SWIPE RIGHT FOR ISIS: SOCIAL MEDIA AND MATERIAL SUPPORT TO FOREIGN TERRORIST ORGANIZATIONS

KASEY A. FELTNER*

I. INTRODUCTION 96
II. WHOEVER "KNOWINGLY" PROVIDES 100
III. IS THERE INTENT, UNDER ATTEMPT? 102
IV. THE SLOWLY EVOLVING, LESS AMBIGUOUS DEFINITION OF MATERIAL SUPPORT? 105
V. JUST WHAT IS THE DEFINITION OF COORDINATION? 110
VI. CONCLUSION 113

Imagine reading on a friend's Facebook page one afternoon, "I support the religious goals of ISIS, and I think everyone should join them." At first, you might be a little confused because while your friend [insert name here] is known to be unabashed in his/her social media postings, this seems to be a pretty radical statement. You might want to leave a comment saying something like, "How could you say that? Don't you realize all the harm they have done and will continue to do?" However, you then notice the thirteen hundred and eleven comments already conveying that message, many in-less-than cordial language. So you go about your day, perhaps a little perturbed, but overall unaffected by your friend's social media post.

But what about your friend (or former friend) who posted that message? Surely he or she is protected under the First Amendment of the United States Constitution in posting such shocking comments on social media. It might be shocking for most American citizens to learn that it might not be that cut and dry.[1] *What if that post was actually seen by ISIS and shared all over the Internet? Just imagine, ISIS could say, "look, even these Americans, whom we*

* B.S., University of West Florida; M.S., National Graduate School; J.D. candidate, Stetson University College of Law, 2017. At Stetson, the author serves as a Stetson Law Review associate, Moot Court Board Chief Justice, and Editor-in-Chief for the Stetson Online Law Journal, Advocacy and the Law. He is also currently a Lieutenant in the United States Coast Guard Reserve. Mr. Feltner dedicates this Article to his wife, Adrienne, who has been a constant source of knowledge and support; Erin Okuno, who has always been available to offer advice and guidance; Professor Podgor and Professor Jimenez, who tirelessly help students become better legal writers and thinkers; and to his loving family and friends.

[1] *See* United States v. Nagi, No. 15–MJ–2122, 2015 WL 4611914, at *2 (W.D.N.Y. July

hate, agree with us and want us to win." Imagine further that this reposting of your friend's comments by ISIS on Facebook actually led other Americans to support and possibly join ISIS. If this happened, then your friend might not be protected under the First Amendment and would be at risk of criminal liability for providing material support to foreign terrorists.

I. INTRODUCTION

In response to the World Trade Center bombings in 1993, Congress passed several bills to curb financial support of terrorist activities.[2] The codification of these bills culminated in the enactment of 18 U.S.C. § 2339B ("§ 2339B") which prohibits providing "material support or resources" to foreign terrorist organizations.[3] Pursuant to § 2339B, it is illegal to knowingly provide, attempt to provide, or conspire to provide material support to a known foreign terrorist organization ("FTO").[4] While the statutory language may seem fairly straightforward, courts have struggled in the application of § 2339B to social media usage, primarily because there are four considerations that must be made before holding someone criminally liable under § 2339B.[5]

First, a person must "knowingly" provide or "knowingly" attempt or conspire to provide material support.[6] Both the term "knowingly" and recent Circuit Courts of Appeals decisions suggest that the aid (support or resources) provided must be intentional on the part of the accused.[7] However, what if the person accused of attempting to provide material support had no idea he or she was providing support? Second, if a person does not actually provide material support, courts must then determine what constitutes attempt under § 2339B.[8] Determining what constitutes intent requires the courts to resolve the difficult question as to where the substantial step towards the objective crime lies and

---

31, 2015) (finding that speech which is transmitted over social media can be used as evidence that a defendant either intended to support or join a Foreign Terrorist Organization).

[2] *See generally* Katherine R. Zerwas, Note, *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, 5338 (2011) (finding that Congress amended 18 U.S.C. § 2339A following the Oklahoma City 1995 bombing of the Alfred P. Murrah building, creating a new material support provision which was codified at 18 U.S.C. § 2339B).

[3] 18 U.S.C. § 2339B (2012); *see also* Zerwas, *supra* note 2.

[4] 18 U.S.C. § 2339B(a)(1) (2012).

[5] *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 26 (2010) (describing § 2339B's prohibition on four types of material support—"training," "expert advice or assistance," "service," and "personnel"); *see Nagi*, 2015 WL 4611914 at *2.

[6] *See* 18 U.S.C. § 2339B(a)(1) (2012).

