the view, held by some political theorists, that by “reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.”).

⁸⁰ It is the filter provided by elections in a republic that serves as a check on the tyranny of the majority, where as in a pure democracy “there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.” *Id.*

⁸¹ *Id.*

⁸² Madison, coming across as a hardened realist, argues that it is political success, not “moral []or religious motives,” that will lead to such moderation.

⁸³ *See id.* (“Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.”).

⁸⁴ *Id.*

⁸⁵ *Id.*

will be filtered to the fringe and the increased chances that an “enlightened” representative will arise from the election process:

[A]s each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.⁸⁶

With respect to the greater sphere, in a small society it will be more likely that the people will have the same interests and that a strong majority without meaningful opposition will result; the minority thus has a limited ability to check candidates for office. A large society, however, contains more interests and passions, and thus there are a greater number of factions to check any possible invidious passions of prospective representatives:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.⁸⁷

⁸⁶ *Id.*

⁸⁷ *Id.* (paragraph break added); see Wood, *Revolutionary Characters* at 113 (quoting Madison as writing, “In a large society, the people are broken into so many interests and parties, that a common sentiment is less likely to be felt. . . . Divide et impera, the reprobated maxim of tyranny, is under certain qualification, the only policy by which a republic can be administered on just principles. . . . [I]t must operate not within a small but an extensive sphere.”) (citation omitted).

In light of this, Madison concludes that, contrary to Montesquieu's prevailing theory, a large society operated by republican principles is preferable to a smaller one.⁸⁸ In other words, Montesquieu's "law" regarding scale was wrong.⁸⁹

⁸⁸ See *Federalist* No. 10 ("it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic, -- is enjoyed by the Union over the States composing it."). Specifically, a larger republic will be characterized by: "the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice, "greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest," "greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority[.]" *Id.*

⁸⁹ See Post at 116 (citing Jefferson's belief that the republican government can work in a large territory, despite Montesquieu).

II. MADISON AND TODAY'S INTERNET

This section applies Madison's views on factions in an expansive republic to the Internet, which also contains factions and is growing as a communications medium, in order to fashion a tool of diplomacy in the current war on transnational terrorism.

1. General Application of Federalist No. 10 to the Internet

There can be little doubt that factions -- those with interests and passions particular to their own circumstances and predilections -- exist with respect to the Internet. Perhaps one of the most obvious examples is the tension between major record labels -- which seek to safeguard copyrighted works from unauthorized downloading -- and the user music community -- which seeks to harness the power of the Internet to share music files without restriction and for minimal if not no cost.⁹⁰ Other factions are readily identifiable as well, including those who find certain sexual imagery to be contrary to good taste and law, and those who believe such images are protected by free speech considerations,⁹¹ online merchants who wish to peddle their goods to other states online and those who wish to protect home merchants from the competition of out-of-state online retailers⁹², and those who voice different political opinions in cyberspace⁹³.

As factions are on the World Wide Web, the factual predicate exists for the application of *Federalist* No. 10, the essence of which is the concept of

⁹⁰ See generally Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004); Timothy James Ryan, Note, *Infringement.com: RIAA v. Napster and the War Against Online Music Piracy*, 44 ARIZ. L. REV. 495 (2002).

⁹¹ See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (invalidating on First Amendment grounds the Child Pornography Prevention Act of 1996); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004) (invalidating on First Amendment grounds the Child Online Prevention Act).

⁹² The Supreme Court weighed in on this disagreement in *Granholm v. Heald*, 544 U.S. 460 (2005).

