MATERIAL SUPPORT FOR TERROR AND *HOLDER V. HUMANITARIAN LAW PROJECT*: AN EMPIRICAL EXAMINATION.

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I. INTRODUCTION

Zeinab Taleb-Jedi, a naturalized U.S. citizen from Iran, travelled to Iraq to assist and advocate for the People's Mojahedin Organization of Iran (PMOI), a leftist group seeking the overthrow of the Iranian government. However, the group also had been designated a terrorist organization by the U.S. State Department.[1] When Taleb-Jedi returned to the United States in 2006, she was charged with violating section 2339B of the U.S. Code by providing "material support" for the terrorist group.[2] Similarly, after Tarek Mehanna provided Arabic to English translations of al-Qaeda recruiting documents in 2005, he also was charged with providing material support for terrorism.[3] More recently, when the widow of the Orlando nightclub shooter was arrested in early 2017 she too was charged with providing material support to her husband and to ISIS, or the Islamic State.[4] These examples show the expanding—and expansive—use of American law criminalizing material support for terrorism. Yet, given the strong protection both American society and U.S. courts have given to First Amendment free speech rights, what should occur when, as in the cases of Mehanna and Taleb-Jedi, ostensible material support for terror groups comes in the form of words and speech assisting terrorist groups?

This article examines material support prosecutions before and after *Holder v. Humanitarian Law Project* (*Holder*).[5] The *Holder* decision stands as the Supreme Court's principal interpretation of individual First

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1. United States v. Taleb-Jedi, 566 F. Supp. 2d 157, 161 (E.D.N.Y. 2008).
2. *Id.* at 162.
3. United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013).
4. Steven Porter, *Widow of Orlando Nightclub Shooter Charged*, CHRISTIAN SCI. MONITOR (Jan. 17, 2017), http://www.csmonitor.com/USA/Justice/2017/0117/Widow-of-Orlando-nightclub-shooter-charged-What-does-it- mean-to-aid-and-abet-a-terrorist.
5. Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

Amendment and Fifth Amendment rights in terrorism prosecutions.[6] As described below, the Court's decision in *Holder* created an important limit on individual free speech rights: any speech done in coordination with designated terrorist groups lacks First Amendment protection. The decision in *Holder* cuts to the core of otherwise-protected political speech. Similarly, the Court endorsed the broad language of the material support law, rejecting arguments that the law was unconstitutionally vague or overbroad in its terms. The Court's expansive definition of material support, and the deferential use of strict scrutiny in the opinion, has led many to question whether the Court struck the right balance between individual rights and the government's legitimate need to limit the reach of terror groups. Wadie Said, for example, expressed concern that the Court had entered into "what appears to be an unresolvable tension with the First Amendment," creating "an impermissible prior restraint on speech in violation of the First Amendment" in the process.[7] Similarly, David Cole described *Holder* as "dramatic retreat" from the principles of *Brandenburg v. Ohio*,[8] the "linchpin of the First Amendment's protection of political expression."[9] Owen Fiss concluded the Court's failure to protect core speech rights ultimately "poses a threat to our democracy."[10]

I examine twenty-seven cases after the *Holder* decision and eighteen cases before *Holder* to determine whether and how the Court's ruling has shaped material support prosecutions and the First Amendment's protection of free speech. *Holder* stands as a particularly important case to examine free speech developments, as the case revolves around what can be termed "unpopular speech"—here, speech advocating or in coordination with terrorist groups.[11] Though the case has been subject to numerous analyses, several unanswered questions remain.[12] Notably, did the Court's ruling lead to a demonstrable shift in material terror jurisprudence? If so, how did *Holder* change either First Amendment jurisprudence or terror prosecution standards? This article examines *Holder* empirically, looking to aggregate trends in lower court decision making both before and after the decision to

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6. David Cole, *The First Amendment's Border: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 148 (2012).
7. Wadie Said, *Humanitarian Law Project and the Supreme Court's Construction of Terrorism,* 2011 BYU L. REV. 1455, 1457, 1459 (2011).
8. Brandenburg v. Ohio, 395 U.S. 444 (1968).
9. Cole, *supra* note 6, at 148. Cole served as the appellate attorney for the Humanitarian Law Project in the Supreme Court. Holder v. Humanitarian Law Project, 561 U.S. 1, 6 (2010).
10. Owen Fiss, *The World We Live In*, 83 TEMPLE L. REV. 283, 296 (2011).
11. Of course, not all such "unpopular speech" involves speech advocating or in coordination with terrorist groups. *See* Snyder v. Phelps, 562 U.S. 443 (2011) (allowing displays celebrating the deaths of U.S. soldiers outside of military funerals); United States v. Alvarez, 567 U.S. 709 (2012) (allowing individuals to make knowingly false statements about their military service without fear of prosecution).
12. For those analyses, *see*, *e.g.*, Cole, *supra* note 6; Said, *supra* note 7; Fiss, *supra* note 10.

determine whether *Holder* represents a fundamental break with past free speech rulings in terrorism case, or whether the decision follows jurisprudence already created by lower courts before it. At the same time, this article also provides an in-depth examination of pre- and post-*Holder* material support outcomes, allowing for both a qualitative and quantitative analysis of First and Fifth Amendment constitutional issues in terror prosecutions, both before and after the decision.

This article is organized as follows. Part II provides a background and overview of the material support statute that is the legal focus of the *Holder* case, with Part III providing an analysis of the *Holder* decision itself. Parts IV and V examine two specific issues arising out of the *Holder* decision left for later courts to consider: First, how can we differentiate "coordinated" advocacy from "independent" advocacy of terrorism and terror groups? Second, how "foreign" do terror groups have to be to fall under the statute, and how specific does coordinated advocacy have to be? Part VI examines empirically the material support decisions made both before and after the *Holder* decision to see whether and how the Court's outcome has shaped terror prosecutions and speech rights. Finally, Part VII concludes.

II. WHAT IS MATERIAL SUPPORT?

Given the ubiquity of material support prosecutions today, it is important to remember that Congress did not address this aspect of national security law until the 1990s. Congress first enacted a statute outlawing material support for terrorism in 1994, though amendments in 1996, 2001, and 2004 have altered both the boundaries of coverage under the law and the penalties.[13] As it stands today, the material support statute really encompasses two types of activities.[14] Section 2339A, original to the statute, criminalizes providing material support for the commission of terrorist offenses.[15] This section requires such support be provided "knowing or intending that [it is] to be used in preparation for, or in carrying out," a terrorist act.[16] A second section, 2339B, was added to the law with the passage of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).[17] The AEDPA was passed following the 1995 Oklahoma City bombing, the deadliest instance of homegrown terrorism to date. However, evidence suggests Congress also was motivated to pass section 2339B from

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13. 18 U.S.C. §§ 2339A-2339B (2012); CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B (2010).
14. *See* 18 U.S.C. §§ 2339A-2339B.
15. 18 U.S.C. § 2339A(a).
16. *Id.*
17. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (codified as amended at 18 U.S.C. § 2339B (2011)).

the belief that foreign terrorist groups had begun to raise large amounts of money in the United States.[18] Section 2339B criminalizes the provision of material support to designated foreign terrorist organizations, and does not require a specific mens rea other than knowing the support is being provided to a terrorist organization.[19] The difference between the two sections is slight, but significant: section 2339A involves criminalizing support for specific terrorist *acts*, while 2339B involves a broader range of conduct—including conduct that may not lead directly to an actual terrorist act, but that does in some way support terrorist organizations. Section 2339A also requires showing that the defendant acted with knowledge that their support would be used for a terrorist act, while section 2339B only requires knowledge that the defendant supported a terrorist group.[20] Material support for terror is defined quite broadly in the statute, and can include providing any of the following "property" or "service[s]" to a foreign terror organization:

- financial services;
- lodging;
- training;
- expert advice or assistance;
- false documentation;
- communications equipment;
- facilities;
- weapons;
- personnel; and
- transportation.[21]

Thus, the law opens up a wide range of actions—from logistics to finance—that can potentially be prosecuted. Because of this broad focus and wide range of proscribed activities, the material support law has become "the premier statutory tool used to tackle the phenomenon of terrorism in American courtrooms."[22] Criminal penalties attach, and range from up to 20 years for some offenses to life in prison if the material support provided results in a person's death. In addition, plaintiffs can file civil actions under section 2339B(b) to recover monetary damages from financial institutions that violate the law.[23] Finally, the statute only criminalizes material support

18. *Id.*; Wadie Said, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 51 (2015).
19. 18 U.S.C. § 2339B(a)(1).
20. *See* 18 U.S.C. §§ 2339A-2339B.
21. 18 U.S.C. § 2339A(b)(1).
22. SAID, *supra* note 18, at 51.
23. 18 U.S.C. § 2339B(b).

to designated "foreign terrorist organizations,"[24] as determined by the U.S. Department of State.[25] Thus, the statute only covers foreign, not domestic terror groups.

