

2012

Sharing Translations or Supporting Terror? An Analysis of Tarek Mehanna In The Aftermath of Holder v. Humanitarian Law Project

Innokenty Pyetranker

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/nslb>



Part of the [International Law Commons](#)

Recommended Citation

Pyetranker, Innokenty "Sharing Translations or Supporting Terror? An Analysis of Tarek Mehanna In The Aftermath of Holder v. Humanitarian Law Project," American University National Security Law Brief, Vol. 2, No. 2 (2012).
Available at: <http://digitalcommons.wcl.american.edu/nslb/vol2/iss2/3>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University National Security Law Brief by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

**SHARING TRANSLATIONS OR
SUPPORTING TERROR?
AN ANALYSIS OF TAREK MEHANNA
IN THE AFTERMATH OF
*HOLDER v. HUMANITARIAN LAW PROJECT***

INNOKENTY PYETRANKER*

I. INTRODUCTION

On October 21, 2009, Tarek Mehanna was arrested by federal authorities for allegedly violating 18 U.S.C. § 2339A and 18 U.S.C. § 2339B, the terrorist material support statutes.¹ Mehanna's subsequent indictment, prosecution, and conviction became the subject of intense media scrutiny.² Unlike hundreds of suspected foreign terrorists, Mehanna was not captured by U.S. military personnel in a war-torn country halfway around the world; he is an American citizen³ who was picked up in his parents' home in upscale Sudbury, Massachusetts.⁴ Evidence presented by the government, including an internet chat in which Mehanna adoringly labeled Osama bin Laden his "real father,"⁵ lent support to the prosecutor's first words in his opening statement: Mehanna had "answered a call

* J.D. candidate, Harvard Law School, 2013; B.A., Columbia University, 2010. I am enormously grateful to Professors Theodore Heinrich and Robert Chesney for their indispensable guidance and assistance with this project.

1 Claire Suddath, *Alleged U.S. Terrorist Tarek Mehanna*, TIME, Oct. 22, 2009, available at <http://www.time.com/time/nation/article/0,8599,1931521,00.html>.

2 See, e.g., Abby Goodnough & Liz Robbins, *Mass. Man Arrested in Terrorism Case*, N.Y. TIMES, Oct. 21, 2009, available at <http://www.nytimes.com/2009/10/22/us/22terror.html> ("Tarek Mehanna, 27, was charged with conspiring to provide material support to terrorists."); Dina Temple-Raston, *In Boston Terrorism Trial, A Free Speech Defense*, NPR, Oct. 27, 2011, <http://www.npr.org/2011/10/27/141740974/in-boston-terrorism-trial-a-free-speech-defense> ("Opening statements . . . in . . . terrorism trial involving a young Massachusetts man named Tarek Mehanna."); Peter Schworm, *Mehanna Conviction Stirs Outcry on Rights*, BOSTON GLOBE, Dec. 22, 2011, available at <http://www.bostonglobe.com/metro/2011/12/22/mehanna-conviction-stirs-outcry-rights/I73lyAEVWYdBtGLIoi6LBJ/story.html> ("To many civil libertarians, the conviction of Tarek Mehanna . . . undermined free speech rights . . .").

3 See Martin Finucane, *The Terror Defendant Who Allegedly Called People 'Dude'*, BOSTON.COM, Oct. 26, 2011, <http://www.boston.com/Boston/metrodesk/2011/10/the-terror-defendant-who-allegedly-called-people-dude/UOEqhEDQ7uaWEUuWP2M4SK/index.html> (describing Mehanna as "a US citizen born in Pittsburgh . . .").

4 Suddath, *supra* note 1.

5 Denise Lavoie, *Friend: Mehanna Dubbed Osama Bin Laden His "Real Father"*, CBS BOSTON, Nov. 3, 2011, <http://boston.cbslocal.com/2011/11/03/friend-mehanna-dubbed-osama-bin-laden-his-real-father/>.

to action from Osama bin Laden to fight and kill American soldiers.”⁶ Mehanna’s attorneys, on the other hand, denied that their client was promoting terrorism and instead portrayed him as an American “exercising his free speech rights to show anger over the U.S. invasion of Iraq.”⁷

Tarek Mehanna is not unique because his attorneys disagreed with prosecutors about his guilt. Indeed, every indicted criminal defendant who pleads “not guilty” to the charges presented against him or her ostensibly challenges the government’s accusations. What makes Mehanna special is that one of the acts that he was accused of – translating videos and publications promoting violent jihad⁸ – stands uncomfortably and ambiguously at the nexus between legal, constitutionally-protected activities and illegal, criminally-punishable acts. Did Mehanna’s activities amount to material support to terrorism? The federal government argued yes, while Mehanna’s defense counsel maintained that the answer was no. Although the twelve jurors that were convened for the Mehanna trial rendered a verdict of guilty, the question of whether actions like Mehanna’s constitute violations of the material support statutes remains highly controversial.

This article aims to achieve an in-depth understanding of precisely this controversy by analyzing Mehanna’s actions through the lens of *Holder v. Humanitarian Law Project*,⁹ a landmark June 2010 Supreme Court case that upheld the constitutionality of the terrorist material support prohibitions. In Part II of this Article, I briefly describe the historical circumstances surrounding the material support statutes, specifically the September 11th terrorist attacks and the Patriot Act of 2001, the government’s legislative response to the attacks. In Part III, I review *Holder v. Humanitarian Law Project* and examine current academic literature on the case to explain its significance. In Part IV, the analytical nucleus of this Article, I search for insights into the contours of the terrorist material support statutes by investigating significant appellate-level decisions that cite *Holder v. Humanitarian Law Project*. Part V returns to the trial of Tarek Mehanna, focusing on a pair of opposing motions submitted by the defense and the prosecution, both of which cite *Holder v. Humanitarian Law Project*. Part VI concludes.

II. HISTORICAL CONTEXT

A. SEPTEMBER 11, 2001

When then-U.S. President George W. Bush addressed the American people on September 11,

6 Lauren Keiper, *Trial of Massachusetts Man Accused of Aiding Terrorism Begins*, REUTERS (Oct. 28, 2011, 5:54pm EDT), <http://www.reuters.com/article/2011/10/28/us-usa-crime-mehanna-idUSTRE79Q7FX20111028>.

7 Lavoie, *supra* note 5.

8 See Second Superseding Indictment, United States v. Mehanna, No. 09-CR-10017-GAO (D. Mass. June 17, 2010), 2010 WL 2516469. The indictment depicts Mehanna’s translations as elements of material support offenses on several occasions, including the twenty-first “overt act” committed in furtherance of Mehanna’s conspiracy to violate 18 U.S.C. § 2339B, *id.* at 8, and the nineteenth “overt act” committed in furtherance of Mehanna’s conspiracy to violate 18 U.S.C. § 2339A, *id.* at 15-16.