⁹³ See Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 693 (2007) ("some argue that the blogosphere has increasingly been appropriated as an organized political tool by partisan political operatives with particular political agendas."); see also Michael Crowley, *Conservative Blogs Are More Effective*, N.Y. TIMES, Dec. 11, 2005, at 64 ("Liberals use the Web to air ideas and vent grievances with one another, often ripping into Democratic leaders. . . . Conservatives, by contrast, skillfully use the Web to provide maximum benefit for their issues and candidates.").

factions, to the Internet. Madison's first point, that factious behavior exists, resonates with the online sphere, as demonstrated by the examples of factions enumerated above. Madison's second point also works well with the Internet -- eliminating the liberty to use the Internet would be far worse than the bickering that takes place with respect to the online medium and it would be beyond impracticable to require each Internet user to possess and/or communicate the same ideas online.

The third and fourth points concern whether the people or a delegated subset of people should be entrusted with defining and implementing applicable rules of conduct.⁹⁴ It would appear that the existence of factions and Madison's distrust of the people to properly coordinate their affairs would suggest his preference for a representative entity to devise and administer Internet rules.⁹⁵ For purposes of this Article⁹⁶, it is sufficient to accept the fact that the Internet, at

⁹⁴ Whether and to what extent a supervisory body should or will emerge is an open question among commentators. See Justin Graham, Ashley Johnson, Emilio Mena and Neil Wolitzer, *Cybersquatting: The Latest Challenge in Federal Trademark Protection*, 2001 DUKE L. & TECH. REV. 9, *24 (2001) ("Despite a growing consensus that a democratic international governing body is vital to the effective and efficient functioning of the Internet, some still insist the Internet should remain a cooperative association with no centralized control by any individual or government agency.") (internal quotes and citation omitted). Some argue supervisory control over the Internet is not even possible. See Joseph S. Burns & Richard A. Bales, *Personal Jurisdiction and the Web*, 53 ME. L. REV. 29, 32 (2001) ("As the Internet has no centralized point of control, no entity or group of entities can control or limit the ability of others to access its content."); *ACLU v. Reno*, 929 F. Supp. 824, 832 (E.D. Pa. 1996) ("[I]t would not be technically feasible for a single entity to control all of the information conveyed on the Internet.").

⁹⁵ To some extent, however, Internet rules generally have developed with broad consensus. See A. Michael Froomkin, *Habermas@Discourse.net: Toward A Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 756 (2003) ("Decisionmaking concerning fundamental issues of Internet management (including both technical matters and issues of social propriety) is primarily by consensus."); Post at 139 ("[a] nobody-in-charge, nobody-can-enforce, consensus-based, anyone-who-wants-to-participate-may-do-so process . . . produced the technical underpinnings for what became the global Internet[.]"). This reflects and would seem to obviate the need for a moderating, republican structure. See John Lawrence Hill, *A Third Theory of Liberty: The Evolution of our Conception of Freedom in American Constitutional Thought*, 29 HASTINGS CONST. L.Q. 115, 142 (2002) (stating that the goal of combating factions is to ensure that policies will enjoy "popular support" and approach "a functional consensus."). The fact that disputes regarding the Internet remain, however, would seemingly cut the other way and support Madison's republican prescription. All told, it is unclear how Madison would come out on this issue -- if there would be sufficient factious behavior in his mind to warrant a ruling body.

present, is unregulated by a centralized authority, allowing users to enter and exit the network at will.⁹⁷

The fifth point -- that the extended sphere makes it less probable that a certain faction will be able to dominate -- applies to the Internet as well. There is little doubt that the Internet is an extended, and growing, entity.⁹⁸ The discriminatory properties of territorial governance, in which the broad base of people select only the best and relegate to the fringe the disfavored, is present on the Internet as well. For example, the prevailing Internet protocols generally are those that attain positive feedback from the users themselves, which lead these protocols to grow and to command adherence, whereas those which the users reject are discarded or ignored.⁹⁹

Federalist No. 10 can be applied to the Internet. Another, far more important issue is how it can be applied in a useful, helpful fashion in the battle against terrorists.