From the beginning, the material support law was subject to litigation challenging whether the broad range of activities criminalized under the law runs afoul of the U.S. Constitution. Though it has become the primary courtroom tool to fight terrorism, David Cole has voiced concern that section 2339B, in particular, can allow the government to prosecute "what the government fears might happen," rather than "the wrongfulness of . . . past conduct"—the traditional requisite of criminal law prosecution.[26] Related to Cole's critique is the larger concern that the material support law is unconstitutionally vague and overbroad. For example, what specific type of conduct would fall under the law's prohibited "training" or "advice"? One of the first legal cases examining both the vagueness and the overbreadth of the law was filed by a group of non-profit organizations and individuals led by the Humanitarian Law Project.[27] As described in detail below, they sought to provide certain services and coordinate certain activities (including speech) with the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (Tamil Tigers), two groups designated by the State Department as terror organizations.[28]

III. *HOLDER V. HUMANITARIAN LAW PROJECT*

Given the importance of terror prosecutions in both the legal and political worlds, it may be surprising that *Holder v. Humanitarian Law Project* stands as the Supreme Court's only interpretation of the material support statute.[29] In fact, the Court did not venture into the constitutionality of this important area of national security law until 2010—nine years after September 11, 2001 and sixteen years after the passage of the initial statute.[30]

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24. 18 U.S.C. § 2339B(a)(1).
25. 8 U.S.C. § 1189(a)(1) (authorizing the Secretary of State to designate an organization as a FTO if (1) the organization is foreign; (2) the organization engages in terrorist activity; (3) that terrorist activity threatens the security of the U.S. or U.S. nationals).
26. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 723 (2009). For a related argument, *see also* Emily Goldberg Knox, Note, *The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists*, 66 HASTINGS L.J. 295 (2014).
27. Holder v. Humanitarian Law Project, 561 U.S. 1 (2010); Humanitarian Law Project v. Reno, No. CV 98-1971 ABC, 2001 WL 36105333 (C.D. Cal. Oct. 2, 2001);
28. *Foreign Terrorist Organizations*, U.S. DEPARTMENT OF STATE, https://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Aug. 28, 2017).
29. Cole, *supra* note 6, at 148 (stating that *Holder v. Humanitarian Law Project* was the Supreme Court's "first decision to address the tension between First Amendment rights and national security since the terrorist attacks of September 11, 2001.").
30. *See Holder*, 561 U.S. 1.

Yet, *Holder* was the product of over a decade of continuous litigation in the lower federal courts. In fact, the circumstances leading to the Court's decision begin well before Eric Holder took office as Attorney General. As described above, Congress amended the material support for terrorism law in 1996 and passed legislation that enabled the Department of State to designate groups as foreign terrorist organizations.[31] The State Department used that authority in 1997 to name thirty groups as terrorist organizations, including the Tamil Tigers and the PKK.[32] Both the Tamil Tigers and the PKK were involved in national liberation movements—the Tamil Tigers were established in 1976 with the aim of creating an independent Tamil state in Sri Lanka, while the PKK was created in 1974 to establish an independent Kurdish state in Turkey.[33] The PKK and the Tamil Tigers engaged in many terrorist acts to advance their national liberation goals. The Tamil Tigers, for example, were responsible for the assassination of the Prime Minister of India in 1989 and the President of Sri Lanka in 1993.[34] Yet, as broad liberation movements, both groups also were involved in providing social services to local communities, with both also operating political wings that ostensibly sought to end the conflicts of which they were a part.[35] In fact, the lead plaintiff, the Humanitarian Law Project (HLP), had been working with the PKK on peace building efforts for several years before their designation as a terrorist organization in 1997.[36] After the State Department labeled both groups terrorist organizations, the HLP and several other organizations initiated a pre-enforcement challenge to the material support law.[37] They claimed the law as applied would prevent them from providing peaceful and legitimate non-terrorist services to the Tamil Tigers and the PKK, including political advocacy, training in the use of international law and non-violent conflict resolution, and training in how to request relief funds from the United Nations and other international bodies.[38]

The case, which was initiated in 1998 and was the subject of several appeals court rulings before reaching the Supreme Court, ultimately focused

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31. 18 U.S.C. § 2339B (2012).
32. U.S. Department of State Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997).
33. Brief for Petitioners at 6, *Holder*, 561 U.S. at 9 (Nos. 08-1498, 09-89).
34. Edward Gargan, *Suicide Bomber Kills President of Sri Lanka*, N.Y. TIMES, May 2, 1993, at A15.
35. *See, e.g.*, Megan A. Stewart & Yu-Ming Liou, *Do Good Borders Make Good Rebels? Territorial Control and Civilian Casualties*, 79 J. POL. 284, 286 (2016) (comparing PKK behavior in the Kurdish region of Turkey (its home region), in which it sought to "provide social services and limit civilian victimization" to obtain local support, with behavior outside Turkey, in which it did not seek to provide for the local communities).
36 Cole, *supra* note 6, at 151.
37. Humanitarian Law Project v. Reno, No. CV 98-1971 ABC, 2001 WL 36105333 at *8 (C.D. Cal. Oct. 2, 2001)
38. *Id.*

on two constitutional claims.[39] First, HLP alleged the material support statute was unconstitutionally vague. Specifically, they stated the text of the law made it unclear whether certain common and otherwise legal actions undertaken by international non-governmental organizations (NGOs) would constitute material support for terror. For example, the plaintiffs argued it was unclear from the text of the statute whether teaching humanitarian and international law to members of the PKK could be prohibited material support in the form of training.[40] Similarly, they argued it was unclear whether the political advocacy they performed on behalf of the PKK and the Tamil Tigers would be prohibited under the material support law as a form of personnel or services.[41]

Second, the plaintiffs alleged the material support statute violated their First Amendment rights by criminalizing legitimate political speech.[42] They argued that political advocacy efforts they might seek to undertake, including distributing Kurdish independence literature and lobbying members of the U.S. Congress, would be prosecutable acts under the statute.[43] The government, for its part, argued throughout the litigation that the law was speech-neutral and regulated only *conduct*, not speech.[44] The Ninth Circuit Court of Appeals ultimately upheld part of the HLP's pre-enforcement challenge, ruling the law was unconstitutionally vague (and potentially overbroad), though upholding the law against the First Amendment political speech argument.[45] The government's appeal to the Supreme Court sought resolution to both constitutional questions.[46]

Answering the preliminary question on whether the law is unconstitutionally vague, Chief Justice Roberts, writing for a six-member majority on the Supreme Court, determined that training members of the PKK in international law, humanitarian law, and peace building, could be prosecutable offenses under the material support law. The Court concluded these actions would fall under both the training and "expert advice or assistance" components of the law, and would be prohibited, prosecutable actions.[47] In none of these areas did the Court find the law unconstitutionally

39. *Id.* at *1.
40. Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).
41. *Id.*
42. *Id.*
43. Brief for the Petitioners at 37, *Holder*, 561 U.S. at 39–40 (Nos. 08-1498, 09-89).
44. Thus, the government's position was that *O'Brien* intermediate scrutiny should be applied as the standard of review. *See Holder*, 561 U.S. at 26–27.
45. Humanitarian Law Project v. Mukasey, 509 F.3d 1122 (2007). Further complicating an already complicated case, the Tamil Tigers were militarily defeated by the Sri Lankan government during the 12 years in which this case was litigated. Thus, some of the questions raised—and the Court's answers to those questions—only pertained to the PKK by the time the decision was announced.
46. *Holder*, 561 U.S. at 14. The Humanitarian Law Project also filed a conditional cross-petition to the Supreme Court.
47. *Id.* at 20.

vague. In fact, Roberts noted that the definitions within the statute and later clarifications added by Congress over time made the answer to these questions quite "clear in their application to the plaintiffs' proposed conduct."[48]

Regarding whether the law infringed on legitimate political speech protected by the First Amendment, the Court determined the law did indeed criminalize certain types of speech, and that criminalization was based on the content of the speaker's intended message.[49] Yet this fact, by itself, would not require the Court to rule the law unconstitutional. Content-based speech regulations receive "strict scrutiny" review from the Supreme Court.[50] That is, for the law to survive constitutional review it must meet a compelling governmental interest and be narrowly tailored so that the law is the least restrictive means of accomplishing the government's interest. Notably, the law must neither be under-inclusive, failing to proscribe speech that falls under the government's compelling interest, nor over-inclusive, curtailing speech that does fall outside of the government's interest.[51]