9 *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

2001, he called the day's events "a series of deliberate and deadly terrorist acts."¹⁰ President Bush was correct; it would eventually become clear that members of al Qaeda, an extremist terrorist network founded by Osama bin Laden, were behind the four coordinated attacks that occurred on the morning of September 11, 2001.¹¹ The terrorists hijacked and intentionally crashed two of the planes into the Twin Towers of the World Trade Center in New York, one plane into the Pentagon in Virginia, and the final plane into a field in Pennsylvania.¹² The total number of Americans that perished on September 11th – nearly 3,000 – was greater than the number lost at Pearl Harbor in December 1941.¹³ In a single day, the United States transformed from a seemingly invincible super-power poised to project its influence all over the globe to a seemingly vulnerable victim of terrorist attacks on its own soil.

Likewise, the priorities of the United States changed overnight: under the Clinton and pre-9/11 Bush administrations, "[t]errorism was not the overriding national security concern for the U.S. government,"¹⁴ but after September 11th, the federal government "turned its entire attention to formulating and executing a response."¹⁵ Along with efforts on the international stage, including the commencement of the U.S. invasion of Afghanistan to "capture or kill individuals believed to be responsible for the September 11 attacks and to topple the Taliban regime that harbored them,"¹⁶ the federal government passed new anti-terrorism laws, including the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," commonly known as the Patriot Act.¹⁷ Among its many provisions, the Patriot Act granted "wiretapping and surveillance authority to federal law enforcement;" removed "barriers between law enforcement and intelligence agencies;" and gave "greater authority to the Attorney General to detain and deport aliens suspected of having terrorist ties."¹⁸ The Patriot Act also amended the

10 *Statement by the President in His Address to the Nation*, THE WHITE HOUSE ARCHIVES, <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html> (last visited Dec. 16, 2011).

11 See Maria Newman, *Bin Laden Takes Responsibility for 9/11 Attacks in New Tape*, N.Y. TIMES, Oct. 29, 2004, available at <http://www.nytimes.com/2004/10/29/international/30osamaCND.html> (describing a message from Osama bin Laden that aired on Al-Jazeera just before the 2004 presidential elections, in which bin Laden claims direct responsibility for the September 11 attacks).

12 Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1221 (2002).

13 See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY 1-2 (2004) available at http://www.9-11commission.gov/report/911Report_Exec.pdf.

14 *Id.* at 10.

15 Note, *supra* note 12, at 1222; see also Eric Sandberg-Zakia, *Beyond Guantanamo: Two Constitutional Objections to Nonmilitary Preventive Detention*, 2 HARV. NAT'L SEC. J. 283, 291 (2011) ("In the years since the September 11, 2001, terrorist attacks on the Pentagon, World Trade Center, and passengers and crew of four commercial airplanes, the U.S. government has made counterterrorism a primary undertaking").

16 Note, *supra* note 12, at 1222.

17 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter the Patriot Act].

18 Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 435 (2002).

material support statutes, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B.¹⁹ These two statutes eventually became “the heart of the Justice Department’s terrorist prosecution efforts.”²⁰

In its present form, 18 U.S.C. § 2339A outlaws support for terrorism by turning the following acts into federal criminal offenses:

- (1) (a) attempting to,
(b) conspiring to, or
(c) actually
- (2) (a) providing material support or resources, or
(b) concealing or disguising
 - i. the nature,
 - ii. location,
 - iii. source, or
 - iv. ownershipof material support or resources
- (3) knowing or intending that they be used
 - (a) in preparation for,
 - (b) in carrying out,
 - (c) in preparation for concealment of an escape from, or
 - (d) in carrying out the concealment of an escape from
- (4) an offense identified as a federal crime of terrorism.²¹

Section 2339A(b) also provides three key definitions. “Material support or resources” is defined in the following way:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.²²

“Training” is defined as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.”²³ Finally, “expert advice or assistance” is defined as “advice or assistance

19 See Katherine R. Zerwas, *No Strict Scrutiny – the Court’s Deferential Position on Material Support to Terrorism in Holder v. Humanitarian Law Project*, 37 WM. MITCHELL L. REV. 5337, 5339 (2011) (discussing how the Patriot Act strengthened the punitive measures in the material support statutes).

20 CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B 1 (2010), available at <http://www.fas.org/sgp/crs/natsec/R41333.pdf>.

21 *Id.* at 15.

22 18 U.S.C. § 2339A (2006).

23 *Id.*

derived from scientific, technical or other specialized knowledge.”²⁴

In its present form, 18 U.S.C. § 2339B outlaws support for designated foreign terrorist organizations by turning the following acts into federal criminal offenses:

- (1) (a) attempting to provide,
(b) conspiring to provide, or
(c) actually providing
- (2) material support or resources
- (3) to a foreign terrorist organization
- (4) knowing that the organization
(a) has been designated a foreign terrorist organization, or
(b) engages, or has engaged, in “terrorism” or “terrorist activity.”²⁵

According to the law, the term “material support or resources” has the same meaning in section 2339B as in section 2339A.²⁶ Section 2339B also includes two other clauses that explain the term “material support or resources.” In subsection (h), the law provides that:

No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.²⁷

Subsection (i) further specifies that “[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.”²⁸

Dissecting the minutiae of the two material support statutes is no abstract academic exercise. In the ten years following September 11, 2001, sections 2339A and 2339B have each been utilized over 100 times in criminal prosecutions.²⁹ Moreover, the use of the material support statutes has increased over time; since 2009, these two statutes have become the most commonly used laws in

24 *Id.*

25 18 U.S.C. § 2339B (2006).

26 *Id.*

27 *Id.*

28 *Id.*

29 See Ctr. on Law & Sec., Terrorist Trial Report Card 13 (2011), available at <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf> (identifying common charges in terrorism prosecutions).

terrorist prosecutions.³⁰

III. *HOLDER V. HUMANITARIAN LAW PROJECT*

A. Facts and Holding

Holder v. Humanitarian Law Project was the “key legal challenge” to the material support statutes.³¹ Much ink has been spilled rehashing the case’s complicated background and proceedings, but the issues presented to the Supreme Court were relatively straightforward. The central question considered was the legality of section 2339B’s proscription of material support for the humanitarian and political activities of two designated foreign terrorist organizations, the Kurdistan Workers’ Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).³² The PKK and the LTTE are not mere terrorist groups; it was “undisputed in the litigation” that the two organizations are “dual-purpose groups – that is, these groups possessed both lawful social and political goals as well as unlawful violent ones.”³³ The plaintiffs, a group of U.S. citizens and organizations, were determined to give money as well as training in international law and advocacy to the PKK and the LTTE in order to facilitate the lawful, nonviolent purposes of the groups.³⁴ Seeking an injunction to prohibit the enforcement of the material support statute with regard to the PKK and the LTTE, the plaintiffs challenged the constitutionality of 18 U.S.C. § 2339B on the grounds that the statute infringed on their constitutional rights because it was “too vague, in violation of the Fifth Amendment,” and “it infringe[d] their rights to freedom of speech and association, in violation of the First Amendment.”³⁵ The government’s arguments included the assertions that section 2339B “[did] not target speech per se, but instead regulate[d] the conduct of providing support to designated terrorist organizations, even if that support [took] the form of speech,” that “the government had an interest in delegitimizing designated terrorist groups,” and that “any contribution, including of speech, furthered that group’s violent purposes and therefore could be banned.”³⁶

The Supreme Court’s 6-3 majority opinion in *Holder v. Humanitarian Law Project* posited a three-pronged holding. First, the Court found that “the plaintiffs’ claims of vagueness lack[ed] merit” because the terms that the plaintiffs alleged were vague – “training,” “expert advice or assistance,” “service,” and “personnel” – were not vague because they did not require “untethered, subjective judgments” and, indeed, were “clear in their application to plaintiffs’ proposed conduct.”³⁷ Second, the Court held that the material support statute did not violate freedom of speech because material

30 See *id.* at 14.

31 Michael G. Freedman, *Prosecuting Terrorism: The Material Support Statute and Muslim Charities*, 38 HASTINGS CONST. L.Q. 1113, 1119 (2011).