[7] *See* United States v. Mehanna, 735 F.3d 32, 42 (1st Cir. 2013) (quoting United States v. Al Kassar, 660 F.3d 108, 129 (2d Cir. 2011)) (explaining that one of the two express scienter requirements is "that the aid be intentional").

[8] *See Nagi*, 2015 WL 4611914 at *2.

how one crosses it using social media.[9] Third, courts must determine what constitutes "material" support when applied to speech (both content-based and content-neutral).[10] For example, what is deemed "material" when looking at an individual's expressions on different social media platforms? Lastly, is simply knowing that an organization has been labeled a "terrorist organization" sufficient to find that a person acted in "coordination" or under the direction of that organization? All of these considerations must be applied carefully to social media use so as not to over-criminalize seemingly innocent behavior or independent political advocacy normally protected by the First Amendment.

After the attack on the Twin Towers in 2001, the United States government began prosecuting individuals on a regular basis for providing, attempting, or conspiring to provide material support or resources to foreign terrorist organizations.[11] In 2010, the Supreme Court of the United States ruled that content-based speech constitutes material support to a foreign terrorist organization in certain situations.[12] In *Holder v. Humanitarian Law Project*, the Court found that a charitable organization's desire to provide legal services to a known FTO would have violated the material support statute.[13] This ruling was significant because it not only provided that speech may be deemed material support, but it also stated that a person or organization does not have to "intend[ ] to further a foreign terrorist organization's illegal activities."[14] The Court found that under § 2339B, the term "knowingly" referred to the knowledge that an organization was connected to terrorism, not the specific intent to further terrorist activities.[15]

The intent requirement was not the only hurdle the Court had to cross when deciding *Holder*. The defendants in *Holder* also raised First and Fifth Amendment challenges to the application of the material support statute to speech.[16] The Court held that § 2339B did not violate the Fifth Amendment for vagueness because it provided "a person of ordinary intelligence fair notice of what is prohibited."[17] Moreover, the Court found that § 2339B does not prohibit independent advocacy or membership in an FTO.[18] Rather, the material support

---

[9] United States v. Farhane, 634 F.3d 127, 147 (2d Cir. 2011) (holding that identifying a substantial step varies depending on the facts of each case and the crime being charged).

[10] *See Nagi*, 2015 WL 4611914 at *2.

[11] *See generally* Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 862 (2004).

[12] Holder v. Humanitarian Law Project, 561 U.S. 1, 26 (2010) (holding that plaintiffs' activities fell into the "category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations").

[13] *Id.* at 10.

[14] *Id.* at 16–17.

[15] *Id.*

[16] *Id.* at 8.

[17] *Id.* at 18 (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).

[18] *Id.* at 26.

statute prohibits "material support" in the form of speech when that speech is "under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."[19] Therefore, under *Holder*, speech may be considered material support to an FTO and fall outside the protection of the First Amendment when it meets one of the statutory definitions of material support and is performed in coordination with or under the direction of that FTO.

Since *Holder*, the Supreme Court has continually denied certiorari in cases involving speech and the material support statute.[20] This is problematic because the Court in *Holder* did not define what it takes for a party to satisfy the coordination requirement under the material support statute as applied to speech.[21] This omission, whether on purpose or not, has caused confusion amongst the lower courts when applying the coordination requirement to a party's speech and the material support statute. Under the *Holder* decision, could coordination merely be a "coincidence of *wants* between the speaker and the terrorist group"?[22] And if so, how does this translation of the coordination requirement affect someone speaking through social media? As America's (and the world's) use of social media continues to grow,[23] can social media activity actually qualify as material support to foreign terrorist organizations? And if so, how should courts distinguish material support from mere political advocacy? Could a court find someone guilty of attempting to provide material

---

[19] *Id.*

[20] *See* Mehanna v. United States, 735 F.3d 32 (1st Cir. 2013), *cert. denied*, 135 S. Ct. 49 (2014); *see* Hassan v. United States, 742 F.3d 104 (4th Cir. 2014), *cert. denied,* 135 S. Ct. 157 (2014); *see* Abigail M. Pierce, *#Tweeting for Terrorism: First Amendment Implications in Using Proterrorist Tweets to Convict Under the Material Support Statute*, 24 WM. & MARY BILL RTS. J. 251, 265 (2015) (explaining that the United States Supreme Court denied certiorari in *Mehanna v. United States*).

[21] *Holder*, 561 U.S. at 24–25 (stating that the defendants failed to provide "any specific articulation" that would allow the Court to demonstrate how much coordination or direction is necessary).