Using this standard of review, the Court determined the law was, in fact, "drawn to cover only a narrow category of speech to, under the direction of, or in coordination with" foreign terrorist organizations, satisfying the narrow tailoring prong.[52] Further, the law was designed to meet clearly compelling governmental interests: protecting national security and preventing terrorist acts. Thus, the material support statue met both aspects of the strict scrutiny standard of review and did not run afoul of the First Amendment. In so concluding, the Court rejected the HLP's claim that the government's interest in preventing terrorism would be inapplicable to their activities because the HLP only sought to advance the non-violent and peaceful conduct of those terrorist groups. Answering HLP's claim, Roberts noted that even aid for peaceful and lawful activities can fall within the bounds of the material support statute because such activities can "free[] up other resources within the organization that may be put to violent ends."[53] Training terrorist groups in methods of international law, for example, can be used cynically by those groups "as a means of buying time," allowing them to prepare for new attacks on civilians.[54] Allowing such support within the United States for terror

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48. *Id.* at 21.
49. *Id.* at 27.
50. However, it should be noted that Roberts never explicitly states he is applying strict scrutiny. Instead, he uses the terms "First Amendment scrutiny," "demanding" scrutiny, and "more rigorous scrutiny" to describe the review. *See id.* at 27–28.
51. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PENN. L. REV. 2417, 2422–23 (1997).
52. *Holder*, 561 U.S. at 25.
53. *Id.* at 30.
54. *Id.* at 37.

groups could also disrupt American foreign policy efforts.[55] Acknowledging the increasing significance of "lawfare"—the use of law a weapon of war—the Court also determined that teaching international law to a terrorist group could in fact be employed for nefarious ends, specifically "to threaten, manipulate, and disrupt" their opponents in courts of law.[56]

Still, given the strong protections historically given to political speech, could HLP's political advocacy on behalf of the PKK and the Tamil Tigers truly be criminalized? The Court answered "yes" to this question, but with a caveat. Political speech could be considered a prohibited service under the material support law, but only if that advocacy was "in coordination with, or at the direction of, a foreign terrorist organization."[57] In limiting the reach of the First Amendment's free speech protections, Roberts endorsed the view that any coordinated support or advocacy for such groups could provide legitimacy for that organization's terrorist goals, even if that support did not involve advancing terrorism itself (providing legitimacy to terror groups is presumably the action that would rise to a material support charge, though Roberts's reading does provide an exceptionally broad interpretation of the statute).[58] However, the group would not run afoul of the law if they sought to engage in purely independent advocacy—that is, speech advocating ideas that advance or support those terrorist groups, but that is not done in coordination with the group.[59] In determining the law to be narrowly tailored, the Court focused on the distinction between coordinated and independent activities. The HLP, or any other individual or entity, still can express its thoughts and beliefs as long as it does not fall under the "narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."[60] Further, the law does not criminalize simple membership in any organization, but rather the provision of material support. Thus, the Court concluded that arguments to overturn the law based on violations of freedom of association and speech ultimately are unsupported.

The *Holder* opinion produced a notable dissent. Justice Breyer, writing for Justices Sotomayor and Ginsburg, focused on the Court's analysis of First Amendment speech rights and its application of the strict scrutiny test.[61] Breyer noted that the Court had long permitted individuals to associate with groups that sought the overthrow of the U.S. constitutional order.[62] Going back to the height of the Cold War, the Court protected the ability of citizens

55. *Id.* at 37.
56. *Id.* at 37; *See also* ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR (2016).
57. *Holder*, 561 U.S. at 24.
58. *Id.* at 29.
59. *Id.* at 24.
60. *Id.* at 26.
61. Holder v. Humanitarian Law Project, 561 U.S. 1, 52–53 (2010) (Breyer, J., dissenting).
62. *Id.*

to join and associate with the Communist Party.[63] Similarly, the Court had previously ruled that speech advocating criminal conduct—even speech that advocates violence against the government—must be allowed unless it is said with an intent to create an "imminent lawless action."[64] In light of these precedents, *Holder* represented at best an anomaly and at worst an erosion of core political speech rights. Breyer also noted that the Court majority's application of narrow tailoring was both conclusory and uncritical.[65]

Holder provides the Court's first real attempt to define terrorism and to fit federal terror crimes within a broader constitutional framework. Yet, the Court's interpretation of individual speech rights has come under intense scrutiny from several quarters.[66] To Wadie Said, the opinion is evidence of the Court's uncritical affirmation of constitutionally problematic terror policies.[67] Others focus on the Court's unusual line-drawing, which criminalizes otherwise-valid political speech for its connections to terror groups. This line-drawing also appears to alter the meaning of key First Amendment precedents. David Cole noted that speech advocating "lawful, peaceful activity" had been a core part of the First Amendment until *Holder*.[68] In fact, though *Holder* outlaws some content-based speech attempting to foster peace and humanitarian dialogue, the Court still protects the direct advocacy of criminal activities in other contexts. Owen Fiss has also criticized the *Holder* ruling, noting the irony that the Court chose to limit the reach of the First Amendment in a case involving advocacy with an essentially peaceful and humanitarian focus.[69] Marjorie Heins expressed concern that the *Holder* decision might take free speech back to the 1950s Red Scare era.[70] Still others have found the substance of the Court's free speech guidance to be wholly inadequate, with little guidance to differentiate punishable "coordinated" speech from "independent" speech advocating terrorist goals or motives, which is not punishable under the law.[71] Again, David Cole noted simply advocating for a group to be removed from the

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63. Scales v. United States, 367 U.S. 203 (1961).
64. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
65. *Holder*, 561 U.S. at 52–53 (2010) (Breyer, J., dissenting).
66. Cole, *supra* note 6; Said, *supra* note 7; Fiss, *supra* note 10; Said, *supra* note 18; Marjorie Heins, *The Supreme Court and Political Speech in the 21st Century: The Implications of* Holder v. Humanitarian Law Project, 76 ALB. L. REV. 561 (2012–2013); Aaron Tuley, Note, Holder v. Humanitarian Law Project: *Redefining Free Speech Protection in the War on Terror*, 49 IND. L.J. 579 (2016); Emma Sutherland, Note, *The Material Support Statute: Strangling Speech Domestically?*, 23 GEORGE MASON CIV. R.L.J. 229 (2012–2013); Nikolas Abel, Note, United States v. Mehanna, *The First Amendment, and Material Support in the War on Terror*, 54 B.C. L. REV. 711 (2013).
67. Said, *supra* note 7; SAID, *supra* note 18.
68. Cole, *supra* note 6, at 176.
69. Fiss, *supra* note 10.
70. Heins, *supra* note 66, at 611–12.
71. *See* Abel, *supra* note 66; Tuley, *supra* note 66.

designated terrorist list could run afoul of the material support law as interpreted in *Holder*.[72]

It is true, substantive questions remained after the *Holder* decision was announced. In fact, the Court confined its holding to the specific facts presented by the plaintiffs. Roberts pointedly noted that future cases in which the material support statute limits speech or advocacy might lead to a different outcome.[73] By cabining the *Holder* decision, the Court has left room for future courts to interpret the material support law and constitutional rights in different ways. The next section examines how lower federal courts have interpreted the *Holder* decision. Have these courts read the decision broadly, or has the case been confined to its own facts? This investigation is important because several critical questions remained unresolved by the *Holder* Court. First, what is independent advocacy, and what is advocacy that is "coordinated with" other actors? For example, can private messages on a computer be evidence of coordination? Can internet-based speech be coordinated or connected with other terrorist actors, and if so how? Second, the material support law does not apply to *domestic* actors—a point the Court specifically noted in the conclusion to *Holder*. What if an international terrorist organization also has a domestic branch—can citizens or citizen groups coordinate speech with that local branch? Examining lower court interpretations of *Holder* in detail can help to provide a better understanding of its lasting importance.

IV. WHAT IS INDEPENDENT ADVOCACY? WHAT IS COORDINATION WITH A TERRORIST ORGANIZATION?

One question left unanswered after *Holder* is the amount or extent of coordination needed for political advocacy to constitute a "service" to terrorist groups. This question, along with the issue of independent advocacy, was at the forefront of *United States v. Mehanna*,[74] a First Circuit Court of Appeals decision reviewing a material support conviction based on both the defendant's attempt to find a terrorist training camp and, more controversially, his later writings and translation services. According to his indictment, Tarek Mehanna, an American citizen from Massachusetts, travelled to Yemen in search of a terrorist training center, though he was unable to find one and ultimately returned to the United States. After his return, Mehanna began posting English-language translations of al-Qaeda books and videos on a website operated by at-Tibyan, a web group sympathetic to al-Qaeda.[75] In fact, some of the items posted for translation

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72. Cole, *supra* note 6, at 149.
73. Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010).
74. United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013).
75. *Id.* at 57–58.

came directly from al-Qaeda. He also commented in online chats that "there was an obligation for Muslims to stand up and fight against the invasion of Iraq" and "America was at war with Islam," with American "soldiers being valid targets" in that war.[76] Mehanna was ultimately arrested and charged with several crimes, including material support for terrorism based on the comments he made and the translation services he provided to al-Qaeda through at-Tibyan. He argued his translations did not violate the material support law because they lacked the required "coordination" with a terrorist group. Notably, he never had any direct contact or coordination with al-Qaeda, only with the at-Tibyan website. In fact, he claimed he did not know al-Qaeda had made the translation requests.[77] Thus, because he never directly coordinated with al-Qaeda, his acts constituted purely independent political and religious speech on the Internet. The effect might be to help al-Qaeda, but the intent was to independently express his political views. As such his words were essentially independent advocacy and could not be prosecuted under the material support statute.