32 *Id.* at 1120.

33 Amanda Shanor, *Beyond Humanitarian Law Project: Promoting Human Rights in A Post-9/11 World*, 34 SUFFOLK TRANSNAT’L L. REV. 519, 521 (2011).

34 Freedman, *supra* note 31, at 1120.

35 *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

36 Shanor, *supra* note 33, at 523.

37 *Humanitarian Law Project*, 130 S. Ct. at 2719-20.

support is “carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”³⁸ The Court further explained the second part of the holding in the following way:

Plaintiffs want to speak to the PKK and the LT*TE, and whether they may do so under § 2339B depends on what they say. If plaintiffs’ speech to those groups imparts a “specific skill” or communicates advice derived from “specialized knowledge” – for example, training on the use of international law or advice on petitioning the United Nations – then it is barred On the other hand, plaintiffs’ speech is not barred if it imparts only general or unspecialized knowledge.³⁹

Third, the Court ruled that section 2339B did not violate plaintiffs’ freedom of association by upholding the Ninth Circuit’s rejection of this First Amendment claim. Specifically, the Court reasoned that “[t]he statute [did] not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group . . . [w]hat [§ 2339B] prohibits is the act of giving material support”⁴⁰

B. Analysis

The Supreme Court’s holding in *Holder v. Humanitarian Law Project* upheld the constitutionality of the material support statutes and paved for the way for the federal government to continue prosecuting the statutes’ transgressors. The decision also quickly became a fount of controversy because of its potential impact on the seemingly ever-expanding definition of terrorism-related crimes.

Scholars noted that because the *Humanitarian Law Project* opinion “deferred to Congress’ finding that there is no meaningful separation between a terrorist organization’s legal and illegal activities,” the material support statutes could now definitively treat “support for one” as “functionally equivalent to support for the other.”⁴¹ Michael J. Ellis wrote that, as a result of the Supreme Court’s decision, “it is difficult to imagine *any* activity a member of a foreign terrorist organization could engage in that would not violate the material support statute.”⁴² Citing the 2009 conviction of Javed Iqbal for “violating the criminal prohibition against providing material support to a terrorist organization by helping to broadcast Hezbollah’s TV station Al-Manar,” Daphne Barak-Erez and David Scharia concluded that the Court’s decision in *Holder v. Humanitarian Law Project* “embodies the peak of other legal efforts of the United States government to fight terrorist activities by limiting the speech that supports them.”⁴³ Likewise, members of the legal community began questioning the decision’s

38 *Id.* at 2722-23.

39 *Id.* at 2723-24.

40 *Id.* at 2730 (citing *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000)).

41 Ctr. on Law & Sec., *supra* note 29, at 21.

42 Michael J. Ellis, *Disaggregating Legal Strategies in the War on Terror*, 121 YALE L.J. 237, 242 (2011) (emphasis added).

43 Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT’L SEC. J. 1, 3 (2011).

(likely negative) influence on the future of Muslim charities⁴⁴ and human rights groups.⁴⁵

Some commentators, however, offered an alternative view of the Court's holding. Katherine R. Zerwas, for instance, predicted that this was "likely not the end of litigation challenging section 2339B" because "[t]he Court's fact-specific interpretation of the plaintiffs' arguments could permit future litigants to bring a challenge on slightly different facts."⁴⁶ Indeed, Chief Justice Roberts's majority opinion affirmed that the majority did not "address the resolution of more difficult cases that may arise under the statute in the future."⁴⁷ For more difficult – that is, more ambiguous – instances of material support, the impact of the *Humanitarian Law Project* decision remained unclear. The limits of the material support statutes, it seems, would be determined on a case-by-case basis.

IV. THE AFTERMATH OF *HOLDER V. HUMANITARIAN LAW PROJECT*

At first blush, the material support statutes appear relatively straightforward when viewed in light of *Holder v. Humanitarian Law Project*: the case appears to hold that giving material support of almost any kind – including any service or tangible or intangible property – to terrorists or a foreign terrorist organization is proscribed, and that this proscription is not vague or unconstitutional on First or Fifth Amendment grounds.

Determining whether a given act – such as translating a document – constitutes material support, however, remains a relatively contentious undertaking. That is, since *Humanitarian Law Project* was decided, a number of individuals have challenged their material support convictions by arguing that their actions did not amount to material support to terrorism. Naturally, a discussion of *Humanitarian Law Project* surfaced in several of the decisions that resolved those appeals. In the remainder of this section, I survey a selection of such cases in order to learn about the contours of the terrorist material support statutes as understood by federal judges. One of the cases, *United States v. Bahlul*, was not decided by a judge in an Article Three Court; *United States v. Al-Bahlul* was decided in a Court of Military Commission Review, a tribunal created by the Military Commissions Act of 2006.⁴⁸ However, one of the offenses that Ali al-Bahlul was charged with was modeled after the material support statutes,⁴⁹ so the court's reasoning in the *Bahlul* decision is instructive with regard to interpretations of the material support statutes. As for the other four decisions surveyed below, the authors are judges on the United States Courts of Appeals.

44 See generally Freedman, *supra* note 31.

45 See generally Shanor, *supra* note 33.

46 Zerwas, *supra* note 19, at 5358.

47 *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

48 See News Release, U.S. Department of Defense, Charges Referred on Detainee al Bahlul (Feb. 26, 2008), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=11718>; News Release, U.S. Department of Defense, Detainee Convicted of Terrorism Charge At Military Commission Trial (Nov. 3, 2008), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=12329>.

49 See *United States v. Hamdan*, CMCR 09–002, 2011 WL 2923945, at *15 (U.S. Ct. of Mil. Comm'n Rev. June 24, 2011) (explaining that 18 U.S.C. § 2339A and 18 U.S.C. § 2339B were "the basic model for the 2006 M.C.A. offense bearing the same name").

