Mississippi College Law Review

Volume 31
Issue 1 *Vol. 31 Iss. 1*

Article 8

2013

Think before You Speak: Holder v. Humanitarian Law Project - The Terrorists Stole My Freedom of Speech

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Custom Citation
31 Miss. C. L. Rev. 155 (2012-2013)

THINK BEFORE YOU SPEAK: *HOLDER V. HUMANITARIAN LAW PROJECT*—THE TERRORISTS STOLE MY FREEDOM OF SPEECH!

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I. INTRODUCTION

The first decade of the Twenty-First Century brought with it a heightened awareness of global violence. Media outlets flooded the newsstands and television stations with images and videos of extremists engaging in violence. Americans now commonly refer to these persons as terrorists and have labeled their violence as terrorism. Some individuals and groups engage in terrorism for political reasons while others, perhaps, only out of a lust for violence. In response to these groups and their acts, countries vary in their approaches. This Note addresses the American zero-tolerance method of dealing with terrorism. America's chosen response to terrorism—particularly after the attacks of September 11, 2001—likely led Congress to pass 18 U.S.C. § 2339B, which was at issue in the case *Holder v. Humanitarian Law Project.*[1] Section 2339B, among other things, forbids Americans from giving "material support or resources" to any group on the known terrorist list.[2] *Holder* is the United States Supreme Court's opinion that deals with several constitutional challenges to § 2339B.[3] This Note argues that the *Holder* interpretation of § 2339B, which was intended to hamper terrorism, is doing something far more costly—reducing Americans' right to freedom of speech.[4]

Three constitutional issues were raised in *Holder*: arguments that § 2339B violated (1) due process, (2) freedom of speech, and (3) freedom of association.[5] This Note will focus on the First Amendment aspects of *Holder*, with emphasis on freedom of speech.[6] Therefore, other issues raised in *Holder* will be included by summary in Parts I, II, and III, but Parts IV and V will address only the freedom of speech issues. Part II of this Note will provide the facts leading up to litigation over § 2339B, and

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

2. 18 U.S.C. § 2339(B)(a)(1) (2006) (originally enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, §303, 110 Stat. 1250). For an in-depth look at 18 U.S.C. § 2339B, see 184 A.L.R. Fed. 545 (2003).

3. *Holder*, 130 S. Ct. at 2712–13.

4. *Cf.* Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1 (2011).

5. *Holder*, 130 S. Ct. at 2712–13.

6. For analysis of the foreign policy issues in *Holder*, see Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543 (2011).

Part III will provide a summary of the Supreme Court's analysis and holding, including the majority and dissenting opinions. Part IV of this Note will provide a background and overview of First Amendment jurisprudence, and Part V will use the background of case law and the Court's *Holder* opinion to demonstrate how a statute, which was intended to hamper terrorist groups' violence, is having the effect of limiting the freedom of speech rights of American citizens. This Note argues that *Holder* creates a new branch of freedom of speech law, which does not follow existing case law, and also argues that no deviation from existing precedent was needed. This Note will also recommend that the Court reevaluate the decision regarding the constitutionality of § 2339B, or in the alternative that Congress revise § 2339B so that terrorism can be combated in another way, without sacrificing the most fundamental of individual rights—the freedom of speech.[7]

II. FACTS

The statute at issue in *Holder*, § 2339B, in part, makes it a federal crime to "'knowingly provid[e] material support or resources to a foreign terrorist organization.'"[8] Precisely what constitutes "material support or resources" is a large issue in *Holder*. "The authority to designate a [ ] [foreign] entity as a 'terrorist organization' rests with the Secretary of State."[9] An organization who has been labeled a terrorist group may seek review of that designation by the United States Court of Appeals for the District of Columbia within thirty days of its designation.[10]

Under these statutes, in 1997, the Secretary of State designated thirty groups as foreign terrorist organizations, two of which were the Kurdistan Workers' Party or Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).[11] The PKK was founded in 1974 with the goal of establishing an independent Kurdish state in southeast Turkey, while the LTTE, founded in 1976, desired to create an independent Tamil state in Sri Lanka.[12] Both groups engage in political and humanitarian activities; however, in the court below, the government presented evidence that both groups have committed numerous terrorist attacks, some of which harmed American citizens.[13] The LTTE challenged its designation

7. For more on the purpose behind § 2339B, see Adam Tomkins, *Criminalizing Support for Terrorism: A Comparative Perspective*, 6 DUKE J. CONST. L. & PUB. POL'Y 81 (2010).

8. *Holder*, 130 S. Ct. at 2712–13.

9. *Id.* at 2713 (citing 8 U.S.C. § 1189(a)(1)-(d)(4) (2006)). For cases discussing the constitutionality of this designation procedure, see United States v. Rahman, 209 F. Supp. 2d 1045 (C.D. Cal. 2002); People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17 (D.C. Cir. 1999); Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001).

10. *Id.* (citing § 1189(c)(1)).

11. *Id.*

12. *Id.*

13. *Id.*

as a terrorist organization,[14] but the designation was upheld by the D.C. Circuit.[15]

After the designations of the PKK and LTTE as terrorist organizations, the Humanitarian Law Project (HLP), along with two U.S. Citizens and six other domestic organizations,[16] filed suit challenging the constitutionality of § 2339B because the HLP wished to provide monetary contributions, legal training, political advocacy, and other tangible aid in support of the humanitarian and political activities of the PKK and LTTE but could not for fear of criminal prosecution under § 2339B.[17] At the time this suit was originally filed, violation of § 2339B carried a criminal punishment of up to ten years in prison and a possible fine; at that time, § 2339A(b) defined "material support or resources" "as currency or other financial securities, financial services, lodging, training, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, [*with the*] *except*[*ion of*] *medicine* [*and*] *religious materials*."[18]

The HLP challenged the statute as unconstitutionally vague and as a violation of their rights of freedom of speech and freedom of association.[19] The district court agreed with the HLP's vagueness claims but rejected the freedom of speech and association claims.[20] The Ninth Circuit affirmed the district court's decision.[21] Congress amended the definition of "material support or resources" in 2001 to include "expert advice or assistance."[22] The HLP filed a second action challenging the constitutionality of the statute as amended.[23] "In [this] action, the [d]istrict [c]ourt held that the term 'expert advice or assistance' was impermissibly vague" but again rejected the First Amendment claims.[24]

While the appeal of the second action was pending, Congress again amended the statute.[25] In the amendments, Congress clarified the mental

14. PKK did not challenge its designation.

15. *Holder*, 130 S. Ct. at 2713.

16. The Plaintiffs will be collectively referred to as the HLP hereafter but actually are the Humanitarian Law Project, Ralph Fertig, Nagalingam Jeyalingam, and five other nonprofit groups.

17. *Holder*, 130 S. Ct. at 2714.

18. *Id.* n.2.

19. *Id.* at 2714.

20. *Id.*

21. *Id.*

22. 18 U.S.C. § 2339A(b)(1)(2009).

23. *Holder*, 130 S. Ct. at 2714-15.

24. *Id.* at 2715.

25. *Id.* (amended by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §6603, 118 Stat. 3762 (2004)).

state necessary to violate § 2339B,[26] added the term "service" to the definition of "material support or resources,"[27] defined "training,"[28] defined "expert advice or assistance,"[29] but most importantly, clarified the scope of "personnel" by adding:

> No person may be prosecuted under [§ 2339B] 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.[30]

In light of this new legislation, the Ninth Circuit affirmed the rejection of the HLP's First Amendment claims, vacated their earlier judgment with respect to the vagueness of the statute, and remanded to the district court.[31] The district court consolidated both of the HLP's cases and again decided the case based upon vagueness.[32] On review of this decision, the Ninth Circuit affirmed, rejecting the HLP's First Amendment claims, but held that the statutory terms "training," "expert advice or assistance," and "service" were unconstitutionally vague.[33]

After twelve years of litigation in the Ninth Circuit, the Supreme Court granted both the Government and the HLP's petitions for certiorari.[34] The Court accepted the HLP's petition challenging the statute's definition of "material support" using terms: "training," "expert advice or assistance," "service," and "personnel," claiming that each was unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause and also that each violated the First Amendment freedom of speech and freedom of association.[35]

The HLP provided support to the PKK and LTTE before the enactment of the statute and claimed that they would like to continue to provide

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26. § 2339B was amended to require knowledge of the foreign group's designation as a terrorist organization or the group's commission of a terrorist act. This amendment will be used by the majority to support their interpretation of the statute's mental intent requirement. *See infra* Part III.A.2.