2. *The Post-9/11 Context*

Afghanistan and Iraq are the focal points of the American campaign against transnational terrorism. The American foreign policy goals in both of these regions are becoming increasingly elusive. The condition in Afghanistan, for example, is “deteriorating,” according to Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff.¹⁰⁰ He added, “Afghanistan is very vulnerable, in terms of Taliban and extremists taking over again, and I don’t think that threat’s going to go away.”¹⁰¹ Moreover, American and Iraqi officials are both in agreement that al Qaeda is “regaining strength” in Iraq.¹⁰² Despite the continuing American

⁹⁶ Providing a definitive response as to how Madison would substantively react is beyond the purview of this Article and will require resolution in another forum.

⁹⁷ See *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 951 (C.D. Cal. 1997) (noting that the Internet is “a highly diffuse and complex system over which no entity has authority of control”).

⁹⁸ See Post at 31-33, Table 2.1 and Figure 2.1 (charting this growth over time).

⁹⁹ See *id.* at 134 (praising this user-driven process as it pertains to the emergence of the TCP/IP network).

¹⁰⁰ Tom LoBianco, Mullen Says State of Afghanistan Getting Worse, WASH. TIMES., Aug. 24, 2009.

¹⁰¹ *Id.*

¹⁰² Ernesto Londoño, Al-Qaeda in Iraq regaining strength: Government is the Target, WASH. POST, Nov. 22, 2009, at A16.

presence in Iraq and troop surges, al Qaeda remains “capable of conducting singular high-profile attacks,” according to General Ray Odierno, the top U.S. commander in Iraq.¹⁰³

Of most relevance here is that the terrorists are online. It is undisputed that one of the players in cyberspace is terrorist elements¹⁰⁴ and that the Internet was specifically used by al Qaeda in the course of executing the attacks of 9/11.¹⁰⁵ According to some government experts, “terrorists are at the threshold of using the Internet as a *direct instrument* of bloodshed.”¹⁰⁶

In particular, al Qaeda has used the Internet for multiple purposes, including “to train and recruit adherents, reestablish damaged cells, obtain financing, and communicate operational information.”¹⁰⁷ With respect to training, al Qaeda uses the Internet in order to furnish instructions on the “cleaning and care of weapons, physical training for its foot soldiers, and the way to set up a safe house, as well as how to stage a kidnapping,” among other activities.¹⁰⁸ As to recruitment, the Internet “helps Islamist terrorists unify and motivate their zealous adherents.”¹⁰⁹ It also has used the Internet for restorative reasons, to “replace their dismantled training camps, reconnect their weakened organization, and reconstitute their leadership.”¹¹⁰ The Internet is a virtual cash cow for al Qaeda, as it solicits money online and engages in identity and credit card theft online, for

¹⁰³ *Id.*

¹⁰⁴ See Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 375, xxx (2007) (surveying the numerous ways in which terrorists have used the Internet in furtherance of their objects); *id.* at xxx. n.23.

¹⁰⁵ See Aaron Nance, Note, Taking the Fear out of Electronic Surveillance in the New Age of Terror, 70 UMKC L. REV. 751, 755 (2002) (“[T]he al-Qaeda cells behind the Twin Towers and Pentagon attacks used the Internet, email and cell phones to communicate about their plans.”).

¹⁰⁶ Michelle E. Boardman, *Known Unknowns: The Illusions of Terrorism Insurance*, 93 GEO. L.J. 783, 796 (2005) (quoting Barton Gellman, Cyber-Attacks by Al Qaeda Feared, WASH. POST, June 27, 2002, at A1) (emphasis added).

¹⁰⁷ Sidhu at xxx.

¹⁰⁸ CNN Live Saturday (CNN television broadcast July 17, 2004), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/040717/cst.03.html>.

¹⁰⁹ Anti-Defamation League, *Jihad Online: Islamic Terrorists and the Internet* (2002), at 3, available at http://www.adl.org/Learn/internet/jihad_online.pdf.

¹¹⁰ Jarret M. Brachman, *High-Tech Terror: Al-Qaeda's Use of New Technology*, 30 FLETCHER F. WORLD AFF. 149, 153 (2006).

example, to raise funds.¹¹¹ Most relevant, al Qaeda is on the Internet in order to disseminate its “virulent ideology” and messages of jihad.¹¹²

What can we do about this?