The First Circuit disagreed, upholding the jury's conviction, though without fully resolving the First Amendment arguments raised by Mehanna. Regarding the conviction for providing material support, the court noted the trip to Yemen combined with his statements regarding the obligation of Muslims to engage in jihad and fight American soldiers showed the necessary intent to materially support terrorist groups. Mehanna argued his words should be construed as protected political speech, though the court rejected this argument, finding that a jury could have interpreted these words as expressing material support for terror. Thus, the combination of travel to Yemen and the statements on jihad were sufficient by themselves to secure a conviction. By resolving the question in this manner, the First Circuit avoided definitively answering whether Mehanna's translation services were truly coordinated with al-Qaeda, or whether they were independent activities that fall outside of the material support statute.[78] However, the tenor of the court's opinion suggests the translations by themselves could support a conviction as well.

The *Mehanna* decision appears to express a further narrowing of speech rights in terror prosecutions. In *Holder*, Chief Justice Roberts stated, to violate section 2339B, an individual must provide speech "to" or "in coordination with" a foreign terrorist organization.[79] Arguably, Mehanna did not direct any of his speech directly to a terrorist group, nor did he actually coordinate with a terrorist group when posting his translations. His actions

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76. *Id.* at 44.
77. Petition for Writ of Certiorari at 2–3, Mehanna v. U.S., 135 S. Ct. 49 (2014) (No. 13-1125).
78. The court relied on Griffin v. United States, 502 U.S. 46 (1991), which requires conviction when at least one of two grounds for conviction is valid.
79. Holder v. Humanitarian Law Project, 561 U.S. 1, 26 (2010).

appear more akin to an independent contractor, or even a volunteer, to translate messages he supported—though possibly a contractor who takes willfully negligent disregard for who his clients are. The outcome of *Mehanna* suggests the bar for coordination is low—a defendant may not even need to have direct contact with a terrorist group, or be successful in his or her attempts to coordinate, to run afoul of the material support law.[80]

The level of coordination required for one's speech to be evidence of material support also was at the center of *United States v. Pugh*,[81] the first material support trial in the United States involving support for ISIS, or the Islamic State. Tairod Pugh, an Air Force veteran and former commercial airline mechanic, travelled from Egypt to Turkey on January 10, 2015, but was detained at Istanbul International Airport by Turkish border guards and returned to the United States. He was then arrested and charged with providing material support for terrorism. In the trial, the federal prosecutors introduced several pieces of evidence, including his solar power chargers and USB drives that had been destroyed, presumably by Pugh, to make them unreadable for investigators. They also introduced Pugh's web browsing history, including searches for "borders controlled by Islamic State" and cached files indicating he watched ISIS propaganda videos.[82] The government also introduced a letter to his wife that was stored on his laptop hard drive, in which he proclaimed, "I am a Mujahid. … I will use the talents and skills given to me by Allah to establish and defend the Islamic State."[83] Pugh claimed the letter should not be admitted, as he never actually sent the letter to his wife. And without sending the note, there was no indication he had intent to act on his expression. Instead, the letter represented a private, unperformed thought. Further, his wife was Egyptian and did not understand English; therefore, absent a translation into Arabic from English, she would not have been able to understand the contents of the letter.

Ultimately, Pugh's letter was introduced and he was convicted of providing material support in the form of personnel to ISIS. However, the use of Pugh's private letter provides a noteworthy introduction to a new type of issue: when do personal thoughts and beliefs for terrorist goals cross the line into impermissible material support? Though Pugh's letter to his wife could serve as strong evidence of his state of mind to join, and thus provide "personnel" to the Islamic State, its use in his trial is problematic in that he never actually sent the letter. Without the act of sending or transmitting the

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80. *See* KATHLEEN RUANE, CONG. RESEARCH SERV., R44626, THE ADVOCACY OF TERRORISM ON THE INTERNET: FREEDOM OF SPEECH ISSUES AND THE MATERIAL SUPPORT STATUTES 17 (2016).

81. United States v. Pugh, 162 F. Supp. 3d 97 (E.D.N.Y. 2016).

82. *Id.* at 113.

83. Press Release, U.S. Dep't of Justice, Air Force Veteran Sentenced to 35 Year in Prison for Attempting to Join ISIS and Obstruction of Justice, (May 31, 2017), *available at* https://www.justice.gov/usao-edny/pr/air-force-veteran-sentenced-35-years-prison-attempting-join-isis-and-obstruction.

letter, there is a real risk that the evidence used in Pugh's terror conviction was based on his private—but unperformed—beliefs of support for the Islamic State. This distinction between acted-on and unperformed thoughts is important for two reasons. First, unlike many European states, it is not simple membership in a terrorist group that is criminalized but rather the provision of *material support* for a terrorist group that is made illegal—a point made clear in *Holder*.[84] Second, it is not inchoate or unformed support, but rather *material* support that is criminalized. In this area, the Court went to great pains in *Holder* to differentiate independent expressions of support for terrorist goals and motives, which receive constitutional protection, and those coordinated actions with terrorist groups that do not. In Pugh's trial, the difference between a defendant's speech being coordinated or uncoordinated with a terror group appear to be ignored altogether.[85]

Taken together, *Pugh* and *Mehanna* represent an expansive view of the material support for terror statute and a limited view of individual speech rights to express controversial and dangerous views. These decisions seem to give some credence to critiques by David Cole, Owen Fiss, and others. Yet, not all court decisions after *Holder* have endorsed this expansive view of material support. The next section delves into the tangled history of the Al Haramain Islamic Foundation of Oregon and efforts by another Oregon non-profit, the Multicultural Association of Southern Oregon, to advocate with and for Al Haramain.

V. HOW "FOREIGN" DOES A TERRORIST ORGANIZATION HAVE TO BE?

Roughly one year before the First Circuit announced its *Mehanna* decision, the Ninth Circuit Court of Appeals heard a complex case brought by Al Haramain Islamic Foundation of Oregon (AHIF-Oregon) and the Multicultural Association of Southern Oregon (MCASO). The resulting case, *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*,[86] takes a dramatically different view of protected First Amendment speech and its relationship to material support for terrorism. In September 2004, the Department of Treasury imposed sanctions on the Al Haramain Islamic Foundation of Oregon based on its connection to the Saudi-based Al Haramain Foundation, a group earlier designated as a "global terrorist

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84. *See* United States v. Trabelsi, 845 F.3d 1181, 1192 (D.C. Cir. 2017) (defendant could be convicted in Belgium "simply for being 'part of' an illegal private militia" while U.S. law requires "having actually supplied resources to a foreign terrorist organization.")

85. However, the *Holder* Court discussed speech in terms of providing a "service" or "advice or assistance." In this case, the letter served to advance the idea that Pugh was providing "personnel" to ISIS.

86. Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965 (9th Cir. 2012).

organization." Though the connection is somewhat unclear, the AHIF-Oregon was essentially a branch of the Saudi organization.[87] The specific dispute arose after AHIF-Oregon donated $150,000 to the Saudi AHIF. The Treasury Department determined that money was used for terrorist activities in Chechnya, and labeled the Oregon branch a "Specially Designated Global Terrorist" organization subject to asset freezing and other penalties.[88] The Oregon branch admitted to making the donation, but contended the money was used for humanitarian efforts in Chechnya, not terrorism. Thus, AHIF-Oregon's initial argument was very similar to the claim unsuccessfully made by the Humanitarian Law Project, their support and assistance to designated terrorist organizations would only advance those organization's lawful and peaceful activities.