[22] *See* Andrew V. Moshirnia, *Valuing Speech and Open Source Intelligence in the Face of Judicial Deference*, 4 HARV. NAT'L SEC. J. 385, 431 (2013) (emphasis added) ("It seems, therefore, that a coincidence of wants between the speaker and the terrorist group—that is, a desire that the message be published—would likely qualify as coordination even if there was no coincidence of motive.").

[23] Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RES. CTR. (Oct. 8, 2015), http://www.pewInternet.org/2015/10/08/social-networking-usage-2005-2015 (stating that "nearly two-thirds of American adults (65%) use social networking sites, up from 7% when Pew Research Center began systematically tracking social media usage in 2005"); Yigal Carmon & Steven Stalinsky, *Terrorist Use of U.S. Social Media is a National Security Threat*, FORBES (Jan. 30, 2015), http://www.forbes.com/sites/realspin/2015/01/30/terrorist-use-of-u-s-social-media-is-a-national-security-threat/#36dab23112d0 ("ISIS has grasped the effectiveness of social media . . . .").

support to an FTO by merely posting a video to YouTube?[24] While the Supreme Court refuses to clarify some of the lingering questions left from *Holder*, these are tough questions that courts must answer in order to strike the proper balance between protected expressions and the harm in providing material support to foreign terrorist organizations.

Part I of this Article introduced the issue of how courts should interpret § 2339B, which prohibits providing "material support or resources" to foreign terrorist organizations. Part II explores how courts have interpreted the word "knowingly" and how it applies to the phrasing of "[w]hoever *knowingly* provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so . . . ."[25] Part III discusses how courts should define "attempt" under § 2339B,[26] especially when the support or resources are speech across social media.[27] Part IV analyzes whether social media postings can be classified as material support under the definitions section of §§ 2339B and 2339A.[28] Part V discusses how courts have interpreted the coordination requirement referenced by the Supreme Court in *Holder*, and suggests what the coordination requirement should be in order to avoid over-criminalizing seemingly innocent behavior of those utilizing social media.[29] Part VI concludes that without clarification on when content-based speech may be deemed material support to an FTO, American citizens will be charged for attempting to provide or actually providing material support simply by using social media.[30]

---

[24] *See* Forrest v. Citi Residential Lending, Inc., 73 So. 3d 269, 271 n.1 (Fla. Dist. Ct. App. 2011) (explaining that YouTube© is a registered corporation that allows members—individuals who sign the user's agreement policy—of the social media platform to post and view video files to the Internet).

[25] 18 U.S.C. § 2339B(a)(1) (2012) (emphasis added).

[26] *Id.*

[27] *Id.* The test for attempt is important because there must be a separate *mens rea* analysis when deciding whether someone *attempted* to provide material support or resources. Note that the statutory language of § 2339B contains two intent requirements under its plain terms. *Id.* First, and as will be explored in Part II of this Article, a person must "*knowingly* provide[ ] material support or resources to a foreign terrorist organization, or attempt[ ] or conspire[ ] to do so . . . ." *Id.* (emphasis added). Second, "[t]o violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism." *Id.* (emphasis added). There is, however, a separate intent requirement when analyzing whether someone *attempted* or *conspired* to provide material support. United States v. Farhane, 634 F.3d 127, 145 (2d Cir. 2011) ("A conviction for attempt requires proof that a defendant (a) had the intent to commit the object crime and (b) engaged in conduct amounting to a substantial step towards its commission.")

[28] 18 U.S.C. § 2339B(g–h) (2012); 18 U.S.C. § 2339A(b) (2012).

[29] Holder v. Humanitarian Law Project, 561 U.S. 1, 24 (2010) (holding that plaintiffs' activity counted as "advocacy performed in coordination with, or at the direction of, a foreign terrorist organization").

[30] Washington Field Office, *Woodbridge Man Charged with Providing Material Supports*

II. WHOEVER "KNOWINGLY" PROVIDES

Under § 2339B, to be found culpable of attempting to provide material support to an FTO, does a person have to *know* that his or her social media postings are support or resources? The Court in *Holder* made it clear that "Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."[31] However, the Court was silent on how to apply the "knowing" standard to instances where a person or organization did not intend its actions or speech to be either support or a resource in the first place, regardless of whether it might further an FTO's terrorist activity.[32] In his dissent, Justice Breyer states that a person should only be culpable under § 2339B if the person knows that he or she is providing support or resources; however, he adds that "knowingly" under § 2339B should encompass the knowledge that any aid should bear "a significant likelihood of furthering the organization's terrorist ends."[33] The question then remains: what if a person or organization does not *know*, and does not intend, that its actions or speech could be either support or resources to an FTO?