3. *The Proposal*

Taking a cue from Madison, to neutralize the terrorists that operate on the Internet, the United States should itself enter the Internet as a robust faction. If it is the case that al Qaeda uses the Internet as a means of propagating its views, it would only make sense to be an active participant in the online marketplace of ideas and to spread information on the United States that reflects the best of the American constitutional structure, egalitarian principles and individual rights, and its demonstrated efforts to prosecute the current war in a manner consistent with that structure and those ideals. The United States should, in other words, make an appeal to conscience in cyberspace.

The United States government has recognized that terrorists are on the Internet. This understanding took time, to be sure. In May of 2002, FBI Director Robert S. Mueller testified that, “As best we can determine, the actual hijackers had no computers, no laptops, no storage media of any kind.”¹¹³ In truth, al Qaeda had been using the Internet for “theological and paramilitary training” by in 1990’s¹¹⁴ and, as noted above, used in the course of the 9/11 attacks.¹¹⁵

Today, the government has entered cyberspace in order to work against al Qaeda’s utilization of the Internet as a terrorist tool. For example, it conducts electronic surveillance to detect messages of attacks, investigate the whereabouts

¹¹¹ Todd M. Hinnen, *The Cyber-front in the War on Terrorism: Curbing Terrorist Use of the Internet*, 5 COLUM. SCI. & TECH. L. REV. 1, 9 (2004).

¹¹² Michael Scheuer, *Assessing London and Sharm al-Sheikh: The Role of Internet Intelligence and Urban Warfare Training* (Jamestown Found. Terrorism Focus), Aug. 5, 2005, at 8, available at http://jamestown.org/terrorism/news/uploads/tf_002_015.pdf.

¹¹³ *Reforming the FBI in the 21st Century: Hearing Before S. Comm. on the Judiciary*, 107th Cong. 248, 254 (2002) (statement of Robert S. Mueller, Director, Federal Bureau of Investigation).

¹¹⁴ Scheuer at 7.

¹¹⁵ See footnote 105, *supra*.

of al Qaeda operatives and cells, and safeguard attacks on the Internet itself.¹¹⁶ But it does not have a meaningful, coherent substantive voice on the Internet that is designed to combat the terrorist dogma being disseminated throughout cyberspace. In other words, it is listening on the conversations of the terrorists, but not participating in the conversations themselves.

Imagine, for example, that a group of trained Americans enters a message board or chat room known to be used by terrorists to recruit disaffected Iraqi or Afghani youth. Rather than simply jot down what is being said, these officials affirmatively join the conversation, discussing in Arabic and English, for example, 1) the separation of powers scheme in the American constitutional design that checks executive overreaching, 2) the freedoms accorded to individuals, and the due process rights afforded to each person, and 3) the judicial process which has led to decisions, such as *Hamdan v. Rumsfeld*¹¹⁷ and *Boumediene v. Bush*¹¹⁸, which ruled in favor of Muslim detainees and rejected government arguments with respect to the legality of their own conduct, in order to show that these principles are not just hollow promises of a just society. The First Amendment's protection of religious expression, which enjoys a special place in the constellation of constitutional rights,¹¹⁹ may be particularly salient with the Muslim community.

To the extent that there are individuals -- potential recruits -- unsure about whether to side with the terrorists and take arms against the United States, information on the American system of governance, its consideration of individual rights, and its exercise of that system and consideration may convince those individuals to resist the temptation to join opposition forces. The United States is fighting an uphill battle in persuading individuals to reject the advances of fellow, local Muslims. Accordingly, it is incumbent upon the Americans to

¹¹⁶ See Sidhu at xxx (“the U.S. intelligence community has implemented programs to monitor the Internet for evidence of terrorist planning and to protect against an attack on the infrastructure of the Internet itself.”).