AHIF-Oregon and MCASO initiated a lawsuit against the Treasury Department challenging the terrorist designation. MCASO claimed that the government's decision prevented it from coordinating its own advocacy efforts with AHIF-Oregon, which violated MCASO's First Amendment speech and association rights. Following the *Holder* decision, the Ninth Circuit applied strict scrutiny to the government's limitations on speech. Yet, the Ninth Circuit ultimately arrived at a much different conclusion than the Supreme Court regarding speech as a form of material support. The Ninth Circuit panel began by looking at the content of MCASO's proposed speech. Unlike the Humanitarian Law Project, which was not able to state, to the Court's liking, the specific advocacy it would undertake with the Tamil Tigers or the PKK, the Ninth Circuit found MCASO was able to point to specific joint advocacy efforts they would like to engage in with AHIF-Oregon—a coordinated press release and a press conference in which the two groups would challenge AHIF-Oregon's designation as a terrorist organization. To the judges on the panel, this specificity stood as a critical difference between the two cases, with MCASO's challenge moving out of the range of hypothetical harm and into a real limitation on speech rights.[89]

Next, the panel in *Al Haramain* distinguished the clearly foreign PKK and Tamil Tigers organizations from AHIF-Oregon, which was "in at least some respects, a domestic organization."[90] Specifically, the organization was incorporated under Oregon law, had a physical presence in Oregon, and did most activities in the United States. This domestic tie proved to be a second critical difference from *Holder*. The circuit court panel then applied these two differences to several key factors behind the *Holder* decision. First, the *Holder* Court found coordinated speech or advocacy by outside groups could violate the material support law because such activities could allow a terrorist

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87. *Id.* at 971.
88. *Id.* at 970.
89. *Id.* at 996.
90. *Id.* at 999.

organization to free up its resources for illegal terrorist actions. However, the Ninth Circuit found this rationale inapplicable because the Treasury Department froze all of AHIF-Oregon's assets. Thus, MCASO's advocacy could not lead to freeing up resources for terror. In fact, MCASO sought to advocate with AHIF-Oregon precisely so that they would no longer face asset freezing—a fact that could have been used to support limiting MCASO's speech rights by a court seeking an expansive reading of *Holder*. Second, the Ninth Circuit rejected *Holder's* concern that coordinated advocacy would give legitimacy to terror organizations. Unlike the Supreme Court, the Ninth Circuit found this rationale "not particularly strong."[91] Finally, the circuit court rejected the *Holder* Court's concern that coordinated advocacy by U.S. groups and individuals with foreign terror groups could harm American foreign policy or American interests. Like the first rationale, the Ninth Circuit found this foreign policy concern misplaced given that MCASO sought to coordinate only with Al Haramain's domestic branch, though the court also noted "foreign nations may not appreciate this distinction fully."[92]

Ultimately, with *Al Haramain* and *Mehanna,* we see examples of two different interpretations of speech rights post-*Holder*. *Al Haramain* represents an expansive interpretation speech rights in material support for terror prosecutions and *Mehanna* represents an expansive view of the material support law, with a more limited recourse to First Amendment rights that can be used as a defense. Still, the question remains: how important and impactful has *Holder* itself been to terror prosecutions and speech rights? Do we see large aggregate changes by lower courts in the manner of interpreting the material support law? Does the expansive view exemplified by the Second Circuit in *Mehanna* reign after *Holder*, or have other lower courts followed the Ninth Circuit? The next section examines these questions in detail, first examining trends in lower court decision making after *Holder* before finishing the analysis by examining how lower courts handled the constitutional issues in material support prosecutions before the *Holder* decision.

VI. THE IMPORTANCE OF *HOLDER*: WHAT THE DATA SAYS.

To examine whether *Holder* has led to a marked change in the way terrorism cases are litigated, I analyze twenty-seven terrorism and material support cases decided after the *Holder* decision, as well as eighteen material support cases decided before *Holder*. This universe of cases represents all such cases with announced opinions that are available on LexisNexis. It is important to note that this dataset does not include those cases in which a

91. *Id.* at 1000.
92. *Id.* at 1000.

defendant pleads guilty without a trial, and it does not include those cases without a written opinion at either the federal district court or the appeals court level. Though reliance on published opinions is standard in empirical legal studies, this reliance does leave out unpublished decisions from the analysis.[93] There are some differences to keep in mind between published and unpublished decisions. At the lower and intermediate court level, published decisions generally are more important decisions, in which new legal interpretations are introduced or the law is applied to new factual circumstances. Unpublished decisions, on the other hand, are often said to represent the routine, "easy" cases.[94] Some scholars have found ideology or politics can play a role in the decision to publish or not, though Cass Sunstein's exhaustive study of ideological effects in the lower federal courts finds no discernible ideological pattern exists in criminal appeals cases—the subset of cases in which terrorism and material support falls.[95]

To determine whether *Holder* led to a change in jurisprudence, it is important to examine material support cases both before and after the opinion was announced. If the Court's opinion led to a discernible shift in the way that material support cases are decided, we should see evidence of this in the decision making and opinion writing of the lower courts after the judgment is announced. Yet, to ensure any subsequent pattern is truly a product of the Court's opinion, we also must examine the trend in judgments and reasoning in the lower courts before the opinion was announced. I begin with post-*Holder* outcomes before moving to pre-*Holder* opinions.

A. Post-*Holder*

Examining the twenty-seven terrorism opinions written after *Holder*, seven cases involved a defendant invoking First Amendment free speech or freedom of association rights. However, of those seven cases that featured a First Amendment defense to the government's prosecution, only one—*Al Haramain*—saw the defendant successfully prevail in their challenge (see Figure 1). The plaintiffs in *Holder* also invoked a Fifth Amendment defense based on the vagueness of the terms used in the material support statute—an argument the Court rejected along with the First Amendment defense. After

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93. *See* CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Cass Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004); Matthew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMPIRICAL L. STUD. 574 (2010).

94. Denise Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL L. STUD. 213 (2009); Hall, *supra* note 93.

95. Thus, ideology or politics should not be a major issue in the decision to publish the cases reviewed here. *See* Keele et al., *supra* note 94; Sunstein et al., *supra* note 93, at 325.

Holder, Fifth Amendment vagueness arguments are similarly unavailing: in only one of nine such cases did the defendant prevail (again, *Al Haramain*).

Figure 1. Terrorism prosecutions after Holder: success rate of constitutional defenses.

Thus, it appears lower courts have followed a broad interpretation of the material support law and not the path taken by the Ninth Circuit in Al Haramain to limit the reach of the material support statute when faced with a First Amendment defense. But, how have lower courts reacted to the Mehanna and Al Haramain decisions? Both cases represent starkly different interpretations and applications of the Holder decision. The decision to cite these cases, either positively or negatively, can provide important insight into the relative influence of either case.

Overall, U.S. district and appellate courts have expressed a broad preference for the outcome and reasoning in *Mehanna*, and not for *Al Haramain* (see Figure 2). Of the nine terrorism cases citing *Al Haramain*, only two courts (both U.S. district courts within the Ninth Circuit) have followed the reasoning in the case. Further, those two cases did not directly implicate the material support statute, but rather focused on plaintiffs who sought a process to challenge their appearance on the U.S. government's No-Fly List.[96] In five of the nine cases citing *Al Haramain*, judges have attempted to distinguish their own verdict from the Ninth Circuit's outcome. A different story can be seen with *Mehanna*. Four of the five terrorism cases citing *Mehanna* have followed that court's reasoning, with the fifth citing case considered a neutral citation (*Mehanna* appears in a string citation of

96. Latif v. Holder, 28 F. Supp. 3d 1134 (D. Or. 2014); Latif v. Lynch, 2016 U.S. Dist. LEXIS 40177 (D. Or. March 28, 2016).

recent terrorism cases).[97] No court citing *Mehanna* has tried to differentiate its ruling from the First Circuit's decision (see Figure 2).

These results also suggest that lower courts have taken a broad reading of material support after *Holder*. The only case limiting the reach of *Holder*—*Al Haramain*—has itself been limited in subsequent court decisions. Close analysis confirms subsequent terrorist decisions generally have not followed the Ninth Circuit's lead. In *Kadi v. Geithner*,[98] for example, the District Court for the District of Columbia was presented with another case involving donations to the Al Haramain Foundation, this time donations to the Bosnian branch of the Saudi terrorist funding organization. Yet, despite these factual similarities, the district court pointedly declined to apply *Al Haramain*, finding the Ninth Circuit's holding "ultimately inapposite and inapplicable" to this case.[99]

Ultimately, the district court declined even to apply strict scrutiny, instead determining the different factual circumstances surrounding Kadi's case meant that the lesser standard of intermediate scrutiny should apply to cases in which individuals challenge their inclusion on the Department of Treasury's terrorism list.[100] Notably, the district court found *Al Haramain* involved a domestic entity that sought to engage in pure speech "with little evidence that the pure-speech . . . will aid the larger organization's sinister purposes."[101] Kadi, on the other hand, was a foreign national who sought to make money transfers to other organizations also on the specially designated global terrorist (SDGT) list with "no claim that he seeks to donate to these entities . . . for political reasons."[102] Contra to the spirit of *Al Haramain*, the D.C. district court noted even if Kadi could point to some political purpose, *Holder* already foreclosed arguments that tried to separate out donations made or services rendered to the "good" side of terrorist organizations.