27. § 2339A(b)(1).

28. § 2339A(b)(2) defined "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge."

29. § 2339A(b)(3) defined "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge."

30. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2715 (2010) (quoting § 2339B(h)).

31. *Id.*

32. *Id.* at 2715–16.

33. *Id.* at 2716.

34. *Id.*

35. *Id.*

similar support but could not for fear of criminal prosecution.[36] The type of "support" activities in question are: (1) training the PKK to use international law to peacefully resolve disputes; (2) political advocacy on behalf of the Kurds in Turkey; (3) teaching the PKK how to petition the United Nations and other bodies for relief; (4) providing legal expertise in order to negotiate peace agreements between the LTTE and Sri Lanka; and (5) advocating politically on behalf of the Tamils in Sri Lanka.[37]

III. INSTANT CASE

A. Majority Opinion

The majority opinion in *Holder* decided most of the issues that the parties' raised. This Part will summarily address many of the issues that the majority analyzed while providing a more in-depth recitation of the major constitutional issues. This Part will also explain the majority's decisions on justiciability and statutory interpretation which had to be determined before the majority could reach the constitutional issues. After discussing the preliminary issues that the Court decided, this Part will explain the majority's holding on the issues of vagueness, freedom of speech, and freedom of association.

1. Justiciability Under Article III

Chief Justice Roberts began the majority opinion by considering whether the HLP presented a justiciable case under Article III.[38] In a declaratory action where, as here, a party was seeking pre-enforcement review of a criminal statute, the Court decided that an Article III analysis was warranted to determine if there was a case or controversy.[39] After briefly considering the justiciability issue, the Court concluded that there was a justiciable case under Article III because the HLP "face[d] a 'credible threat of prosecution' and 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' "[40]

2. Section 2339B's Mental Intent Requirement

The HLP's first substantive argument was that the Court should affirm the Ninth Circuit without reaching any issues of constitutional law by interpreting the "material-support statute" to require proof that a defendant had intent to further a foreign terrorist organization's illegal activity.[41] This would have seemingly ended any litigation because the HLP claimed

36. *Id.* at 2717.
37. *Id.* at 2716.
38. *Id.* at 2717.
39. *Id.*
40. *Id.* (quoting Babbit v. Farm Workers, 442 U.S. 289, 298 (1979)).
41. *Id.*

that they did not have this intent.[42] The Court, however, summarily rejected this interpretation of the statute because § 2339B has an unambiguous mental state requirement which only requires knowledge of a foreign terrorist group's designation as such; the statute does not require intent to further illegal terrorism.[43] Sections 2339A and 2339C, which immediately surround § 2339B, *do* explicitly require the HLP's suggested mental state, and the Court reasoned that this made it clear that Congress did not choose to use the same mental state requirement for § 2339B.[44]

The HLP relied heavily on *Scales v. United States*,[45] in which the Court held that a defendant could not be convicted under the Smith Act[46] unless that defendant possessed knowledge of a group's illegal activity and had a specific intent to further the group's illegal activity.[47] The Court, however, readily distinguished *Scales* because the statute that *Scales* was decided under is different than the "material-support statute" in question here—the Smith Act in *Scales* required specific mental intent, while § 2339B does not.[48] The Court also recognized that § 2339B does not criminalize membership in a designated terrorist organization, but it does criminalize providing material support to that organization.[49]

3. Challenge on Due Process Grounds

The Court next considered the HLP's challenge to the statute based upon vagueness in violation of the Fifth Amendment's Due Process Clause.[50] The traditional vagueness rule is that " '[a] 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.' "[51] The Court began its Due Process analysis by recognizing that the Ninth Circuit incorrectly applied the principles by merging the vagueness and First Amendment claims and considering the statute based upon facts not before the court.[52] The Ninth Circuit incorrectly considered various hypothetical situations, one being if the HLP wanted to file an amicus curiae brief on behalf of a foreign terrorist group; this analysis by the Ninth Circuit contravened the long-standing rule that a party's

42. *Id.*

43. *Id.*

44. *Id.* at 2717–18.

45. 367 U.S. 203 (1961) (discussed more *infra* Part IV).

46. 18 U.S.C. § 2385 (2006).

47. *Holder*, 130 S. Ct. at 2718. The Smith Act made criminal any individual citizen's knowing membership or involvement with a group that had plans to overthrow the government. 18 U.S.C. § 2385.

48. *Holder*, 130 S. Ct. at 2718.

49. *Id.*

50. *Id.*

51. *Id.* (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).

52. *Id.* at 2719.

vagueness claim must apply to their own conduct and not the hypothetical conduct of others.[53]

The Court held that the proper inquiry was not whether the material support statute grants too much enforcement discretion to the government—a claim not alleged by the HLP—but only whether the statute adequately provides notice of the prohibited conduct.[54] The Court noted initially that the material support statute uses different terms than any statute that the Court has struck down for vagueness in the past, and that Congress has narrowed the definitions in the statute over time to further clarify the terms used.[55] The Court considered it dispositive of the vagueness issue that although in some hypothetical situation the terms of the statute might be unclear, as applied to the HLP, the terms were clear because most of the HLP's proposed conduct fell directly under the statute.[56]

The HLP's only proposed activity which was not hypothetical in nature was advocating politically on the Kurds' behalf in Turkey and for the Tamils in Sri Lanka.[57] The Court, however, held that this conduct was not prohibited by the statute as it fell under the "independent advocacy" exception to § 2339B(h) because the HLP would not be acting "in coordination with, or at the direction of, a foreign terrorist organization."[58] The Court further held that a person of ordinary intelligence could understand the difference between acting independently of and acting at the direction of another.[59] The Court chose not to address the HLP's final contention that the statute's construction makes it difficult to know exactly how much coordination would be necessary to constitute "acting in direction of" because the answer would require "sheer speculation" in which the Court was unwilling to engage.[60]

4. Challenge on First Amendment Freedom of Speech Grounds

The Court began its analysis of the HLP's Freedom of Speech contentions by noting that Congress has not banned the HLP's pure political speech, that the HLP are entitled to speak and write freely about the PKK and LTTE, and that the HLP may advocate independently before the United Nations because Congress has only prohibited "material-support," which usually does not take the form of speech.[61] The Court also rejected the Government's argument—that § 2339B prohibits only conduct and not speech—by noting that speech might easily be considered material support under § 2339B depending on what the HLP said.[62] If the HLP's speech

53. *Id.* (citing Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)).
54. *Id.* (citing *Williams*, 553 U.S. at 304).
55. *Id.* at 2720.
56. *Id.*
57. *Id.* at 2721.
58. *Id.* at 2722.
59. *Id.*
60. *Id.*
61. *Id.* at 2723.
62. *Id.* at 2723–24.