¹¹⁷ 548 U.S. 557 (2006).

¹¹⁸ 128 S. Ct. 2229 (2008).

¹¹⁹ See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963) (“The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the . . . inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel[.]”); *Schneider v. Smith*, 390 U.S. 17, 25 (1968) (observing that the First Amendment “creates a preserve where the views of the individual are made inviolate.”).

counter this attraction, to the degree it exists, with the American story because it is through such attraction that the terrorists themselves recruit others.¹²⁰ In the push and pulls between clashing entities, who prevails in this information age “may ultimately be about whose story wins,” notes two RAND experts.¹²¹

This approach provides the Americans with an additional tool in its post-9/11 arsenal when the campaigns abroad have not yielded the desired results. Moreover, it is consistent with the American view that “more speech” is preferable to less speech. Some American legal minds, however, have doubted whether American interests possess effective speech that may respond to or offset the ideology of the terrorists. Judge Richard A. Posner, for example, states, “it is unclear what counterarguments are available to opponents” of the rhetoric of radical Muslim clerics.¹²² As I noted elsewhere, “Posner underestimates the attractiveness of the fundamental principles of liberty and religious freedom that form the intellectual foundation of the American republic. . . . American values and ideals can resonate with the hearts and minds of all men and can commensurately diminish the misguided intention to cripple the greatest experiment in liberty and religious freedom ever known.”¹²³

Relatedly, a substantive American faction on the Internet would unleash an aspect of “soft power,” which has heretofore been a limited component of American foreign policy, particularly with respect to dealing with terrorists.¹²⁴ The *Economist*, for example, observed in the aftermath of the 9/11 attacks that, in compromising American ideals, the Bush administration was “blunting one of America’s most powerful weapons against terrorism.”¹²⁵

¹²⁰ See Joseph S. Nye, Jr., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 25 (2004) (stating it is a “mistake” to ignore soft power because “it is through soft power that terrorists gain general support as well as new recruits.”).

¹²¹ *Id.* at 106 (citation omitted).

¹²² Richard A. Posner, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 122 (2006).

¹²³ Dawinder S. Sidhu, *Wartime America and The Wire: A Response to Posner’s Post-9/11 Constitutional Framework*, 20 *GEO. MASON U. CIV. RTS. L.J.* 37, 67-68 (2009).

¹²⁴ See Nye at 25 (“the means the Bush administration chose . . . did not take enough account of soft power.”).

¹²⁵ *Id.* at 60 (citation omitted). For instance, Voice of America, a component of American diplomacy, cut its English-language broadcasts by 25%. *Id.* at 105.

“Soft power” consists of “the ability to get what you want” in terms of foreign policy “through attraction rather than coercion or payments.”¹²⁶ Harvard’s Joseph S. Nye, who coined the phrase, explains that, “Seduction is always more effective than [military or economic] coercion, and many values like democracy, human rights, and individual opportunities are deeply seductive.”¹²⁷

It is not only more effective, but “essential to winning the peace,” not just “winning a war.”¹²⁸ To prevail in the long-term, “you need to get others to buy in to your values.”¹²⁹ Soft power has had demonstrable success in the past -- it was integral piece of the American victory in the Cold War. As one historian noted, “However important the military power and political promise of the United States were . . . , it was the American economic and cultural attraction that really won over the hearts and minds of the majorities of young people for Western democracy.”¹³⁰

To be sure, soft power, as Nye admits, depends on having “willing receivers,” or a captive audience.¹³¹ While hardcore fundamentalists may be out of the reach of reason or reasonable debate, it is the moderates who the faction would aim to persuade. “[T]he ability to attract the moderates is critical to victory,” Nye adds.¹³² In order to effectively communicate with the moderates, the contents of the information about the United States should be descriptive in nature rather than comparative. If the information is perceived as an exercise in arrogance or articulated in a tone of condescension, these efforts will repulse moderates and be counterproductive.¹³³

An American faction may yield additional, strategic benefits. Sharing more information on the United States may not only help draw moderate Muslims towards American purposes, but may also help generate a broader base of international support for American policy initiatives, including the campaigns in

¹²⁶ *Id.* at x.