*A. Ali Asad Chandia**1. Material Support Allegations*

Ali Asad Chandia, a third-grade teacher,⁵⁰ was convicted on multiple counts of providing material support to terrorists or terrorist organizations in violation of 18 U.S.C. § 2339A and § 2339B.⁵¹ Following his conviction, the United States Probation Office prepared a presentence report (PSR) that detailed the offenses committed by Chandia.⁵² The PSR asserted that in late 2001, Chandia went to Pakistan and visited the office of a designated foreign terrorist organization called Lashkar-e-Taiba (LET), where he “inquired about the training that occurred at the LET military camp,” and asked “what type of clothing was necessary.”⁵³ The PSR “did not assert that Chandia actually went to a LET training camp while he was in Pakistan.”⁵⁴ Additionally, the PSR stated that Chandia provided assistance such as transportation and computer access to Mohammed Ajmal Khan, a LET leader, after Khan arrived in the United States.⁵⁵ On appeal, Chandia objected to a number of the PSR’s allegations: he claimed that he had flown to Pakistan as a result of familial obligations, that LET engages in non-terrorist work such as the operation of schools and hospitals, and that he did not know Mohammed Ajmal Khan was in the United States on LET business.⁵⁶

2. Treatment of Holder v. Humanitarian Law Project

In *United States v. Chandia*, the Fourth Circuit held that a district court did not properly resentence Ali Asad Chandia and remanded the case for another resentencing.⁵⁷ The court reasoned that the lower court failed to state specific facts regarding Chandia’s motive in providing material support to LET, a consequential error because specific intent is required for a sentencing court to apply the “federal crime of terrorism” sentencing enhancement.⁵⁸ The *per curiam* opinion utilized *Holder v. Humanitarian Law Project* in a discussion of Chandia’s motives in providing material support to LET.⁵⁹ Specifically, the *Chandia* court pointed out that the defendant’s “knowledge of LET’s terrorism-related purpose was necessary to his conviction” under 18 U.S.C. § 2339B and, indeed, part of the reason that § 2339B was not declared unconstitutional by *Holder v. Humanitarian Project* was the statute’s mens rea component, which requires that the defendant have knowledge that the organization receiving material support is a designated terrorist organization.⁶⁰

50 *Teacher Guilty of Aiding Terror Group*, USA TODAY, June 6, 2006, available at http://www.usatoday.com/news/nation/2006-06-06-teacher-terror-group_x.htm.

51 *United States v. Chandia*, 395 F. App’x 53, 54 (4th Cir. 2010).

52 *See id.*

53 *Id.* at 55.

54 *Id.*

55 *Id.*

56 *Id.* at 56.

57 *Id.* at 60.

58 *Id.*

59 *See id.* at 59 n.4.

60 *Id.*

The *Chandia* court's use of *Humanitarian Law Project* may appear to be merely ancillary to its decision. However, by referring to *Humanitarian Law Project*'s requirement that a defendant be aware of an organization's ties to terrorism in order to be prosecuted for giving material support to that organization, the *Chandia* decision underscored that the constitutionality of section 2339B rests upon the government differentiating between individuals who know that they are giving material support to a terrorist organization and individuals who are not aware of the terrorist connections of organizations that they support. The former are prosecutable in the Fourth Circuit, the logic of the *Chandia* court goes, while the latter are not.

B. Oussama Kassir

1. Material Support Allegations

Oussama Kassir was convicted on multiple counts of providing material support to terrorists or terrorist organizations in violation of 18 U.S.C. § 2339A and § 2339B.⁶¹ According to the U.S. government, Kassir was sent to the United States by Abu Hamza, "a cleric at a London mosque widely known in England for the Jihadist sermons he delivered."⁶² The government alleged that the following events occurred after Kassir arrived in the United States and set up shop in the Pacific Northwest:

Kassir gave instruction to small groups of men on certain practical aspects of violent Jihad. Kassir showed the men how to build and use a firearm silencer, and how to conduct effective nighttime surveillance of a moving target. In addition, Kassir . . . traveled . . . to a farm complex in Bly, Oregon. This was the proposed location for the Jihad training camp. At Bly, Kassir continued to provide guidance to Mosque associates with the workings of Jihad. Kassir provided instruction on how to kill a man by slitting his throat, and disseminated information from an electronic version of "the Encyclopedia of Jihad."⁶³

After leaving the United States, Kassir allegedly established and maintained a number of websites that were used "to disseminate terrorist materials – including videos showing Jihadis participating in murder and torture, and instructions on how to make bombs and poisons."⁶⁴

2. Treatment of *Holder v. Humanitarian Law Project*

In *United States v. Mustafa*, the Second Circuit held that 18 U.S.C. § 2339B was not unconstitutional as applied to Oussama Kassir,⁶⁵ rejecting Kassir's claim that section 2339B is "unconstitutionally vague, overly broad, and infringes his First Amendment rights."⁶⁶ To arrive at its decision, the *Mustafa* court applied the due process test pronounced by *Holder v. Humanitarian Law Project*: "[a]

61 United States v. Mustafa, 406 F. App'x 526, 528 (2d Cir. 2011).

62 United States v. Kassir, No. S2 04 Cr. 356(JFK), 2008 WL 2653952, at *1 (S.D.N.Y. July 3, 2008).

63 *Id.*

64 *Id.* at *2.

65 406 F. App'x at 530.

66 *Id.* at 528.

conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”⁶⁷ According to the *Mustafa* court, Kasir’s constitutional challenge to section 2339B had to fail because “knowingly providing jihad training and disseminating training manuals on the Internet for the benefit of al Qaeda, and other terrorist organizations, implicate[d] the core meaning of a statute that proscribes knowingly providing training and expert advice or assistance to a foreign terrorist organization.”⁶⁸

The *Mustafa* court’s use of *Humanitarian Law Project* shows that the latter case definitively laid to rest the argument that an individual involved in providing jihad training or disseminating jihad training materials could challenge a material support conviction on void-for-vagueness grounds, at least in the Second Circuit.

C. Rafiq Sabir

1. Material Support Allegations

Rafiq Sabir, a licensed emergency room doctor, was convicted of providing and conspiring to provide material support to a terrorist organization in violation of 18 U.S.C. § 2339B.⁶⁹ While speaking to Tarik Shah (a friend who was also convicted for terrorism-related crimes) and Ali Soufan (an undercover FBI agent posing as a recruiter for al Qaeda), Sabir allegedly “expressed interest in meeting with *mujahideen* operating in Saudi Arabia and agreed to provide medical assistance to any who were wounded.”⁷⁰ The conversation allegedly progressed in the following way:

To ensure that Shah and Sabir were, in fact, knowingly proffering support for terrorism, Soufan stated that the purpose of “our war, . . . our jihad” is to “[e]xpel the infidels from the Arabian peninsula,” and he repeatedly identified “Sheikh Osama” (in context a clear reference to Osama bin Laden) as the leader of that effort. Sabir observed that those fighting such a war were “striving in the way of Allah” and “most deserving” of his help. To permit *mujahideen* needing medical assistance to contact him in Riyadh, Sabir provided Soufan with his personal and work telephone numbers. When Shah and Soufan noted that writing down this contact information might create a security risk, Sabir encoded the numbers using a code⁷¹

According to the government, the direction that the conversation took next removed any remaining doubts about Sabir’s motives or awareness that he was committing to materially support al Qaeda:

Sabir and Shah then participated in *bayat*, a ritual in which each swore an oath of allegiance

67 *Id.* at 530 (citing *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010)).