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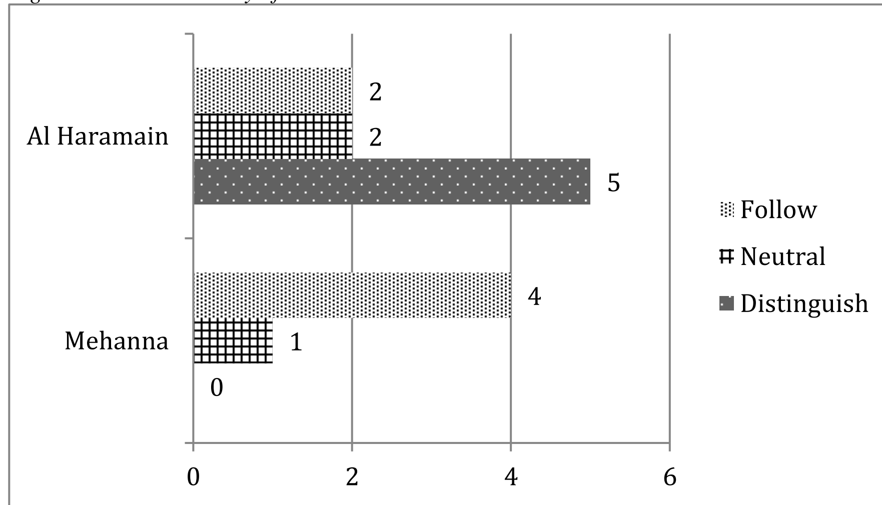
97. *See* United States v. Ahmed, 94 F. Supp. 3d 394 (E.D.N.Y. 2015); United States v. Pugh, 162 F. Supp. 3d 97 (E.D.N.Y. 2016); United States v. Phillipos, 849 F.3d 464 (1st Cir. 2017); United States v. Trabelsi, 845 F.3d 1181, 1192 (D.C. Cir. 2017); United States v. Nagi, 2017 U.S. Dist. LEXIS 78273 (W.D.N.Y. May 23, 2017).
98. Kadi v. Geithner, 42 F. Supp. 3d 1 (D.D.C. 2012).
99. *Id.* at 86.
100. Kadi's legal case challenged his placement on the Department of Treasury's specially designated global terrorist (SDGT) list by the department's Office of Foreign Assets Control (OFAC).
101. Kadi, 42 F. Supp. 3d at 34.
102. *Id.* at 88.

Figure 2. Citation history of Al Haramain and Mehanna.



B. Pre-*Holder*

Still, the question remains: How important has the *Holder* decision been to federal courts' interpretation of the material support statute? Many commentators have focused on the opinion as a decisive change in the way free speech is protected.[103] It is true the case provided the Supreme Court with its first real opportunity to explain the limits of the free speech clause within the context of the "global war on terror." It is also true, as the apex court in the U.S. legal system, the Supreme Court's decisions on federal law and the constitution carry decisive weight and are binding precedent on all lower courts.

Yet, federal courts had interpreted the material support statute for years before the Supreme Court spoke in *Holder*. Somewhat oddly, Roberts's majority opinion does not discuss or even mention any of these previously decided material support cases, which could leave the impression the case is a matter of first impression.[104] It was not: at least eighteen federal district and appeals court rulings interpreted and applied the material support statue before *Holder*. Given the body of case law that had developed before *Holder*, did the case represent a break with the legal jurisprudence that had developed on constitutional rights in terrorism cases? To analyze this question, I examine those eighteen cases to see whether *Holder* resolved any splits or

103. Cole, *supra* note 6; Said, *supra* note 7; Fiss, *supra* note 10; Said, *supra* note 18; Tuley, *supra* note 66.

104. The Court opinion does include a citation to one previous case, People's Mojahedin Org. of Iran v. U.S. Dep't of State (*PMOI I*), 182 F.3d 17 (D.C. Cir. 1999), but that case is cited to illustrate that the Tamil Tigers had previously challenged their status as a terrorist organization.

uncertainties among federal judges in the constitutional and legal interpretation of the statute.

Figure 3 displays the data for the pre-*Holder* material support decisions. As shown in Figure 3, twelve of the eighteen pre-*Holder* material support cases involved First Amendment defenses.[105] Of those twelve cases, only one opinion was favorable to the idea that the material support law as written potentially violated First Amendment rights to speech and association. That one decision was *United States v. Al-Arian*,[106] a 2004 case in which the District Court for the Middle District of Florida heard a criminal action against members of the Palestinian Islamic Jihad-Shiqaqi Faction (PIJ) who were charged with material support based on fundraising done in the United States for the PIJ. Noting that contributing money to an organization does implicate freedom of association rights, the court determined the government's view of the material support statute "would cause grave concerns about section 2339B's constitutionality under the First Amendment."[107] Yet, the court ultimately avoided ruling the material support statute unconstitutional, instead interpreting the law to require a showing that the defendant exhibited a specific intent to advance terrorist goals. In the court's view, this higher mens rea would avoid the need to rule the law unconstitutional. Ultimately, Congress overrode that interpretation of 2339B—requiring a specific intent to further the illegal activities of a foreign terrorist organization—by 2004 amendments made to the material support statute.[108]

Many pre-2010 court opinions engaged in reasoning similarly employed in the *Holder* outcome.[109] *United States v. Taleb-Jedi*[110] and *United States v. Warsame*,[111] two cases decided in the two years before *Holder*, are instructive. Zeinab Taleb-Jedi was charged in 2006 with material support (by providing "personnel") after travelling to Iraq in 1999 to train and work with the People's Mojahedin Organization of Iran (PMOI), which

105. Figure 3 provides data for the pre-*Holder* material support decisions. I have included United States v. Al-Arian as a "successful" First Amendment challenge despite the court declining to apply the defense's First Amendment argument (see *infra* notes 75–76 and accompanying text for further information on that decision). The First Amendment bar graph in Figure 3 is listed with an asterisk for that reason.

106. United States v. Al-Arian, 329 F. Supp. 2d 1294 (M.D. Fla. 2004).

107. *Id.* at 1303.

108. Holder v. Humanitarian Law Project, 561 U.S. 1, 12 (2010).

109. *See, e.g.*, United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004); United States v. Taleb-Jedi, 566 F. Supp. 2d 157 (E.D.N.Y. 2008); United States v. Warsame, 537 F. Supp. 2d 1005 (D. Minn. 2008); United States v. Shah, 474 F. Supp. 2d 492 (S.D.N.Y. 2007); United States v. Awan, 459 F. Supp. 2d 167 (E.D.N.Y. 2006); United States v. Assi, 414 F. Supp. 2d 707 (E.D. Mich. 2006); United States v. Marzook, 383 F. Supp. 2d 1056 (N.D. Ill. 2005); United States v. Sattar, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

110. *Taleb-Jedi*, 566 F. Supp. 2d. 157.

111. *Warsame*, 537 F. Supp. 2d. 1005.

was at the time labeled a terrorist group by the State Department. While in Iraq, Taleb-Jedi attended meetings, translated documents, taught English, joined the organization's Political Department, and expressed slogans in support of PMOI—all activities she described as conduct and advocacy protected by the First Amendment, not "personnel" provision. Further, like the arguments made by HLP, Taleb-Jedi argued that she did not violate the law on providing "personnel" because she limited her support for PMOI to their non-terrorist activities.[112]

However, two years before *Holder* was announced, the district court for the Eastern District of New York rejected Taleb-Jedi's arguments, and in doing so remarked that Taleb-Jedi's First Amendment arguments already had been "regularly rejected in a number of appellate decisions."[113] Like *Holder*, one year later, the district court rejected Taleb-Jedi's arguments by noting the material support statute does not criminalize mere association or membership in a terrorist organization, but rather the provision of material support to a terrorist organization. Similarly, the court reasoned Taleb-Jedi's actions could still violate the law even if she only provided support for the group's non-terrorist activities, as her participation in the group's benign activities could allow another person "to take part in something far more nefarious."[114]

Two years before *Holder*, the U.S. District Court in Minnesota arrived at a similar conclusion in *United States v. Warsame*.[115] Mohamed Warsame was prosecuted in 2005 under the material support law after being accused of attending al-Qaeda training camps in Afghanistan and Pakistan, as well as allegedly wiring money to a member of al-Qaeda and giving English language lessons to al-Qaeda members. Warsame was charged with providing material support in the form of "currency," "personnel," and "training." He claimed the material support statute violated his First Amendment right of association by failing to distinguish that his support was only for the legal, not the illegal, activities of al-Qaeda. Similar to the outcome in *Taleb-Jedi* (and later in *Holder*), the Minnesota district court dismissed these arguments by noting the law does not simply criminalize *association*, but rather *conduct*: providing material resources to terrorists. The court also rejected Warsame's argument that the material support law's lack of a specific mens rea violated the First Amendment right to associate, again relying on the difference between membership and active material support.[116]

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112. *Taleb-Jedi*, 566 F. Supp. 2d at 176.
113. *Id.*
114. *Id.* at 176.
115. *Warsame*, 537 F. Supp. 2d 1005.
116. *Id.* at 1023.