"imparts a 'specific skill' or [is communication] derived from 'specialized knowledge,' " then it would violate § 2339B; therefore, the HLP's proposed conduct—training in international law and providing advice on petitioning the United Nations—are both barred by the statute.[63] But, the Court noted, if the HLP's speech pertains only to general or unspecialized knowledge, then it is not barred.[64]

The Court also decided that the statute barred more than just conduct, requiring a more stringent constitutional test than intermediate scrutiny entails.[65] The Court, having already decided that the HLP's proposed conduct would be considered material support, next considered the Government's interest in combating terrorism by addressing the HLP's contention that their proposed conduct would advance the legitimate, humanitarian activities of the terrorist groups, but not their terrorism.[66] In deciding this issue, the Court relied on Congress's findings supporting § 2339B which provide that terrorist groups "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[67] The Court held that Congress's intent in § 301(a)(7) was clear because Congress had removed an exception from the statute which previously allowed "material support in the form of 'humanitarian assistance to persons not directly involved in' terrorist activity," which demonstrated that Congress rejected the view that peaceful and humanitarian aid would not have harmful effects.[68]

The Court elaborated on this point by describing the many known terrorist attacks that the PKK and LTTE were responsible for and by describing many hypothetical situations in which support given for peaceful and humanitarian purposes could end up aiding a terrorist group's violent acts.[69] The Court held that terrorist groups do not maintain "financial firewalls" to separate funding or support received for nonviolent activities and support received for violent activities, and the Court also held that this view was supported by both the Executive Branch and Congress.[70] In conclusion, the Court held that § 2339B, when applied to the HLP's proposed conduct, does not violate the HLP members' freedom of speech.[71]

5. Challenge on First Amendment Freedom of Association Grounds

The Court readily affirmed the Ninth Circuit's rejection of the HLP's claim on freedom of association grounds because, as the Ninth Circuit held, members of the HLP are free to become members of the PKK or LTTE and may even vigorously support and promote "the political goals of the

63. *Id.* at 2724.
64. *Id.* at 2724.
65. *Id.* (citing United States v. O'Brien, 391 U.S. 367 (1968)).
66. *Id.*
67. *Id.* (quoting § 301(a)(7)).
68. *Id.* at 2725 (quoting § 2339A(a) (1994 ed.).
69. *Id.* at 2725–30.
70. *Id.* at 2725–26.
71. *Id.* at 2730.

group[s,]" as long as no "material-support" is given.[72] The HLP's secondary argument—that their freedom of association was burdened because they could not provide material support to foreign terrorist organizations but could to other groups—was also summarily rejected by the Court because "Congress is not required to ban material support to every group or none at all."[73]

6. Summary of the Majority Opinion

In regards to the types of support that the HLP specified that they wished to give to the PKK and LTTE, Congress's limitation of their speech and conduct through the statute was consistent with the First and Fifth Amendments; the Ninth Circuit's judgment was affirmed in part, reversed in part, and remanded for further proceedings.[74] Specifically, the Ninth Circuit's decision on the First Amendment freedom of speech and association issues were affirmed, the Ninth Circuit's decision on vagueness in violation of due process was reversed, and the case was remanded for further proceedings consistent with the Supreme Court's directives.[75]

B. Dissenting Opinion

The dissenting opinion, authored by Justice Breyer and joined by Justices Ginsburg and Sotomayor, begins by agreeing with the majority as to the statute's vagueness but disagreeing with the majority's holding "that the Constitution [would] permit the Government to prosecute the HLP "for engaging in coordinated teaching and advocacy furthering the designated organizations' lawful political objectives."[76] The dissent's position is that all of the HLP's proposed activities are the type that the First Amendment ordinarily protects.[77]

The dissenters' argument is that all of the HLP's proposed activities involve the communication and advocacy of political ideas and lawful means of achieving political ends—the type of speech and association which the First Amendment offers the strongest protection.[78] "Coordination" with a foreign terrorist group should not deprive the HLP of First Amendment protection because "the First Amendment protects advocacy even of unlawful action so long as the advocacy is not 'directed to inciting or producing imminent lawless action . . . likely to incite or produce such action.' "[79]

The dissent advanced the view that international terrorism, even though serious and possibly deadly, should not require automatic forfeiture of First Amendment rights, and that any statute which abridges First

72. *Id.* (citing Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133 (9th Cir. 2000)).
73. *Id.* at 2731.
74. *Id.*
75. *Id.*
76. *Id.* (Breyer, J., dissenting).
77. *Id.* at 2732.
78. *Id.*
79. *Id.* at 2733 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

Amendment rights should be subject to strict scrutiny, not the loose "more demanding" standard used by the majority.[80] The dissent argued that the statute, as the Government interprets it, should not survive any applicable First Amendment standard of review because the Government's compelling interest—protecting the security of the United States from foreign terrorist organizations—is not furthered by the statute's criminal prohibition of the HLP's proposed activities.[81] The dissent would have rejected the Government's argument that the HLP's support for the PKK and LTTE is fungible because there is no obvious way in which political advocacy and peaceful teaching would further a terrorist group's violent ends.[82]

The dissent also discounted the Government's argument that the HLP's proposed activities would bolster the terrorist organization's legitimacy and impede the Government's effort to weaken foreign terrorist groups because the Government does not forbid all speech which might legitimize a terrorist group.[83] Speech, association, and related activities done on behalf of a terrorist group could have a legitimizing effect even if not done "in coordination with" a terrorist group.[84] This is inconsistent with prior case law in as much as the First Amendment has always protected an American's right to belong to any political party, regardless of any legitimating effect that their membership might have, as long as the citizen did not participate in the party's illegal purposes.[85] The dissent also disagreed with the Court that teaching the PKK and LTTE about the international legal system is too dangerous.[86]

1. The Majority's Deferral to Congress's Judgment

The dissent did not agree with the Court's deferral to Congress's "informed judgment" regarding the legality of the HLP's proposed actions because the "judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution."[87] While the Government may possess expertise in foreign affairs and foreign relations, it is still the Court's role to determine whether the Government has criminalized First Amendment protected activity; in this inquiry neither the Government nor the Court pointed to any non-speculative facts showing that the HLP's speech-related activities would advance the PKK's or LTTE's unlawful interests.[88]

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80. *Id.* at 2733–34.

81. *Id.* at 2734.

82. *Id.* at 2735.

83. *Id.* at 2736.

84. *Id.*

85. *Id.* at 2736–37 (citing Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961)).

86. *Id.* at 2738.

87. *Id.* at 2739 (quoting Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 844 (1978)).

88. *Id.*

2. Avoiding the Constitutional Issue

The dissent also argued that the statute should be construed to preclude the constitutional issue by inferring into the statute a mental intent requirement whereby defendants must know or intend for their activity to assist the terrorist group's unlawful terrorist actions.[89] This construction of the statute would allow criminal punishment only when defendants are aware of or willfully blind themselves to a significant likelihood that their conduct will materially support a foreign organization's terrorist conduct.[90] This construction of the statute is consistent with § 2339B(a)(1)'s "knowingly provides" text and would allow those engaged in pure speech and association to be protected by the First Amendment while criminally punishing those who purposefully aid terrorism.[91] The dissent's construction of the statute would require a defendant to know or intend (1) to provide support/resources, (2) to possess knowledge that the group is a foreign terrorist organization, (3) to possess knowledge that the support is material, and (4) to possess knowledge that the support is significantly likely to further terrorism.[92] However, the more stringent mental intent would not be required when "material support" took the form of "currency," "financial services," or any of the other specifically prohibited items listed in § 2339A(b)(1) because these types of aid are "fungible" and thus more likely to actually support violence.[93] The dissent argued that the statute's history supported this interpretation[94] and is demanded by the principle of constitutional avoidance, which requires the Court to "'read the statute to eliminate' [the] constitutional 'doub[t] so long as such a reading is not plainly contrary to the intent of Congress.'"[95]

3. The Dissent's Conclusion

Having construed the statute to require a more stringent mental intent, thereby avoiding the constitutional issue, the dissent would have remanded the case for the lower court to further consider the HLP's proposed activities and to determine if the HLP was entitled to injunctive relief.[96] The dissent argued that the majority failed to examine the Government's justifications for the statute with enough care, failed to ask for specific evidence, and failed to require tailoring of the statute to fit only specific ends.[97]

89. *Id.* at 2740.

90. *Id.*

91. *Id.*

92. *Id.* at 2740–41.

93. *Id.* at 2741.

94. *See* H.R. REP. NO. 104-383 (1995); 142 CONG. REC. S3354 (1996).

95. *Holder*, 130 S. Ct. at 2742 (Breyer, J., dissenting) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994)).

96. *Id.*

97. *Id.* at 2743.