68 *Id.* (internal quotation marks omitted).

69 *United States v. Farhane*, 634 F.3d 127, 132 (2d Cir. 2011).

70 *Id.* at 133.

71 *Id.* (citations omitted).

to al Qaeda, promising to serve as a “soldier of Islam” and to protect “brothers on the path of Jihad” and “the path of al Qaeda.” The men further swore obedience to “the guardians of the pledge,” whom Soufan expressly identified as “Sheikh Osama,” i.e., Osama bin Laden, and his second in command, “Doctor Ayman Zawahiri.”⁷²

2. *Treatment of Holder v. Humanitarian Law Project*

In *United States v. Farhane*, the Second Circuit held that 18 U.S.C. § 2339B is neither facially vague (i.e., in conflict with the Due Process Clause) nor overbroad (i.e., in conflict with the First Amendment) as applied to Rafiq Sabir.⁷³ Sabir had argued that the statute’s prohibitions “afford insufficient notice to persons who may traduce those prohibitions and inadequate standards for authorities who must enforce them,” and the statutory exception to the definition of material support for medical materials carved out in section 2339A(b)(1) was “too vague to have put him on notice that it did not encompass his consultative services as a physician.”⁷⁴ The court rejected these claims by turning to the majority opinion in *Holder v. Humanitarian Law Project*, which had “foreclosed” vagueness complaints regarding section 2339B.⁷⁵ To dismiss Sabir’s contention that “his offer of life-saving medical treatment was simply consistent with his ethical obligations as a physician and not reflective of any provision of support for a terrorist organization,”⁷⁶ the *Farhane* court again turned to *Humanitarian Law Project*, this time to cite the distinction that the Supreme Court had made between personnel working under the control of a terrorist organization and individuals working independently.⁷⁷ Rafiq Sabir, the *Farhane* court explained, “was not prosecuted for performing routine duties as a hospital emergency room physician, treating admitted persons who coincidentally happened to be al Qaeda members,” but instead “was prosecuted for offering to work for al Qaeda as its on-call doctor, available to treat wounded *mujahideen* who could not be brought to a hospital precisely because they would likely have been arrested for terrorist activities.”⁷⁸

The *Farhane* court’s use of *Humanitarian Law Project* clarified that an individual that gives or attempts to give or conspires to give medical assistance to terrorists while under the control of terrorists has violated a material support statute, despite the exception for medical materials carved out in 18 U.S.C. § 2339A(b)(1). As a result of this decision, claims of vagueness or overbreadth akin to the claims brought by Rafiq Sabir will be rejected, at least in the Second Circuit.

⁷² *Id.* (citations omitted).

⁷³ *Id.* at 136.

⁷⁴ *Id.*

⁷⁵ *Id.* at 140.

⁷⁶ *Id.* at 141.

⁷⁷ *Id.*

⁷⁸ *Id.*

*D. Ali Hamza Ahmad Suliman al Bahlul**1. Material Support Allegations*

Ali Hamza Ahmad Suliman al Bahlul was convicted of providing material support and resources to al Qaeda by a military commission.⁷⁹ The military commission's decision provides the following set of facts about al Bahlul:

Appellant, a self-described “officer” in al Qaeda, joined that group with knowledge that al Qaeda engaged in terrorism and did so in complete agreement with Usama bin Laden’s declarations that all Americans and anyone in the United States were legitimate targets of armed attack. Following completion of al Qaeda’s military-like training, appellant met personally with bin Laden, discussed al Qaeda’s view of itself as a government in exile for the Muslim world engaged in jihad (or “holy war”) with the United States, and pledged his personal fealty, including his willingness to die for bin Laden and al Qaeda. Bin Laden then assigned appellant to al Qaeda’s media office and later as his personal assistant/secretary for public relations.⁸⁰

The charges against al Bahlul with regard to material support were summarized as follows:

The primary resource charged was that he provided himself to al Qaeda as a member; consistent with the statute’s explicit recognition of “personnel [including] oneself” as material support or resources. [H]e traveled to Afghanistan to join al Qaeda, met with an al Qaeda leader, underwent military-type training at an al Qaeda sponsored camp, met with and pledged personal loyalty to bin Laden, and then joined al Qaeda. Appellant was also charged with providing services in direct support of bin Laden and al Qaeda including: preparation of propaganda products intended for al Qaeda recruiting and indoctrination training, and inciting persons to commit terrorism; acting as personal and media secretary for bin Laden, facilitating the pledges of loyalty to bin Laden and preparing the propaganda declarations styled as Martyr Wills for two suspected September 11, 2001 hijackers/pilots, researching the economic effect of those attacks on the United States and providing the results to bin Laden, and operating and maintaining data processing equipment and media communications equipment for the benefit of bin Laden and other al Qaeda leaders.⁸¹

2. Treatment of Holder v. Humanitarian Law Project

In *United States v. Al-Bahlul*, the United States Court of Military Commission Review held that the First Amendment did not apply to al Bahlul’s conduct, and even if it did, the First Amendment was not violated.⁸² Al Bahlul had argued that because the Supreme Court drew a distinction between independent advocacy and advocacy in coordination with a terrorist organization in *Holder v. Humanitarian Law Project*, the judge erred in his instructions to the members of the tribunal because he

79 *United States v. al Bahlul*, No. CMCR 09–001, 2011 WL 4916373, at *1 (U.S. Ct. Mil. Comm’n Rev. Sept. 9, 2011).

80 *Id.* at *4.

81 *Id.* at *31.

82 *Id.* at *76.

did not tell them that his “political beliefs were not on trial.”⁸³ The Court of Military Commission Review rejected this argument by pointing out that, for a number of reasons – including the fact that he is a noncitizen who carried out the behavior in question outside the United States – al Bahlul “is not entitled and does not have the rights and protections provided by the First Amendment.”⁸⁴ Moreover, the *al Bahlul* court ruled that even if the First Amendment applied to the defendant’s speech, his prosecution would still be lawful because his speech was used to create an al Qaeda propaganda video intended “to incite others to join al Qaeda and to commit crimes against Americans or other U.S. interests.”⁸⁵ The *al Bahlul* court went further by describing al Bahlul’s propaganda video as “an integral part of and intrinsically related to the commission of terrorism” and therefore “unprotected speech integrally tied to unlawful criminal activity.”⁸⁶

The *al Bahlul* court’s use of *Humanitarian Law Project* cleared up an ambiguity regarding the latter case’s First Amendment implications. That is, the *al Bahlul* opinion maintained that although *Humanitarian Law Project* distinguished between independent advocacy and advocacy in coordination with terrorists, that distinction does not give rise to supplementary First Amendment protections for noncitizens who materially support terrorism via their speech outside the United States.