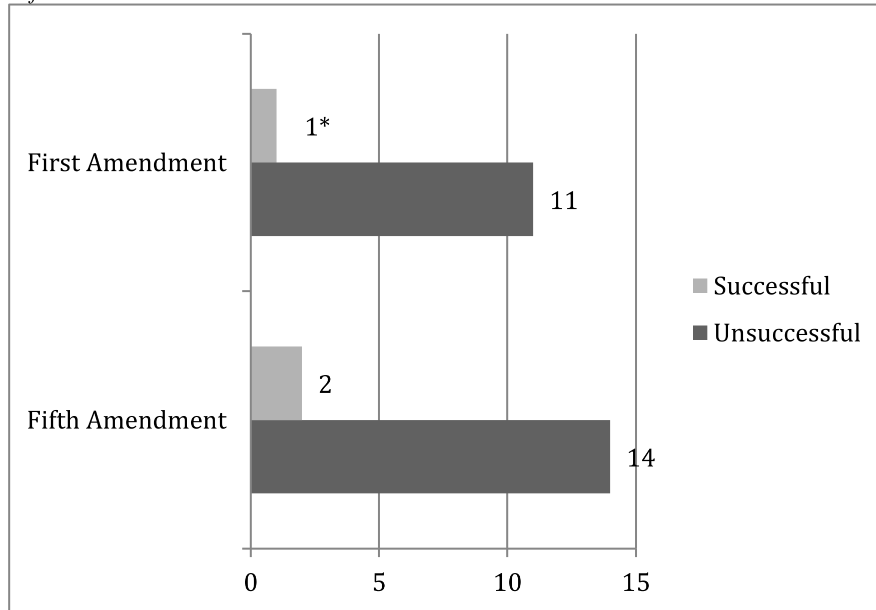
Warsame and *Taleb-Jedi* are just two in a long series of similar pre-*Holder* decisions rejecting First and Fifth Amendment defenses to material support prosecutions. In 2003, the D.C. Circuit Court of Appeals rejected a petition by the People's Mojahedin Organization of Iran (PMOI) to review its designation as a foreign terrorist organization.[117] The PMOI argued, among other things, the material support law violated their ability to freely associate, as guaranteed under the First Amendment. The D.C. Circuit summarily dismissed this claim, finding the law was not aimed at "the expressive component of [the organization's] conduct but at stopping aid to terrorist groups."[118]

In fact, First Amendment defenses have been used as far back as 1998, in the U.S. government's first material support prosecution.[119] Fawzi Assi was arrested at Detroit International Airport, and charged with material support for terrorism after law enforcement agents found night vision goggles and other equipment in his suitcase. Assi admitted the supplies were destined for Hezbollah, the Lebanese terror group, but argued the material support law violated his First Amendment rights to freely associate.[120] Again, this line of argument was rejected, this time by the District Court for the Eastern District of Michigan in 2006. Advocacy of a cause, the court reasoned, "is far different from making donations of material support."[121] Further, the court determined the law allows no bifurcation between support for the lawful versus the unlawful activities of a terrorist organization, as "material support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent."[122] In fact, before *Holder*, the Fourth, Ninth, and D.C. Circuits all reached a similar conclusion: section 2339B does not violate First Amendment rights to speech or association.

In this light, *Holder's* First Amendment outcome does not represent a fundamental break with past material support jurisprudence, or even resolve a split within the appeals courts. Instead, the case appears to simply solidify the dominant, almost exclusive, interpretation by lower courts of freedom of speech and association claims made in material support cases pre-2010.

117. People's Mojahedin Org. of Iran v. U.S. Dep't of State (*PMOI II*), 327 F.3d 1238 (D.C. Cir. 2003).
118. *Id.* at 1244 (citing Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (2000)).
119. *See* SAID, *supra* note 18, at 52–53 for more information.
120. *United States v. Assi*, 414 F. Supp. 2d 707 (E.D. Mich. 2006). Assi was initially released from jail while the investigation proceeded, but he fled to Lebanon upon his release. U.S. officials in Lebanon took him into custody again in 2004.
121. *Id*. at 713.
122. *Id.*

Figure 3. Material support prosecutions before Holder: success rate of constitutional defenses.



1. Fifth Amendment

The picture is somewhat different with vagueness challenges, though the overwhelming trend still is toward the constitutionality of the material support statute (see Figure 3). Sixteen of the eighteen pre-*Holder* material support cases involved a defense based on Fifth Amendment vagueness grounds. The vagueness doctrine has a long, though somewhat opaque history in the Supreme Court.[123] Going back at least to 1875,[124] the Supreme Court has recognized criminal laws must provide people with fair notice of the conduct the law prohibits, and that laws be written in manner that "does not encourage arbitrary or discriminatory enforcement."[125] If criminal laws do not have "sufficient definiteness" such that "ordinary people can understand what conduct is prohibited," then they can be voided by courts for vagueness.[126]

Of those sixteen cases, two (including the Ninth Circuit's opinion in *Humanitarian Law Project v. Mukasey*)[127] ruled the material support law

123. Andrew Goldsmith, *"The Void-for-Vagueness Doctrine in the Supreme Court, Revisited"*, 30 AM. J. CRIM. L. 279 (2003).
124. *Id.* at 280.
125. Kolender v. Lawson, 461 U.S. 352, 357 (1983).
126. *Id.*
127. As noted above, the Mukasey case ultimately was granted a writ of certiorari by the Supreme Court, resulting in the Court's Holder decision. *See supra* Part III.

unconstitutionally vague, with a third (*Al-Arian*) casting some doubt on the whether the material support law provided the clarity that a person of ordinary intelligence would need to understand what the law prohibits. As with the First Amendment issue in that case, the *Al-Arian* court ultimately determined it could avoid overruling the law by imputing a specific mens rea element into the statute.

Still, the vast majority of pre-*Holder* cases rejected Fifth Amendment vagueness challenges.[128]

Many cases examined vagueness claims mixed with First Amendment right of association arguments. In *U.S. v. Marzook*,[129] for example, the District Court for the Northern District of Illinois rejected the defendant's argument that the use of "personnel" in section 2339B was unconstitutionally vague.[130] Foreshadowing the rationale used by Chief Justice Roberts in *Holder*, the district court concluded the plain meaning of providing "personnel" fit the defendant's alleged conduct: recruiting individuals to join Hamas.[131] In *U.S. v. Al Kassar*,[132] a New York federal district court also rejected the defendant's argument that section 2339B violated the Fifth Amendment's Due Process Clause by criminalizing simple membership in an organization.[133] Instead, the court found the law specifies one must "provide material support" for a designated terrorist organization and have "knowledge" the organization is a terrorist group or does terrorist acts.[134] Thus, the law did provide sufficient definiteness such that individuals can understand the conduct that is proscribed, which vitiated Al Kassar's Fifth Amendment argument.

C. Pre-*Holder* Standard of Review

Though *Holder* does not appear to have led a sea change in the way courts resolved First and Fifth Amendment defenses in material support prosecutions, one final way of evaluating *Holder*'s influence is to examine the standard of review used by lower federal courts to resolve the First Amendment claims before and after the decision. In *Holder*, the government argued that the Humanitarian Law Project's activities represented simple conduct, not speech, and advocated the Court to adopt the more deferential

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128. *See, e.g.*, United States v. Warsame, 537 F. Supp. 2d 1005 (D. Minn. 2008); United States v. Shah, 474 F. Supp. 2d 492 (S.D.N.Y. 2007); United States v. Awan, 459 F. Supp. 2d 167 (E.D.N.Y. 2006); United States v. Marzook, 383 F. Supp. 2d 1056 (N.D. Ill. 2005).
129. *Marzook*, 383 F. Supp. 2d at 1066–67.
130. *Id.* at 1066.
131. *Id.*
132. United States v. Al Kassar, 582 F. Supp. 2d 488 (S.D.N.Y 2008).
133. *Id.* at 498.
134. *Id.*

O'Brien intermediate scrutiny standard to resolve the case.[135] The Court, however, unanimously agreed with the plaintiff that the strict scrutiny standard of review should be applied to the government's attempts to limit speech—though the Court majority ultimately determined the government's limits on speech met the strict scrutiny test. Did this strict scrutiny standard create a change in this area of national security law, and have subsequent courts applied strict scrutiny? This question is important to understanding the impact of *Holder*, but also fits into the larger debate in political science and law over the relative importance of court reasoning.

Traditionally, differences have existed among political science and law scholars who posit the Supreme Court is primarily a political institution and those who find more than politics to high court decision making. Mark Richards and Herbert Kritzer's theory of "jurisprudential regimes" posits the importance of the Supreme Court's rulings go beyond simply the outcomes produced, and whether those outcomes are conservative or liberal.[136] Instead, "law at the Supreme Court level is to be found in the structures the justices create to guide future decision making."[137] That is, the Court's main purpose in the system of law is to create rules and guidance for other courts to follow. This is particularly true when the Court announces a new interpretation of a statute or of the constitution. According to Xun Pang, Barry Friedman, Andrew Martin, and Kevin Quinn, these "key precedents create fundamentally different doctrinal tests, such that we might expect to see an important shift in outcomes thereafter."[138] Does *Holder* create such a doctrinal shift?