IV. HISTORY OF THE LAW

Historically, the First Amendment has provided very broad protection of speech. Specifically, it has long been the view of the Supreme Court that the First Amendment's protections were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[98] Moreover, there is long-standing case law that the First Amendment protects any group's right to openly disagree and protest conditions of government or government policy and that any government attempt to punish or limit citizens' rights to protest or advocate for changes cannot comport with the First Amendment.[99] Indeed, "[t]he maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system."[100]

As early as 1938, the Court struck down—on First Amendment grounds—a city ordinance which required persons to get a license to distribute leaflets or pamphlets, holding that the free expression of ideas was an "essential liberty."[101] This essential liberty even went as far as protecting "vigorous advocacy" of unpopular causes from government intrusion.[102]

General categories of judicial review have since developed that courts use whenever enacted laws or policies implicate First Amendment issues. These judicially created levels of scrutiny are especially important to analyze the *Holder* majority's chosen level of scrutiny because, as Part V will argue, there is a serious issue concerning the majority's chosen level of review. This Part will set out the historical levels of scrutiny used by the Supreme Court to review statutes restricting the freedom of speech, and Part V will argue that the majority should have applied strict scrutiny to § 2339B in *Holder*. This Part will also argue that, notwithstanding the majority's decision not to apply strict scrutiny, the majority incorrectly applied the more rigorous scrutiny standard.

A. Intermediate Scrutiny

United States v. O'Brien concerned a First Amendment challenge to O'Brien's criminal conviction for publicly burning his military draft card at a protest.[103] In *O'Brien*, the Court coined what has since been called the "intermediate scrutiny" test under the First Amendment, which is appropriate when a statute criminalizes speech-related *conduct* as opposed to the actual speech.[104] Under intermediate scrutiny, the First Amendment is not violated when there is a substantial government interest, the government

98. Roth v. United States, 354 U.S. 476, 484 (1957).

99. *See* Edwards v. South Carolina, 372 U.S. 229 (1963).

100. Stromberg v. California, 283 U.S. 359, 369 (1931).

101. *See* Lovell v. Griffin, 303 U.S. 444, 452 (1938).

102. NAACP v. Button, 371 U.S. 415, 429 (1963) (citing Thomas v. Collins, 323 U.S. 516, 537 (1945); Herndon v. Lowry, 301 U.S. 242, 259–64 (1937)).

103. 391 U.S. 367 (1968).

104. *Id.* at 377.

used a narrow means to protect that interest, and only non-communicative conduct is prohibited.[105] The Court later succinctly defined the intermediate scrutiny analysis as a "regulation [that] will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[106] When conduct (instead of pure speech) is involved, it must first be determined whether the conduct was expressive or communicative; then it must be determined whether the regulation/law in question is related to the suppression of that expression.[107] If the regulation/law is not related to expression, then the intermediate scrutiny analysis from *O'Brien* for the regulation of non-communicative conduct will control. But if the regulation/law is related to expression, then a heightened standard applies.[108]

B. More Rigorous Scrutiny

After *O'Brien*, *Cohen v. California* marked the emergence of a more rigorous scrutiny, as *Cohen* involved a state punishing the more communicative aspects of conduct, namely, the defendant Cohen being convicted of disturbing the peace when he wore a jacket with some obscene language written on it that described Cohen's personal disapproval of the military draft.[109] However, as the Court noted, the words on Cohen's jacket were not directed to insult any individuals, nor were they intended to arouse any violence; so the greatest interest that the state had in prohibiting Cohen's conduct was the protecting of unwilling viewers from Cohen's choice language.[110] As this state interest did not fall within the traditional categories of exceptions to First Amendment protection, the Court held that it was insufficient and thus not able to survive the heightened scrutiny, which resulted in Cohen's conviction being reversed.[111] More rigorous scrutiny, falling between intermediate and strict scrutiny, requires a more compelling, more defined government interest than intermediate scrutiny, while also requiring that the law serving that interest be narrowly tailored to achieve only that interest.[112]

C. Strict Scrutiny

In *Texas v. Johnson*, the Court had to decide whether to apply *O'Brien*'s intermediate scrutiny test or a stricter scrutiny test to a Texas statute which criminalized desecrating a flag.[113] After considering the defendant Johnson's action of burning a flag, the Court decided that a person

105. *Id.* at 381–82.
106. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) (citing *O'Brien*, 391 U.S. at 377).
107. Texas v. Johnson, 491 U.S. 397, 403 (1989).
108. *Id.*
109. 403 U.S. 15, 16 (1971).
110. *Id.* at 20–21.
111. *Id.* at 26.
112. *See id.* at 17–19.
113. *Johnson*, 491 U.S. at 399.

only burns a flag as a means of communication, thus *O'Brien* would not apply.[114] Moreover, the Court held that because Johnson's act of burning a flag was a means of political expression and was prohibited based upon the content of the communication, the statute prohibiting it had to be subjected to the "most exacting scrutiny."[115] Content-based prohibitions occur when communication is prohibited depending solely on the substance of the communication, and because this category of regulation draws closely to the government telling citizens what they can and cannot do or say, these regulations must pass the highest level of scrutiny.[116] So, applying strict scrutiny, the communicative conduct of burning a flag was held to be protected by the First Amendment freedom of speech because the state had no interest sufficient to support Johnson's conviction and deprive Johnson of his freedom of speech.[117]

In a recent case, *Citizens United v. Federal Election Commission*, the Court decided that a federal law which prohibited corporations and unions from using their general treasury funds to make contributions for candidates' political speeches did not pass the strict scrutiny analysis that is used whenever a statute encumbers political speech.[118] The Court concluded that "[t]he First Amendment stands against attempts to disfavor certain subjects or viewpoints."[119] The Court did note that exceptions to the First Amendment's general protection of political speech have been made when the speech in question was held to interfere with government functions, stating that "these precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech."[120] But the Court went on to conclude that "[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens . . . for simply engaging in political speech."[121]

In *Citizens United*, the Court held that strict scrutiny analysis "require[d] the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' "[122] The Court has also stated that strict scrutiny requires "a narrowly tailored means of serving a compelling [governmental] interest."[123]

114. *Id.* at 410 (noting that *O'Brien*'s test concerned non-communicative conduct, thus Johnson's conduct was outside the scope of *O'Brien*'s test).

115. *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

116. *Id.* (citing *Boos*, 485 U.S. at 321).

117. *Id.* at 420.

118. 130 S. Ct. 876, 898 (2010) (citing FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

119. *Id.*

120. *Id.* at 899.

121. *Id.* at 904.

122. *Id.* at 898 (quoting *Wis. Right to Life, Inc.*, 551 U.S. at 464).

123. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 535–44 (1980) (holding a statute which prohibited an electric company from including political leaflet material along with their customers' bills unconstitutional under strict scrutiny review because it was a State suppression of political communication).

D. *Summary of the Scrutiny Tests*

When a statute contains language that may impinge upon First Amendment freedom of speech protections, one of the scrutiny tests will apply when courts review it for constitutional purposes.[124] The higher the level of scrutiny, the more justification must be provided by the government to support the statute.[125] The level of scrutiny the court will use when reviewing the statute, for First Amendment purposes, depends upon what type of communication is being burdened or regulated by the statute.[126] The easiest form of scrutiny for a statute to pass is intermediate scrutiny, followed by more rigorous scrutiny, and ending with strict scrutiny being the most difficult type of review for a statute to withstand.[127] Intermediate scrutiny applies to statutes that regulate conduct—but only when that conduct is not being used as a form of communication.[128] The Court has applied more rigorous scrutiny in the past when communicative conduct was being restricted.[129] The freedom of speech, being an essential liberty, statutes restricting most other forms of communication, especially political expression and political speech, have traditionally been subject to strict scrutiny.[130] These important historical distinctions in the scrutiny tests provide the basis for Part V of this Note which will argue that the Court's chosen more rigorous level of scrutiny, and its application, do not fall within the established boundaries of the scrutiny tests.