E. The Liberty City Seven

1. Material Support Allegations

Narseal Batiste, Patrick Abraham, Stanley Grant Phanor, Naudimar Herrera, Burson Augustin, Lyglenson Lemorin, and Rotschild Augustine were indicted on charges that included providing material support to terrorists or terrorist organizations in violation of 18 U.S.C. § 2339A and § 2339B.⁸⁷ The group was nicknamed the “Liberty City Seven” for the area of Miami “where they gathered.”⁸⁸ Herrera and Lemorin were eventually acquitted, while the other five defendants were all convicted of violating the material support statutes.⁸⁹

According to the government, the five defendants were members of the Miami branch of the Moorish Science Temple, an organization that “mixed political and religious ideology with martial arts training.”⁹⁰ The government alleged that the group had been “conspiring to overthrow the U.S. government and blow up the 110-story Sears Tower in Chicago, along with several FBI offices and the Miami federal court complex.”⁹¹ The evidence presented by the government at trial also sug-

83 *Id.* at *75.

84 *Id.* at *78.

85 *Id.* at *82.

86 *Id.*

87 Indictment at 1, *United States v. Batiste*, No. 06-20373-CR (S.D. Fla. June 22, 2006), available at http://www.justice.gov/opa/documents/cts_batiste_indictment.pdf.

88 Paul Grant, *Factbox: Miami Terrorism Trial of Liberty City Seven*, REUTERS (Dec. 13, 2007, 5:47 pm EST), <http://www.reuters.com/article/2007/12/13/us-usa-plot-profile-idUSN0733513120071213>.

89 *United States v. Augustin*, 661 F.3d 1105, 1110 (11th Cir. 2011).

90 *Id.* at 1111.

91 Grant, *supra* note 88.

gested the following about the group's plot:

[The defendants] attempted to obtain the support of al Qaeda to achieve their goals and discussed this desire with an individual cooperating with law enforcement who posed as a member of al Qaeda. Believing they were dealing with that terrorist group, in March 2006, Batiste and other defendants pledged an oath of allegiance to al Qaeda and supported a plan to destroy FBI buildings in the United States by taking photos of the FBI Building in North Miami Beach, Florida, and other federal buildings in Miami-Dade County.⁹²

2. *Treatment of Holder v. Humanitarian Law Project*

In *United States v. Augustin*, the Eleventh Circuit acknowledged that the evidence supporting the defendants' convictions under sections 2339A and 2339B was "far from overwhelming" but held that it was impossible to say that the jury was "unreasonable" in concluding beyond a reasonable doubt that the defendants had violated the material support statutes.⁹³ On appeal, the five convicted defendants had argued that, based on the Supreme Court's opinion in *Holder v. Humanitarian Law Project*, "the photographing of the federal buildings from publicly accessible vantage points does not constitute material support."⁹⁴ According to the defendants, *Humanitarian Law Project* "explained that § 2339B barred only speech imparting a specialized skill or communicating specialized knowledge," a distinction that they asserted "should also be applied to conduct, such that the unskilled conduct of taking photos of federal buildings from vantage points accessible to the public should not constitute material support under § 2339B."⁹⁵ The *Augustin* court rejected this interpretation of *Humanitarian Law Project*, instead holding that the "conduct triggering coverage" in *Humanitarian Law Project* was speech, unlike the conduct carried out by the Liberty City Seven, and therefore merited more rigorous scrutiny.⁹⁶ The *Augustin* court further explained that, in contrast to the circumstances in *Humanitarian Law Project*, the defendants' violation of the material support statute "turns on what they did, rather than what they said."⁹⁷ While the court conceded that the photographs themselves "would not actually have been material in furthering the proposed plot to attack the federal buildings," the fact that the defendants had volunteered their services to al Qaeda "was sufficient for a jury to deem it material support in the form of personnel."⁹⁸

The *Augustin* court's use of *Humanitarian Law Project* elucidated the latter case's implications for prosecuting individuals that have allegedly materially supported terrorists or a terrorist organization by providing "unskilled conduct" such as taking photographs. That is, the *Augustin* opinion first recognized that *Humanitarian Law Project* differentiated between unlawful speech that "imparts a 'specific

92 Jim Kouri, *Liberty City Six al Qaeda Cell Convicted for Conspiracy to Kill Americans*, EXAMINER.COM (May 19, 2009), <http://www.examiner.com/law-enforcement-in-national/liberty-city-six-al-qaeda-cell-convicted-for-conspiracy-to-kill-americans>.

93 661 F.3d at 1122.

94 *Id.* at 1120.

95 *Id.*

96 *Id.* (quoting *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010)).

97 *Id.*

98 *Id.*

skill’ or communicates advice derived from ‘specialized knowledge’” and lawful speech that “imparts only general or unspecialized knowledge,” and then proclaimed that such differentiation does not apply to nonspeech conduct. Thus, in the Eleventh Circuit (and perhaps elsewhere), actions that require no training – including tasks as menial as snapping a photograph – can violate the material support statutes if the individuals that commit those actions believe that they are working in concert with terrorists or a terrorist organization.

V. TWO OPPOSING MOTIONS IN THE MEHANNA TRIAL

Tarek Mehanna, the aforementioned Massachusetts resident who was alternately characterized as an American exercising his constitutional rights and a devotee of Osama bin Laden, was indicted on June 17, 2010.⁹⁹ His alleged offenses included conspiring to provide material support or resources to al Qaeda in violation of 18 U.S.C. § 2339B and conspiring to provide material support to terrorists in violation of 18 U.S.C. § 2339A.¹⁰⁰ Among the most controversial “overt acts” alleged by the government were Mehanna’s translations of videos and publications. For instance, the twenty-first “overt act” allegedly committed in furtherance of Mehanna’s conspiracy to violate 18 U.S.C. § 2339B is worded in the following way:

On or about April 1, 2006, MEHANNA completed translation of 39 Ways to Serve and Participate in Jihad, which was intended to incite people to engage in violent jihad.¹⁰¹

Likewise, the nineteenth “overt act” allegedly committed in furtherance of Mehanna’s conspiracy to violate 18 U.S.C. § 2339A is worded in the following way:

On or about February 7, 2006, MEHANNA sent via the internet to A (whose true name is known to the Grand Jury) a video entitled the “Expedition of Umar Hadid,” also referred to as “Ghazwah Umar Hadeed” or “GUH.” MEHANNA described Umar Hadid as a terrorist leader in Fallujah, Iraq, who was associated with Abu Musab al-Zarqawi, the leader of al Qaeda in Iraq. The GUH video is captioned “released by al Qaidah Network in the land of the Two Rivers [Iraq]” “Media Wing,” and contains, among other things, combat footage from Iraq and footage of Musab al-Zarqawi speaking in the beginning of the video and Usama bin Laden at the end of the video, that is over an hour long. On February 7, 2006, MEHANNA told A that he [MEHANNA] had help prepare and translate the video he was sending: “it’s the Umar Hadid vid[eo] . . . but w/ added clips . . . and its transed [translated] into English . . . by yours truly.”¹⁰²

On August 18, 2011, Mehanna’s attorneys filed a pre-trial motion to dismiss three counts of the indictment because “18 U.S.C. § 2339A and 18 U.S.C. § 2339B [were] unconstitutionally vague

99 Second Superseding Indictment at 1, United States v. Mehanna, No. 09-CR-10017-GAO (D. Mass. June 17, 2010), 2010 WL 2516469.