To examine this final question, I investigated whether the same material support cases used above applied the intermediate scrutiny or strict scrutiny test. Of the twelve material support cases involving First Amendment claims decided before *Holder*, seven used the *O'Brien* intermediate scrutiny standard to evaluate the defendant's First Amendment claims. Conversely, only three pre-2010 cases used the strict scrutiny standard to evaluate the First Amendment claims (two opinions did not state a standard of review when evaluating the First Amendment argument). Thus, pre-*Holder*, the dominant standard of review was intermediate scrutiny, not strict scrutiny.

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135. *See* United States v. O'Brien, 391 U.S. 367 (1968).

136. Mark Richards & Herbert Kritzer, *Jurisprudential Regimes in Supreme Court Decision-Making*, 96 AM. POL. SCI. REV. 305, 306 (2002). In many respects, the jurisprudential regimes theory responds to another theory in political science, the attitudinal model of Supreme Court decision making. The attitudinal model posits that outcomes at the Supreme Court are guided by judicial ideologies, with the use of law and precedent in Court opinions a mere *post-hoc* rationalization for ideological decision making. *See* JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). The jurisprudential regimes theory holds that law and precedent do matter.

137. Richards & Kritzer, *supra* note 136, at 306.

138. Xun Pang, Barry Friedman, Andrew Martin & Kevin Quinn, *Endogenous Jurisprudential Regimes*, 20 POL. ANALYSIS 417, 419 (2012).

By adopting strict scrutiny, the Court in *Holder* did, then, announce a new path for lower courts to follow: use strict scrutiny to analyze First Amendment claims in terrorism prosecutions.

Is there a discernible shift in the standard to review speech rights in terrorism cases after *Holder*? Subsequent cases show there is such a shift. Of the seven cases after *Holder* that included free speech arguments, six adopted the strict scrutiny test. In only one post-2010 terrorism case, *Kadi v. Geithner*,[139] did a lower court use the *O'Brien* intermediate scrutiny standard. The use of that standard in *Kadi* appears to have been driven by the fact the plaintiff was contesting his SDGT designation under Executive Order 13,224, not section 2339B of the material support law. For the D.C. District Court, this difference meant that Kadi was not really contesting whether his monetary donations to terror groups have an expressive context or a political purpose, only whether certain conduct he engaged in—the act of giving donations—could be proscribed and punished.[140] For the remaining six post-2010 cases, lower courts employed strict scrutiny to evaluate the First Amendment arguments.

Ultimately, it is in the standard of review that we see the true influence of the *Holder* decision. Though the Humanitarian Law Project lost its legal challenge, the Court did accept that the government's attempts to regulate its expressive activity constituted a true content-based regulation of *speech*, not just conduct. And, in all subsequent terror cases but one, we see this doctrinal shift. It is true the Supreme Court gave a broad interpretation to the material support statute, with this broadness seen most prominently by the cabined reading given to First Amendment speech and association rights. Yet, an examination of pre-*Holder* cases shows the Court's narrow reading of the First Amendment follows the analysis and conclusions in nearly all previous cases in lower federal courts that examined the material support statute. Thus, the Court did not really lead the jurisprudential interpretation of this important constitutional issue. However, the Court's adoption of strict scrutiny does represent a signal shift in the standard used to review First Amendment arguments in terrorism cases.

This is probably a mixed blessing for future defendants. After all, the adoption of strict scrutiny did not provide protection for the coordinated advocacy and speech efforts that the Humanitarian Law Project and the other defendants sought to engage in with the PKK and the Tamil Tigers. Thus, the adoption of strict scrutiny ultimately could be seen as a loss, despite the stringent review—often described as "'strict' in theory and fatal in fact" to laws that receive this standard of review—the government prevailed in its

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139. Kadi v. Geithner, 42 F. Supp. 3d 1 (D.D.C. 2012).
140. *Id.* at 17–18.

effort to uphold the law and solidify the material support exception to core political speech rights.[141]

VII. CONCLUSION

Holder has been much maligned by commentators in the academic and policy world alike.[142] The decision does represent a setback for the freedom to express views that are out of the mainstream or connected to violent organizations. The unwillingness to protect coordinated political advocacy with known terror groups can be juxtaposed against the general expansion of First Amendment rights seen in the first decade of the Roberts Court. For example, in *Citizens United v. FEC*[143] the Court found a new fundamental right for unions, corporations, and other organizations to speak and advocate (and to use their money to advocate) in campaigns and elections. Expanding on *Citizens United*'s free speech (and money is speech) rationale, the Court later held a governmental interest in preventing political corruption is not compelling enough to allow Congress to place aggregate caps on the amount of money one person can donate in national elections.[144] Further, despite the *Holder* ruling, the Roberts Court has otherwise gone to great lengths to protect unpopular speech. Protest groups, like those organized by the Westboro Baptist Church, have earned a right to express hateful words at the funerals of fallen soldiers.[145] State laws designed to prevent the purchase of violent video games by minors have been struck down on First Amendment grounds.[146] Americans now have a right to lie that is protected by the First Amendment, as well.[147] More salutarily, the Roberts Court also found the First Amendment protects public employees from retaliation for engaging in political speech, even in cases where the retaliation is based on a factual mistake regarding the content of the alleged speech.[148] In this context, *Holder* certainly stands out as a notable exception to the general broadening of the First Amendment's outlines seen in recent years.[149]

However, this article seeks to explore *Holder* in a different context, asking whether the Court's decision actually reflected a notable change in the

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141. Gerald Gunther, T*he Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *See also* Fullilove v. Klutznick, 448 U.S. 448 (1980).
142. For its impact in the policy world, see Editorial, *A Bruise on the First Amendment*, N.Y. TIMES, June 21, 2010, at A26, *available at* http://www.nytimes.com/2010/06/22/opinion/22tue1.html.
143. Citizens United v. FEC, 558 U.S. 310 (2010).
144. McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014).
145. Snyder v. Phelps, 562 U.S. 443 (2011).
146. Brown v. Ent. Merchants Ass'n, 564 U.S. 786 (2011).
147. United States v. Alvarez, 567 U.S. 709 (2012).
148. Heffernan v. City of Patterson, 136 S. Ct. 1412 (2016).
149. Ronald K.L. Collins, *Foreword: Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409 (2013).

way federal courts had been interpreting constitutional rights within material support prosecutions. Examining lower court decisions pre-*Holder*, it appears that Chief Justice Roberts did not substantively change the way in which First and Fifth Amendment constitutional rights are weighed in these national security cases. Instead, his opinion largely stuck to the outlines established in many previous cases. Notably, Roberts' opinion focused on HLP's argument that its own actions vis-à-vis the PKK and Tamil Tigers should be protected constitutionally because its support was directed toward the peaceful, legitimate side of these terror groups. *Holder* rejects this argument, but in doing so simply follows *Warsame*, *Taleb-Jedi*, *Assi*, and other earlier cases that rejected similar arguments. Similarly, Roberts does not tread new ground when differentiating the right to associate with a group, which receives strong First Amendment protection, from providing *material support* for a terrorist group, which does not find constitutional protection even when that support comes in the form of speech and advocacy.

Yet, the opinion also makes clear that, while the law generally operates to regulate conduct, the strict scrutiny standard must be applied when that conduct takes the form of speech, and not the lesser, more deferential *O'Brien* intermediate scrutiny standard. This clarification in the standard of review needed to evaluate speech rights in terrorism cases has had a lasting effect in subsequent court decisions—though given that nearly all First Amendment argument failed before *Holder* and after, the increased standard of review likely has not changed the basic outcomes of those cases.

Roberts' opinion also created a distinction between independent and coordinated speech activity with foreign terror groups, with the former receiving and the latter not receiving, constitutional protections. Post-*Holder*, the trial of Tarek Mehanna provides perhaps the best example of an expansive interpretation of coordinated activity with terror groups. Though Mehanna had no direct contact with al-Qaeda, his translation activities still were sufficient to bring a charge of material support. Conversely, the Ninth Circuit Court of Appeals treated a separate instance of coordinated advocacy much differently, allowing an Oregon non-profit to coordinate advocacy efforts with the domestic branch of a group labeled a foreign terrorist organization by the U.S. government. However, based on an analysis of the subsequent citation histories for *Holder*, *Mehanna*, and *Al Hamarain*, nearly all lower courts have adopted the narrower interpretation of speech rights post-*Holder*. Thus, the independent/coordinated distinction that is clarified in *Holder,* has and, likely will continue to shape First Amendment outcomes going forward.

Though *Holder* was a setback for free speech, it was not the first court decision limiting First Amendment rights in these types of terrorism cases. Since the early days of the material support law, lower courts had consistently ruled in favor of limiting speech and association rights in this area of national

security. Ultimately, for those who seek to change the calculus between constitutional rights and national security, it appears the federal judiciary is not the best place to attempt that change. Instead, future efforts to increase speech protection in the national security setting would be better focused on Congress, not the courts.