E. *Breadth of the First Amendment's Protections*

The First Amendment's normal broad protections require that "when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."[131] A narrow means of advancing a governmental interest is always required as the First Amendment does not allow broad, sweeping infringements on enumerated individual rights, no matter how strong the government's interest is.[132]

For example, in *Brandenburg v. Ohio*, Ohio had a state law which criminally punished any person who advocated for using crime, violence, or sabotage as a means of instituting industrial or political reform.[133] Ohio's law was one that most would consider as addressing a valid issue and legislative concern but, nonetheless, when the leader of the Ku Klux Klan was

124. *See* United States v. O'Brien, 391 U.S. 367, 375–77 (1968); *see also* Cohen v. California, 403 U.S. 15, 16 (1971); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 535 (1980).
125. *See Consol. Edison Co.*, 447 U.S. at 530–35.
126. *See* Cohen v. California, 403 U.S. 15, 15–17 (1971).
127. *See supra* Part IV.A.–C.
128. *See supra* Part IV.A.
129. *See supra* Part IV.B.
130. *See supra* Part IV.C.
131. United States v. Robel, 389 U.S. 258, 268 (1967) (emphasis in original).
132. *See id.*
133. 395 U.S. 444 (1969).

convicted under this law, the Supreme Court reversed his conviction holding the state law unconstitutional under the First Amendment, reasoning that "we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."[134] *Brandenburg* is one in a line of cases where the Court developed the rule that advocacy—even advocacy or encouragement to engage in unlawful action—cannot be made illegal, consistent with the First Amendment's guarantee of free speech, unless the advocacy is (1) directed to incite lawless actions, (2) the advocacy makes the unlawful action imminent, and (3) the advocacy is likely to produce or incite unlawful action.[135] In other words, the line of cases dealing with advocacy has an intent or purposeful direction requirement, meaning that as long as a person does not direct her advocacy for the purpose of producing imminent unlawful action, her advocacy would be protected under the First Amendment.[136]

But the First Amendment's protections do not stop there. In *De Jonge v. Oregon*, the defendant, a member of the Communist Party, materially helped the Party to organize and conduct a meeting, the purpose of the meeting being to recruit new members, encourage people to defy the authority of the local police, protest local jail conditions, and to participate in certain, other revolutionary tactics.[137] After being criminally convicted under a California law, the Supreme Court reversed the defendant's conviction holding that the defendant had the right, pursuant to the First and Fourteenth Amendments, to peacefully speak and advocate even if the objectives of that speech were in furtherance of the Communist Party.[138]

In *Scales v. United States*, the Court considered First Amendment implications when reviewing the defendant's conviction under the Smith Act, which made it a crime to knowingly be a member of any group or organization which intends to overthrow the government.[139] In *Scales*, the Court upheld the defendant's conviction for membership in the Communist Party because the defendant was knowingly a member of a party whose intent was to overthrow the government; however, the Court noted that a blanket prohibition covering speech or association with any group that has both legal and illegal aims would be questioned under the First Amendment because legitimate political expression might be impaired.[140]

The Court in *Scales* based its decision on the Act's language which only criminally proscribed "active membership" in the Communist Party,

134. *Id.* at 449.

135. *Id.* at 447. *See also* Noto v. United States, 367 U.S. 290 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); Herndon v. Lowry, 301 U.S. 242 (1937).

136. *See id.*

137. 299 U.S. 353, 359 (1937).

138. *Id.* at 365–66.

139. 367 U.S. 203 (1961).

140. *Id.* at 229.

or membership with the specific intent to carry out the organization's unlawful purposes.[141] The only reason the Smith Act passed constitutional muster was because of its intent requirement.[142] The Court has reaffirmed the rule that there must be "specific intent" purposed to bring about illegal action in order for mere membership in an organization to be criminalized consistent with the First Amendment.[143]

F. Exceptions to the First Amendment's Protections

The Supreme Court has consistently held that although the First Amendment generally prevents the government from proscribing speech or expressive conduct, there are certain recognized, limited areas to which the First Amendment protection does not extend.[144] These areas are considered to be small in social value, of little benefit to society, and outweighed by concerns for societal order.[145] They consist of speech such as obscenities and defamation.[146]

Roth v. United States was the first case in which the Court squarely faced the issue of obscenity and the degree of protection obscenity receives under the First Amendment.[147] Holding that obscenities were not protected under the First Amendment, the Court seemed to determine what would be protected by asking whether the expression had "the slightest redeeming social importance"; but the Court also noted that "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection."[148]

Similarly, there is a long-standing rule that libelous speech is never protected by the First Amendment.[149] Because libel was a crime throughout the common law, the Court has had little problem reaffirming the notion that the First Amendment is not a free pass to libel and defame individuals whenever a person so chooses.[150]

G. The Connection Between the First Amendment and National Security

The Court in *United States v. Robel* considered the interplay between the First Amendment's protection of individual liberties and Congress's interest in maintaining national security, but the Court did not find a national

141. *Id.* at 229–230.

142. *See id. See also* Noto v. United States, 367 U.S. 290 (1961) (decided on the same day).

143. *E.g.*, Elfbrandt v. Russell, 384 U.S. 11 (1966).

144. R.A.V. v. St. Paul, 505 U.S. 377 (1992); Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952).

145. *R.A.V.*, 505 U.S. at 382–83.

146. *Id.* (citing *Roth*, 354 U.S. at 476–84; *Beauharnais*, 343 U.S. at 255–57).

147. 354 U.S. 476, 481 (1957).

148. *Id.* at 484.

149. *Beauharnais*, 343 U.S. at 255–57.

150. *See id.* at 254–60.

security exception to the First Amendment and thus required that any legislation affecting a First Amendment right—even adverse to national security—must be "narrowly drawn legislation."[151] Even when interests of national security are at stake, the Court has held that legislation does not comport with First Amendment requirements when other means of achieving the same goal are available which are less restrictive on individual rights.[152] Moreover, no governmental interest—even national security—can ever allow an overbroad or sweeping statute to comport with the First Amendment's protections on individual rights.[153]

Robel concerned the prosecution of the defendant under the Subversive Activities Control Act of 1950 which in part required any member of a Communist Organization to register as such, and the Act also made it a crime for any member of a Communist Organization to work at a defense facility.[154] The defendant, being employed as a machinist at a shipyard in Seattle, Washington, was a registered member of a Communist Organization and when the Secretary of Defense designated that shipyard as a "defense facility," the defendant was prosecuted under the Subversive Activities Control Act.[155]

Initially, the district court avoided declaring the Act unconstitutional by reading into the Act an unwritten requirement of active membership in the Communist group and specific intent to violate the Act.[156] The government, however, was unwilling to accept this reading of the statute and appealed the district court's interpretation and dismissal, which was certified on direct appeal to the Supreme Court.[157]

The Supreme Court chose not to read additional words into the statute to try to save it as the district court did but instead struck it down as being unconstitutional under the First Amendment.[158] While the district court relied on *Scales* to imply into the statute a requirement of specific intent to further the unlawful goals of the Communist Organization in order for a defendant to violate the statute, the Supreme Court held that requiring such an intent would amount to a practical rewriting of the statute.[159] The Supreme Court continued its analysis by noting that even Congress's War Power could not remove constitutional safeguards which serve to protect essential individual liberties, nor could the concept of national defense justify abridging fundamental liberties.[160] While recognizing that the legislature's stated purpose of protecting against sabotage and espionage in the Nation's defense plants was substantial, the Court concluded that the

151. *See* United States v. Robel, 389 U.S. 258, 266–67 (1967). *But cf.* Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2011).

152. *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

153. *See* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 609 (1967).

154. *Robel*, 389 U.S. at 259–60.

155. *Id.* at 260.

156. *Id.* at 261.

157. *Id.*

158. *Id.* at 262.