100 See *id.*

101 *Id.* at 8.

102 *Id.* at 15-16.

and overbroad, both on their face and as applied to the defendant.”¹⁰³ The attorneys argued that the statutes were vague because they “do not put individuals on notice that if they encourage jihad in the abstract or they translate jihadi material, whether or not they are acting in coordination with terrorists or a terrorist organization, they are committing the crime of providing material support to terrorists or to a terrorist organization.”¹⁰⁴ To support this line of reasoning, Mehanna’s attorneys pointed to *Humanitarian Law Project*’s oft-cited distinction between “concerted activity” and “independent advocacy,” as well as the government’s concession that Mehanna never acted under the direction or control of al Qaeda.¹⁰⁵ To support their overbreadth claim, Mehanna’s attorneys also cited *Humanitarian Law Project*, specifically the majority opinion’s acknowledgment that upholding the constitutionality of the material support statutes in the case did not imply that “any future applications of the material-support statute to speech or advocacy [would] survive First Amendment scrutiny.”¹⁰⁶ Employing *Humanitarian Law Project*’s cautionary statement, the attorneys asserted that the material support statutes, as applied to Tarek Mehanna, were overbroad and infringed upon First Amendment rights because they “almost completely prohibit[ed] independent advocacy for Al-Qaeda and distribution of information about Al-Qaeda causes.”¹⁰⁷

In response, the government filed a pre-trial motion opposing the defendant’s motion to dismiss three counts of the indictment on September 2, 2011.¹⁰⁸ Like the defense, the government employed *Holder v. Humanitarian Law Project* to buttress its arguments. To counter Mehanna’s vagueness claim, the government pointed out that *Humanitarian Law Project* specifically provided that section 2339B was not unconstitutionally vague and, in fact, “place[d] people of ordinary intelligence on notice as to what is prohibited.”¹⁰⁹ With regard to Mehanna’s activities, the government put forth that a reasonable person of ordinary intelligence “would recognize that agreeing and attempting to translate, digitally edit, and disseminate specific media for the purpose of supporting terrorists and terrorist organizations constituted the provision of ‘services,’ ‘expert advice and assistance,’ as well as ‘personnel.’”¹¹⁰ To counter Mehanna’s overbreadth claim, the government noted that *Humanitarian Law Project* held that the First Amendment rights of individuals are not undermined by the material support statutes because American citizens “may say anything they wish on any topic,”¹¹¹ and, in Mehanna’s case, the “types of material support that the indictment allege[d] the defendant furnished – property, services, currency and monetary instruments, training, expert advice and assistance,

103 Defendant’s Memorandum of Law in Support of His Motion to Dismiss Counts One Through Three Based on Vagueness and Overbreadth at 1, *United States v. Mehanna*, No. 09-CR-10017-GAO (D. Mass. Aug. 18, 2011), 2011 WL 3740563.

104 *Id.* at 3.

105 *Id.* at 5.

106 *Id.* at 16 (citing *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010)).

107 *Id.* at 17-18.

108 Government’s Opposition to Defendant’s Motion to Dismiss Counts One through Three of the Second Superseding Indictment Based on Overbreadth and Vagueness at 1, *United States v. Mehanna*, No. 09 CR 10017 GAO (D. Mass. Sept. 2, 2011), 2011 WL 3959520.

109 *Id.* at 2 (citing *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705).

110 *Id.* at 6.

111 *Id.* at 9 (citing *Holder v. Humanitarian Law Project*, 130 S. Ct. at 2722-23).

facilities and personnel – had only a tangential relationship to speech.”¹¹² Mehanna’s unlawful conduct was not his controversial statements, the government seemed to imply, but the services (such as translating and distributing media) that he provided to al Qaeda.

After weighing these competing claims in a pre-trial status conference on September 7, 2011, Judge George O’Toole denied Tarek Mehanna’s motion to dismiss three counts of his indictment based on overbreadth and vagueness.¹¹³ On December 20, 2011, Mehanna was found guilty on all charges, including the material support to terrorism charges.¹¹⁴ On April 12, 2012, Mehanna was sentenced to 17 ½ years in prison.¹¹⁵

VI. CONCLUSION

A. The Contours of the Material Support Statutes

To get the lay of the legal land as regards the material support to terrorism statutes, this Article has explored the ways that appellate courts have utilized *Holder v. Humanitarian Law Project*. Careful analysis of the five cases surveyed in the preceding pages of this article yields two meaningful insights about the application of 18 U.S.C. § 2339A and § 2339B: (1) there is remarkable consistency among the courts in this context, and (2) there is a relatively precise dividing line between lawful and unlawful activities.

1. Remarkable Consistency

In the aftermath of *Holder v. Humanitarian Law Project*, prosecutions for terrorist material support offenses have been upheld in a remarkably consistent fashion. In nearly every case surveyed, judges examined material support violations while sticking close to the message of *Humanitarian Law Project*. Despite the tangible alarm that has materialized in certain sectors of the legal community, it seems that federal courts have confirmed that they will not uphold convictions of individuals who are guilty of merely voicing their opinions. In Ali Asad Chandia’s case (*United States v. Chandia*), the Fourth Circuit confirmed that knowledge of a group’s connections to terrorism is a necessary condition for an individual to be prosecuted under the material support statutes.¹¹⁶ In Oussama Kassir’s case (*United States v. Mustafa*), the Second Circuit confirmed that providing jihad training and disseminating materials to facilitate jihad training are violations of the material support statute.¹¹⁷ In Rafiq

112 *Id.*

113 See Court Docket, U.S. District Court for the District of Massachusetts (Boston), *Electronic Clerk’s Notes for Proceedings Held Before Judge George A O’Toole*, *United States v. Mehanna*, (D. Mass. 2011), (No. 09-CR-10017) (describing proceedings as a “STATUS CONFERENCE AS TO TAREK MEHANNA HELD ON 9/7/2011. DEFENDANT’S MOTION TO DISMISS FOR VAGUENESS . . . IS DENIED”).

114 Abby Goodnough, *U.S. Citizen is Convicted in Plot to Support Al Qaeda*, N.Y. TIMES, Dec. 20, 2011, available at <http://www.nytimes.com/2011/12/21/us/us-citizen-is-convicted-in-plot-to-aid-al-qaeda.html>.

115 Daniel Lovering, *Massachusetts Man Gets 17-1/2 Years in Prison for Aiding Al Qaeda*, REUTERS (Apr. 12, 2012, 7:59pm EDT), <http://www.reuters.com/article/2012/04/12/us-usa-security-mehanna-idUSBRE83B1O320120412>.