¹²⁷ *Id.*

¹²⁸ *Id.* at xii.

¹²⁹ *Id.* at 5.

¹³⁰ *Id.* at 50 (citation omitted).

¹³¹ *Id.* at 120.

¹³² *Id.* at 131.

¹³³ *See id.* at x (“attraction can turn into repulsion if we act in an arrogant manner and destroy the real message of our deeper values.”).

Iraq and Afghanistan. In this respect, the American faction may naturally grow a consensus as to its activities there.¹³⁴

The feasibility of the American online faction is enhanced given the current administration, which is more amenable to diplomacy and “soft power” generally.¹³⁵ In practice, the government could set up an independent office charged with the responsibility to 1) detect online areas in which moderate Iraqis and Afghans frequent and which terrorists enter in order to remonstrate and recruit moderates, 2) develop accurate information on the United States’ structure, individual rights and liberties, and its faithful adherence to this structure and individual guarantees, 3) translate this purely descriptive information into Arabic, using a tone that is respectful, and extracted of any political spin or the hint of superiority, and 4) directly enter these online areas identified in order to disseminate this information.

Part of this office’s mission could be to convince the general public to follow similar paths of spreading descriptive information on the majesty of the procedural and substantive aspects of the American constitutional republic. In this respect, the office can help shape social norms that see such role-playing as a matter of patriotic or civic duty. For example, individuals who participate in social networking sites or programs, such as Second Life, can disseminate information in the United States as online ambassadors of the nation.

Congress can also play a role. For example, it can create tax-based incentives for non-profit organizations to increase civic education in the United States such that the citizens can be informed and effective actors on the Internet stage, and to specifically form the sort of private online faction that join with the government to responsibly combat and neutralize the electronic words of the terrorists. In this fashion, the legal norms can be modified in order to reflect this important policy initiative and element of foreign policy with respect to transnational terrorism.

¹³⁴ If the United States cannot persuade its allies, however, it may be compelled to reexamine its goals and approaches abroad. *See id.* at 65 (noting the same with respect to the Vietnam War).

¹³⁵ *See* David E. Sanger, Obama’s advisers to back soft power, N.Y. TIMES, NOV. 1, 2008, available at: <http://www.nytimes.com/2008/12/01/world/americas/01iht-obama.4.18305735.html>.

CONCLUSION

The concept of faction is essential to understanding American political theory and how the republic was able to survive in a politically diverse, expansive territory. If Madison were to witness the current wartime climate, the success with which the terrorists have occupied the web, and the commensurate absence of a coordinated American faction, he may not be surprised that we may be losing the battle for hearts and minds -- a necessary battle in the larger war on terrorists. The sensible remedy would be to funnel the interests and passions of the American people into a robust faction of ideas that can compete with the terrorists in the digital frontier.

The truth of the matter is that the terrorists are using the Internet to disseminate its ideology and to convince others to come under its banner, among other things. The United States is tracking the online activities of the terrorists but has failed to provide a counterbalance to the terrorist narrative that is taking place in cyberspace. In a war that is becoming difficult to win, the United States should utilize all the tools at its disposal, including entering the Internet as an active participant in the conversation with the terrorists. The American script will reflect the structure, rights and ideals that the United States believes not only in principle but has demonstrated fidelity to in practice. If moderates susceptible to the advances of al Qaeda are presented with an alternative -- one that describes in honesty and with humility the fundamentals of American government -- the moderates will be less likely to side with our enemies and take arms against America and our interests. The expansive Internet, without any supervisory control, enables this substantive American faction to enter and hopefully balance the opposing viewpoint.

Given the disappointing state of the campaign against transnational terrorism, discussing our values is a modest step in a war that threatens those values themselves and the nation to which they belong.