159. *Id.*

160. *Id.* at 264.

method chosen by Congress invaded the First Amendment's protections.[161] The Court also recognized that the statute was invalid because it did not consider that a person might be a member of a group without being aware of or sharing in the group's unlawful aims.[162]

Overall, the legislature has the task of enacting legislation that is not overbroad and that is narrowly-tailored to achieve its purpose; when the content of legislation impacts areas which the First Amendment has traditionally protected, Congress must choose the means of regulation which have a "less drastic" effect on First Amendment freedoms.[163] When Congress fails in this regard, it is the responsibility of the Court to strike down the statute as offensive to the First Amendment's guarantee of individual freedom.[164]

V. ANALYSIS

A. Introduction

It would be a difficult task to read the Court's decision in *Holder* and reconcile it with the Court's previous freedom of speech decisions. When considering the Court's previous First Amendment cases discussed in Part IV, *Holder* represents a sizeable restraint on individual rights which have long been thought of as protected by the First Amendment. The focus of this analysis is the inability to fit the Court's decision into previous areas of First Amendment case law, the vast inconsistency of *Holder* when compared to previous freedom of speech law, and the unavoidable outcome of punishing innocent Americans along with the terrorists.

B. Finding the Correct Level of Scrutiny

The greatest point of contention between the parties when the Court was deciding the freedom of speech aspects in *Holder* was the level of scrutiny that the Court should use to review the statute.[165] Both the HLP and the government took somewhat extreme positions: the government's position being that only conduct was at issue, while the HLP argued that pure political speech was being prohibited.[166] If the Court had sided with the government on this issue, then the intermediate scrutiny test from *United States v. O'Brien* would have applied.[167] The intermediate scrutiny test would have required only a substantial governmental interest, and a narrow means used to protect that interest in order to pass constitutional muster under the First Amendment.[168]

161. *Id.* at 264–65.
162. *Id.* at 266.
163. *Id.* at 268.
164. *See id.*
165. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2722–25 (2010).
166. *Id.*
167. United States v. O'Brien, 391 U.S. 367 (1968).
168. *Id.* at 381–82.

On the other hand, statutes affecting pure political speech require evaluation under the highest level of scrutiny: strict scrutiny.[169] Strict scrutiny has been defined by the Court as "a narrowly tailored means of serving a compelling [governmental] interest"; satisfying both the narrow tailoring and compelling interest elements are required for a statute to be consistent with what the First Amendment requires under strict scrutiny.[170]

The Supreme Court declined to side with either the government or the HLP, but instead decided that a "more rigorous scrutiny" than intermediate needed to be applied to the statute but still less than strict scrutiny.[171] The most glaring problem with the Court's chosen level of scrutiny was not in the decision to use a heightened scrutiny but was in its application of that more rigorous scrutiny; or stated differently, the Court used the correct scrutiny test but incorrectly applied it.

Cohen v. California illustrates an instance in which the Court has previously chosen to use this "more rigorous scrutiny."[172] A casual reading of *Cohen* does seem to support the Court's decision to use this more rigorous scrutiny since *Cohen* concerned a situation where an individual acted, not with intent to do harm, but where Cohen's actions arguably violated a statute.[173] Cohen was prosecuted because he wore a jacket with strong language which communicated his disapproval of the military draft instituted by the legislature.[174] A detailed reading of *Cohen* reveals that this more rigorous scrutiny standard required a state interest—not quite compelling—but which is sufficient, communicated and narrowly tailored in its execution.[175] *Cohen* even went so far as to require that the state interest fall within one of the traditional categories of exceptions to the First Amendment freedom of speech in order to survive the heightened scrutiny.[176]

When applying this standard to § 2339B in *Holder*, the government produced little evidence which demonstrated how § 2339B was narrowly tailored. No court or legal analyst would likely argue that preventing terrorism is not an important and even compelling governmental interest, but compelling governmental interests do not give Congress free reign to overlook the First Amendment.[177] Statutes infringing on the freedom of speech, and triggering heightened scrutiny require narrow tailoring.[178] Narrow tailoring, by the Court's definition, means that broad sweeping infringements on enumerated rights—like the freedom of speech—are not allowed and that less drastic means must be used if at all possible.[179] There

169. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007).
170. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 535 (1980).
171. *Holder*, 130 S. Ct. at 2724.
172. 403 U.S. 15 (1971).
173. *Id.* at 20–21 (Cohen was prosecuted for violating a breach of the peace statute).
174. *Id.* at 16.
175. *See id.* at 16–26.
176. *Id.* at 26.
177. *See* United States v. Robel, 389 U.S. 258, 266–68 (1967).
178. *Id.*
179. *See id.* at 266–69.

is no substitute for the narrow tailoring requirement in this level of scrutiny, regardless of how compelling the governmental interest may be.[180]

Justice Breyer captures the beginning of this problem in his dissent as he recognized that this standard of scrutiny and the narrow tailoring should have required the government to demonstrate exactly how the HLP's teaching and advocacy was linked to the terrorist's illegal objectives.[181] Expanding upon Justice Breyer's contentions, if the government was unable to explain how prohibiting the type of advocacy proposed by the HLP advanced the objective of eliminating violence by terrorists, then prohibiting that advocacy could not have been a narrowly tailored means of dealing with the problem of terrorist violence. When the created solution infringes upon protected, fundamental rights, then the solution does not fit the definition of narrow tailoring.[182]

Secondly, as recognized by the dissent, the government's affidavits and findings were too generic to satisfy narrow tailoring because they failed to amply show that other less drastic means were unavailable to combat terrorism without abridging citizen's freedom of speech.[183] Unspecified, generic findings have never been enough to satisfy a level of review requiring narrow tailoring.[184] Narrow tailoring requires some factual showing which supports the proposed measure as an appropriate solution to a problem.[185] Further, narrow tailoring requires the exhaustion of less drastic alternatives.[186] Findings of the type provided in *Holder* satisfy none of the requirements or purposes of narrow tailoring.

C. Political Speech

1. Section 2339B's Lack of a Specific Intent Requirement

Overall, *Holder* held that the HLP's projected advocacy and speech was not protected political speech, a decision which is difficult to reconcile with the Court's previous decisions but nevertheless understandable considering § 2339B's likely inability to survive a strict scrutiny review. Political speech has traditionally been given the highest level of protection under the First Amendment.[187] Therefore, an interesting byproduct of *Holder* along with § 2339B is an erosion of what once was considered protected speech. Indeed, *Holder* seems to have shifted the Court's focus when dealing with political speech from a focus on the intent behind the speech—a

180. *See id.*

181. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2731–38 (2010) (Breyer, J., dissenting).

182. *See generally* United States v. Robel, 389 U.S. 258, 265–69 (1967).

183. *See Holder*, 130 S. Ct. at 2732–34.

184. *See* United States v. O'Brien, 391 U.S. 367, 381–82 (1968). *See also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997); Texas v. Johnson, 491 U.S. 397 (1989).

185. *See e.g.* Dallas Fire Fighters Ass'n v. City of Dallas, 885 F. Supp. 915 (N.D. Tex. 1995) (holding that narrow tailoring means a statute remedying the problem it sought to address).

186. *See O'Brien*, 391 U.S. at 377 (holding that narrow tailoring means not burdening more speech than necessary to protect government interest). *See also* Adarand Constr., Inc. v. Mineta, 532 U.S. 967 (2001) (holding that narrow tailoring is not satisfied if other more neutral solutions are possible).

187. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

Brandenburg or *De Jonge v. Oregon* type analysis[188]—to a focus on the actual words utilized by the speaker's approach.[189]

For instance, the majority gives the example that if a member of the HLP's speech was common or general, then it would be protected. But if the speech provided a specific skill or gave advice derived from specific knowledge, then it would violate the statute and could result in criminal punishment, notwithstanding the First Amendment.[190] Disregarding the inherent difficulty in determining what might be considered a specific skill or specialized knowledge,[191] this approach in determining the breadth of the freedom of speech is a distinct migration from the often used intent-based approach in *Brandenburg*.[192] Moreover, the Court left no doubt that this is the standard as the Court explicitly declined to extend the *Brandenburg* intent-based inquiry to cases being prosecuted under § 2339B.[193] Now an American's freedom of speech depends only upon what he or she says and to whom he or she says it. The intent behind why the person said what he or she said is now irrelevant.[194]

This decision could be classified as an example of the Court manipulating existing case law in order to get a different, more preferred result. Consider what result would have likely occurred had the Court applied *Brandenburg* to the statute in question and the facts in *Holder*. *Brandenburg* required three things for speech to be unprotected by the First Amendment: (1) the intent and purpose to use speech to incite unlawful action; (2) speech which makes unlawful action imminent; and (3) speech which is likely to produce or incite unlawful action.[195] In short, *Brandenburg* requires a person or group to have the intent or purpose to use their speech to incite or promote imminent unlawful action.[196] The government conceded that the HLP only wished to train members of the PKK on how to use international law to peacefully resolve disputes, engage in political

188. *See id.* at 447; De Jonge v. Oregon, 299 U.S. 353, 365–66 (1937).

189. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723–24 ("Plaintiffs want to speak to the PKK and LTTE, and whether they may do so under § 2339B depends on what they say.").

190. *Id.* at 2724.

191. Outside the scope of this note, there is a legitimate concern that *Holder* provides very little guidance as to what speech or conduct may actually be criminally punishable. Thus, the Court's summary dismissal of vagueness challenges to the statutes in *Holder* may cause concern for some trying to apply the Court's decision and 18 U.S.C. § 2339B.

192. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

193. *Holder*, 130 S. Ct. at 2717.

194. The Court interpreted § 2339B(a)(1) not to have an intent to further the illegal aspects of terrorism requirement, in light of surrounding §§ 2339A(a) and 2339C(a)(1) which do contain a specific intent provision. *See* 18 U.S.C. § 2339A(a) (one who "provides material support . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation of. . ."). *See also* 18 U.S.C. § 2339C(a)(1) ("[one who] unlawfully and willfully provides or collects funds with the intention that such funds be used, or with knowledge that such funds are to be used, in full or in part, in order to carry out [other unlawful acts]").

195. *Brandenburg*, 395 U.S. at 447.

196. *See id.*

advocacy on behalf of the Kurds, teach members of the PKK how to petition various bodies such as the United Nations for relief, offer legal expertise in negotiating peace agreements between the LTTE and Sri Lanka, and engage in political advocacy on behalf of Tamils in Sri Lanka.[197]

In considering the HLP's proposed speech, the majority acknowledged that the HLP only possessed the intent to facilitate the lawful, nonviolent purposes of both the PKK and LTTE and that any speech or advocacy made by the HLP to the PKK or LTTE would be in furtherance of only this purpose.[198] So, had the Court applied *Brandenburg*, the government would not have been able to demonstrate that the HLP's speech violated even the first prong, and therefore their speech would have been protected. *Brandenburg* was decided in 1969. With September 11, 2001 still in recent memory, perhaps the Court is setting precedent that statutes involving foreign policy will be analyzed differently under the First Amendment. This conclusion is warranted since applying *Brandenburg* seemingly would have produced an unfavorable result; and the Court showed obvious overall concerns about the possibly tragic and devastating effects that the HLP's speech might end up having despite what the HLP's intent was behind their speech directed at either the PKK or LTTE.[199] *Holder* could possibly represent the first in a line of cases to come where the First Amendment freedom of speech is further restricted by statutes with the purpose of prosecuting those suspected of supporting terrorism.

2. The Problems with Content-based Restrictions on Speech

Even with legitimate concerns about terrorism, *Holder* prohibits speech—dependent upon what is said and to whom it is said—and this approach is bending, if not breaking the Court's prior decisions which do not allow content-based restrictions on political speech.[200] What *Citizens United v. Federal Election Commission* seemed to circle back around to is the principal that broad-sweeping restrictions on enumerated rights, or categorical prohibitions on enumerated rights, cannot be upheld.[201] This again suggests that a statute, like § 2339B, should be required—under narrow tailoring and political speech requirements—to use a more in-depth inquiry before criminally prosecuting someone for their speech. (Perhaps even an *intent*-based approach).[202] In addition to the inconsistent approach taken by the Court here, there is the concerning problem of increasing government control over an area which was traditionally a broad individual right. Shrinking the freedom of speech in this manner is not only a restriction on what could easily be considered political speech but is treading

197. *Holder*, 130 S. Ct. at 2716.

198. *Id.* at 2712.

199. *Id.* at 2724.

200. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010) ("political speech simply cannot be banned or restricted as a categorical matter").

201. *See id.*

202. But recall from Part III *supra* that the Court refused to employ an intent based approach.

closely to government control over speech concerning unpopular or unfavorable topics. Consistent with our system of government, Congress does not have the power to control what people speak about as the freedom of speech is an enumerated right and a fundamental principle upon which our country was founded.[203]

D. The Supreme Court's Endorsement of Congressional Findings

Holder v. Humanitarian Law Project also seems to create an uncomfortable procedural precedent concerning the amount of deference that was given by the Court to Congressional and Executive findings. Consider the Court's endorsement of Congressional findings which read, " 'Foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.' "[204]

Judicial deference to the findings of the other branches of government has long been a topic of much discussion in the legal community, but truly there has not developed any general rules by which courts abide.[205] Through the uncertainty, the Supreme Court has produced a few holdings which provide guidance in these situations. First, courts are not supposed to blindly accept legislative findings concerning constitutional issues.[206] Secondly, the Supreme Court has held that in the absence of specific countervailing considerations, *like the potential violation of a constitutional right*, the Court recognizes the heavy presumption "to which 'a carefully considered decision of a coequal and representative branch of our Government' is entitled."[207]

What these holdings from the Supreme Court demonstrate is the general allowance of deference to Congressional findings, except when there is a potential violation of a constitutional right.[208] Where an enumerated constitutional right is concerned, this deference to Congressional findings is improper.[209] In *Holder*, because there was an express, fundamental right at issue—the freedom of speech—the amount of deference given to Congressional findings causes concern. Even cases which were not dealing with

203. *See* Roth v. United States, 354 U.S. 476, 484 (1957); *see also* Edwards v. South Carolina, 372 U.S. 229, 237 (1963) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . .").

204. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724 (2010) (quoting 18 U.S.C. § 301(a)(7)).

205. *E.g.*, Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1 (2008); Angela J. Paolini, Note, *Administrative Law—Supreme* COURT DEFERS TO CONGRESSIONAL Intent in Social Security Disability Benefit Delays, 60 TUL. L. REV. 205 (1985); Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme* COURT SHOULD DEFER TO CONGRESSIONAL Factfinding Under the Post-Civil War Amendments, 59 NOTRE DAME L. REV. 337 (1984).

206. *See e.g.* United States v. Morrison, 529 U.S. 598, 614 (2000) ("the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation").

207. U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 721 (1990) (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985).

208. *See id.*; *Morrison*, 529 U.S. at 612–16.

209. *See id.*

express, fundamental rights do not require blind adherence to Congressional findings by the Court.[210] Because the First Amendment right at issue in *Holder* is such an important, fundamental right, the Court should have engaged in a detailed examination of Congress's stated position to make sure that Congress's findings established the logical link required before the Court endorsed the findings.[211]

The Court's endorsement of the Congressional findings means that even if foreign terrorist groups could be shown legal, non-violent means to accomplish their religious, political or other goals, they would still commit acts of violence. It is an interesting position taken by Congress and the Court when considering that if an American citizen truly believed he could change the methodology used by these foreign terrorist groups and went about teaching the terrorist groups legal methods to achieve political or other goals, then that American could not rely on his freedom of speech in doing so.

It is also inconsistent with the deference given to the Congressional findings by the Court and with the level of importance of the statute alluded to by the Court, that there be an exemption for medicine and religious materials.[212] Foreign terrorist organizations are so devoted and predisposed to committing acts of violence (according to the Congressional finding) that American citizens do not have their freedom of speech when conversing with such a group, but providing medical supplies does not support the terrorist group? If terrorist groups engage in armed hostile conflicts with others, or even simply throughout the course of conducting routine business, medical supplies will be needed and if they were not donated would have to be purchased. Therefore, allowing Americans to give medical supplies to terrorist groups frees up the terrorist group's money that it would otherwise have spent on medical supplies. Donating medical supplies has never been held to be a fundamental right, and it seems to be out of place that this remains a legal contribution under the statute. If the Congressional findings are accurate, and any aid to a terrorist group only furthers violence, then the statute seems to be underinclusive.[213]

The overall problem with the type of policy announced by the Congressional findings, whether inherently correct or not, is that innocent American citizens' fundamental rights are greatly reduced. The freedom of expression of ideas is an "essential liberty" and should not be undermined by requiring a person to consider how their words might be interpreted, even when their intent is pure.[214] Constricting an express, essential liberty

210. *See e.g.* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 196 (1997).