116 *United States v. Chandia*, 395 F. App’x 53, 58-59 (4th Cir. 2010).

117 *United States v. Kassir*, No. S2 04 Cr. 356(JFK), 2008 WL 2653952, at *1 (S.D.N.Y. July 3, 2008).

Sabir's case (*United States v. Farhane*), the Second Circuit confirmed that giving medical assistance to terrorists while working in concert with those terrorists is a violation of the material support statute.¹¹⁸ In Ali Hamza Ahmad Suliman al Bahlul's case (*United States v. al Bahlul*), the United States Court of Military Commission confirmed that speech originating from a member of a terrorist group that is intended to incite others to become terrorists or join terrorist groups qualifies as material support to terrorism.¹¹⁹ In the Liberty City Seven's case (*United States v. Augustin*), the Eleventh Circuit confirmed that basically any service – but not any speech – that is carried out in concert with terrorists is material support to terrorism.¹²⁰

In all of these cases, across all of these circuits, across civil and military jurisdictions, these courts maintained that it is never a crime to merely speak one's mind. These courts heeded the language of the material support statutes, especially subsection (i) of 18 U.S.C. § 2339B, which clarifies that the material support statutes are not allowed to infringe upon the First Amendment and do not apply to acts carried out by individuals who act entirely independently. These courts have also complied with the Supreme Court's ruling in *Holder v. Humanitarian Law Project* that while individuals are free to speak about any topic and are free to even join terrorist groups, they are forbidden from giving assistance to terrorism in almost any form. That is, free speech has remained sacrosanct, but certain methods of supporting terrorism – even some that may appear to be just speech – are against the law.

All of the defendants in the cases surveyed can be distinguished from individuals who exercised their Constitutional rights of free speech and free association. Chandia was convicted because he gave computer access and transportation to one of the leaders of a designated foreign terrorist organization. Kassir was convicted because he trained individuals to commit terrorist acts and was planning to set up a terrorist training camp on American soil. Sabir was convicted because he had joined a terrorist group and planned to help other members of that group carry out terrorist attacks by giving wounded terrorists medical assistance. Al Bahlul was convicted because, among other things, he was a personal assistant to the mastermind behind the September 11th terrorist attacks. Members of the Liberty City Seven were convicted because they swore allegiance to a terrorist group and then took steps to prepare for a terrorist attack. None of these defendants were punished for speaking their minds, joining a particular group, or independently advocating for any causes; they were all convicted because their actions constituted material support per the holding of the Supreme Court in *Holder v. Humanitarian Law Project*.

2. *A Relatively Precise Dividing Line*

Reconciling the five appellate opinions surveyed above is easy because all of the cases draw a perceptible, albeit nuanced, line between legal, constitutionally-protected activities and illegal, criminally-punishable acts. Fears that the material support statutes can be manipulated to proscribe any

118 *United States v. Farhane*, 634 F.3d 127, 141 (2d Cir. 2011).

119 *United States v. al Bahlul*, No. CMCR 09–001, 2011 WL 4916373, at *82 (U.S. Ct. Mil. Comm'n Rev. Sept. 9, 2011).

120 *United States v. Augustin*, 661 F.3d 1105, 1120 (11th Cir. 2011).

action are misguided because individuals can only be prosecuted if they have committed certain acts under a specific set of circumstances. Had Chandia not known that the individual he was providing with transportation and computer access was a terrorist, then he would not have violated the material support statutes. If Kassir had not been planning to wage jihad, he would have been acting within the confines of the law when he visited an Oregon farm and instructed people on how to use firearm silencers and conduct nighttime surveillance. If Sabir had been an emergency room physician who, by chance, happened to give medical assistance to members of al Qaeda, then he would have been innocent of any crimes. When Sabir swore an oath of allegiance to al Qaeda and then made plans to treat wounded al Qaeda fighters so that those fighters would live to terrorize another day, however, he broke the law. Al Bahlul was not convicted for believing in al Qaeda's ideology or even for being an officer of al Qaeda – he was convicted for assisting al Qaeda conduct public relations and producing propaganda aimed to incite people to wage jihad against the United States. Of course the members of the Liberty City Seven could ordinarily take pictures of most anything without breaking the law, but the law forbade them from taking any actions in furtherance of their scheme to blow up federal buildings in Florida. In every case, the material support statutes were violated because a defendant crossed a demarcated line between lawful and proscribed activities.

B. The Progeny of Holder v. Humanitarian Law Project in Context

The September 11th terrorist attacks fundamentally changed both the nature of law enforcement in the United States and the law's perception of the types of activities that constitute threats to national security. Following the previously unimaginable loss of nearly 3,000 American lives in a single day, Congress passed and the President signed the material support statutes to punish those who might assist in the orchestration of future terrorist attacks. In *Holder v. Humanitarian Law Project*, the Supreme Court upheld the constitutionality of those statutes, even though they criminalize countless actions that would be legal but for their connection to terrorism. By forbidding individuals from supporting terrorists, the logic went, terrorists would be less likely to successfully strike again.

In the five cases surveyed in this article, each court went out of its way to uphold the values of the Constitution and draw meaningful distinctions between constitutionally-protected activities and criminally-punishable acts. Under the law, people are still free to say anything they like, but not if their speech knowingly assists terrorists or a terrorist organization. Under the law, people are still free to associate with whomever they please, but if they join a terrorist group, some of their even seemingly harmless actions might constitute material support to terrorism. Michael J. Ellis was right to point out that members of foreign terrorist organizations would be proscribed from taking many different types of actions. Indeed, members of terrorist groups appear to be straitjacketed by the material support statutes. But after 9/11, what else could the United States do but restrict the activities of members of terrorist groups? Irrespective of the answer to that normative question, the fact remains that federal courts appear to have consistently given deference not only to the logic behind the Supreme Court's decision in *Holder v. Humanitarian Law Project*, but also to spirit that was behind the passing of the Patriot Act in 2001.

C. Revisiting the Mehanna Motions

It came as little surprise to anyone that the federal judge presiding over Tarek Mehanna's trial denied the defense counsel's motion to dismiss the material support counts of Mehanna's indictment based on overbreadth and vagueness. After all, the constitutionality of the material support statutes had been definitively upheld by *Holder v. Humanitarian Law Project* and its progeny.¹²¹ Nonetheless, Mehanna's defense attorneys latched onto *Humanitarian Law Project* to support their motion.¹²² Their misplaced citations are evidence that, despite a number of appellate-level decisions that refer to the case and the publication of academic analyses of the majority opinion, *Holder v. Humanitarian Law Project* remains mystifying to some members of the legal community.

121 See *supra* Part IV.

122 See generally Defendant's Memorandum of Law in Support of His Motion to Dismiss Counts One Through Three Based on Vagueness and Overbreadth, *United States v. Mehanna*, No. 09-CR-10017-GAO (D. Mass. Aug. 18, 2011), 2011 WL 3740563.