211. *See Morrison*, 529 U.S. at 612–16.

212. *See* 18 U.S.C. § 2339A(b).

213. It is not this author's position that this statute should be so barbaric as to ban the giving of medical supplies or religious materials. However, the realty remains that donating medical supplies frees up terrorist groups' funds to be spent on other things, and building churches provides terrorist groups with a place to meet and assemble.

214. *See* Lovell v. Griffin, 303 U.S. 444, 452 (1938).

of American citizens in the hope that doing so will inhibit a terrorist group's ability to function is offensive to the Constitution.[215] American citizens having the freedom to exchange ideas without any encumbrances is a principle that America was founded upon, was a major reason for America's growth to its current position in the world, and has always been an important method for bringing about changes desired by the citizens.[216]

Even if one accepted the Congressional findings as sound reasoning, a problem still remains with the portion of § 2339B which allows members of the HLP or any American citizen to lawfully become members of the PKK, LTTE, or similarly known terrorist organizations.[217] In light of the Congressional finding in § 301(a)(7), this provision seems to be against all logic. If foreign terrorist organizations are so tainted by their criminal conduct that any contribution to the group facilitates that conduct, then how is an American citizen becoming a member of the group, enlarging the size of the group, and thereby enhancing the prestige and legitimacy of the group tolerable? Secondly, how is an American citizen to be a member—and presumably an active member—but yet not provide any material support to the group? Many American citizens will possess at least some "specialized skill" which is what makes them marketable for employment purposes. Under § 2339B, any such person would not be allowed to be a contributing or active member of a foreign terrorist organization for fear that their speech would be criminal. Hypothetically, a lawyer group member could provide no legal advice to other group members, and a doctor could provide no medical services to other group members as this would constitute a "specialized skill" and could be criminal under § 2339B.[218] This begs the question of why the Court would explicitly recognize an American citizen's right to become a member of a foreign terrorist group but then not mention that much of an American's contributions to such a group could be criminal under § 2339B.

One explanation for having a seemingly thin exemption recognized would be to avoid any problem such as the one in *Scales v. United States*.[219] In *Scales*, because the Smith Act criminalized mere membership in prohibited groups, like the Communist Party, the Court held that to comport with Constitutional standards a specific intent requirement—much like the one

215. *See generally* Edwards v. South Carolina, 372 U.S. 229 (1963); *see also* Roth v. United States, 354 U.S. 476, 488 (noting that "ceaseless vigilance" will be required to prevent Congress and the States from eroding First Amendment protections).

216. *See Roth*, 354 U.S. at 488 ("The fundamental freedom[s] of speech and press have contributed greatly to the development and well being of our free society and are indispensable to its continued growth.").

217. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723 (2010) ("[statute] does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so").

218. *See* 18 U.S.C. § 2339A(b)(2) ("instruction or teaching designed to impart a *specific skill*, as opposed to general knowledge") (emphasis added).

219. 367 U.S. 203, 205 (1961).

rejected in *Holder*—had to be used.[220] Therefore, by providing an exemption which allows citizens to be members in a foreign terrorist organization, a *Scales*-type problem is avoided and the Court was able to uphold § 2339B despite the statute having no specific intent requirement.

E. The Supreme Court's Treatment of the Independent Advocacy Exemption

In the Court's analysis, it also endorsed the statute's independent advocacy exemption as another reason why the HLP's or other citizen's freedom of speech was not burdened.[221] This provision in the statute, in essence, means that a person may campaign or advocate for a cause that might happen to be in line with the goals of a foreign terrorist group such as the PKK or LTTE, and may do so without criminal prosecution so long as they are not acting at the direction of the foreign terrorist group.[222] The Court also summarily rejected the HLP's requests to have the Court define more specifically where the line would be drawn when considering what is independent advocacy.[223] Although the Court justified its refusal to further interpret this portion of the statute by stating that it would not engage in sheer speculation,[224] the Court's refusal to address the issue creates a facial conflict with the portion of the statute that allows American citizens to become members of foreign terrorist organizations.[225]

The problem created with these two provisions is that, from the Court's opinion, the appearance is created that a citizen does not have his or her freedom of speech impinged upon because he or she is able to become a member of a foreign terrorist organization *and* advocate independently for any causes for which he or she wishes to advocate.[226] This is the appearance given by the Court and is also used as a major justification by the Court to support the Court's holding that the statute did not violate citizen's freedom of speech; this is how the Court seems to get around punishing pure political speech or advocacy by providing these exemptions, which seemingly could be used together.[227] But these exemptions run afoul of common sense and other provisions of § 2339B which prevent citizens from acting or working under the direction or control of a foreign terrorist

220. *Id.* at 220–22.

221. *Holder*, 130 S. Ct. at 2723.

222. *See* § 2339B(h). For problems with this approach, see Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687 (2010).

223. *Holder*, 130 S. Ct. at 2722.

224. *Id.*

225. *Id.* at 2723 ("Section 2339B also 'does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so.' "). *See also* Justin A. Fraterman, *Criminalizing Humanitarian Relief: Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?* (January 14, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1750963.

226. *See id.* at 2723.

227. *See id.*

organization.[228] From a common sense standpoint, it would be a practical impossibility for someone to be a member of a group or organization, and to be advocating for the same causes and goals of the group, but then to still consider himself to be acting "entirely independently" from the group's direction.[229]

What this dichotomy becomes is a ban on a citizen's freedom of speech if he or she chooses to exercise their ability to become a member of a foreign terrorist group. This is because, from a practical standpoint, once a citizen becomes a member of a foreign terrorist group, he or she would lose their ability to advocate independently, and, therefore, any speech that a citizen made would violate the statute and could be criminally punished.[230]

Also in play here is § 2339B's lack of unlawful intent or purpose requirement which was discussed in Part V.C.1 *supra*. This part of § 2339B would allow any speech a citizen makes which violates the statute to be criminally punished regardless of the intent behind the speech, and it would further contribute to a citizen forfeiting his freedom of speech when he becomes a member of a known terrorist organization. Without an unlawful intent requirement, after a citizen legally became a member of a known terrorist group, almost any action made by that citizen in furtherance of the group and consistent with his or her membership status in the group could reasonably be criminally punished under the statute.

VI. CONCLUSION

Holder presents a classic case of Congress not being able to control or punish certain terrorist groups, so Congress decided to try to punish these groups by proxy. This Note illustrates the problem with using this type of proxy measure to combat a problem like terrorism. A statute like 18 U.S.C. § 2339B is merely an inconvenience for a terrorist group, while it is simultaneously a detrimental policy to American citizens because it sets a precedent that even the most sacred, historical, and fundamental Constitutional rights can be taken away from innocent American citizens at the desire of Congress.[231] Most deplorable about this type of policy is that regardless of what embargos or financial constraints that America places on terrorist groups, those groups who are determined will still find the ways and means to commit acts of violence. Nothing has demonstrated this more clearly than the situation with Iran, Iraq, Afghanistan, and the War on Terror. Unfortunately, a decision such as this is irreconcilable with

228. *See* 18 U.S.C. § 2339B(h) ("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. . .").

229. *See* 18 U.S.C. § 2339B(h) ("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.") (emphasis added).

230. *See Holder*, 130 S. Ct. at 2723.

231. The term "innocent" was chosen because by § 2339B's terms Americans may be prosecuted absent any intention to further or aid the illegal aspects of terrorist groups.

prior law, offensive to the Constitution, and ineffective at achieving its purpose. For the reasons suggested in this Note, § 2339B needs revision and clarification to avoid trampling upon one of the most important of individual rights.

After *Holder*, it seems as if there is a new category of speech which should be added to libel, obscenities, and the like, as beyond the scope of the First Amendment's protection. This category of unprotected speech is speech materially aiding or supporting a foreign terrorist group.