Since the *Holder* decision in 2010, at least two United States Courts of Appeals decisions have addressed the interpretation of the term "knowingly" as applied to speech under the material support statute.[34] First, in *United States v. Mehanna*,[35] the First Circuit found that "translat[ing] Arab-language materials into English and post[ing] [those] translations on a website" constituted material support under § 2339B.[36] The First Circuit noted that a specific intent to further terrorist activities is not required.[37] The Court did, however, recognize that the material support statute contains "two express scienter requirements: that the *aid be intentional* and that the defendant know the organization he is aiding is a terrorist organization or engages in acts of terrorism."[38] The Court relied on the ample evidence that the government provided to prove that the

---

to Terrorist Organization, FED. BUREAU OF INVESTIGATION (Sept. 2, 2011), https://www.fbi.gov/washingtondc/press-releases/2011/woodbridge-man-charged-with-providing-material-support-to-terrorist-organization [hereinafter WFO] (describing man's arrest for providing material support to a foreign terrorist organization because he uploaded a video on YouTube© allegedly on behalf of the foreign terrorist organization).

[31] *Holder*, 561 U.S. at 16–17.

[32] *Id.* at 16–18.

[33] *Id.* at 57. (Breyer, J., with Ginsburg & Sotomayor, JJ., dissenting).

[34] *See* United States v. Mehanna, 735 F. 3d 32, 42 (1st Cir. 2013) (deciding whether defendant was guilty of "conspiring to violate 18 U.S.C. § 2339B"); *see* United States v. Al Kassar, 660 F. 3d 108, 130 (2d Cir. 2011) (affirming the defendants' "conviction for conspiring to knowingly support a terrorist organization").

[35] *Mehanna*, 735 F.3d 32.

[36] *Id.* at 41.

[37] *Id.* at 42.

[38] *Id.* (emphasis added) (quoting *Al Kassar*, 660 F.3d at 129).

defendant had the *intent* to provide support and resources to the foreign terrorist organization al-Qa'ida.[39] The Court relied on the fact that the defendant had previously traveled to Yemen in hopes of joining al-Qa'ida, and that "the materials that he used to recruit others to follow a similar path" demonstrated his motive and intent to support al-Qa'ida.[40] The government was able to demonstrate that the "aid [was] intentional" by offering evidence that the defendant had traveled overseas and was in the possession of items probative of motive or intent to support al-Qa'ida.[41]

In *United States v. Al Kassar*, another important decision addressing the term "knowingly" under § 2339B, the Second Circuit affirmed the conviction of a defendant for attempting to provide material support to a foreign terrorist organization after the defendant translated negotiations to supply a foreign terrorist organization with missiles.[42] Pragmatically speaking, the issues in *Al Kassar* are more indicative of material support than the instances surrounding *Mehanna*, but the Second Circuit's analysis in *Al Kassar* again shows that not only must a defendant know that the organization he or she is aiding is engaged in acts of terrorism, but also that the "aid [must] be intentional."[43] Moreover, the Second Circuit stated that "[t]he 'personal guilt' requirement of the Due Process Clause is therefore satisfied by the *knowing* supply of material aid to a terrorist organization."[44] Therefore, it would seem that while a defendant need not know that the material support at issue will lend to further terrorist activity, the statute does require that the material support at issue be intentional.

The *Mehanna* and *Al Kassar* decisions fail to address situations where an individual's use of social media *alone* might be considered prohibited under the material support statute. It remains unclear whether there needs to be additional action on the part of the defendant to show that the aid was intentional. Since *Holder*, "most cases have included other extremely damaging evidence, specifically traveling overseas to train with a terrorist organization."[45] Therefore, the first step that the Supreme Court should take if it revisits its analysis of the material support statute should be the requirement that the "aid be intentional."[46] Moreover, the Supreme Court should require the government to provide

---

[39] *Id.* at 46.

[40] *Id.* at 60–61 (citing United States v. El–Mezain, 664 F.3d 467, 509–10 (5th Cir. 2011) (stating that items belonging to a defendant, "including images of violence and videos glorifying Hamas and depicting Hamas leaders, was probative of the motive or intent of the [defendant] to support Hamas"), *cert. denied*, 133 S. Ct. 525 (2012)).

[41] *Id.*

[42] *Id.* at 130–31.

[43] *Id.* at 129.

[44] *Id.* at 130 (emphasis added).

[45] Pierce, *supra* note 20, at 267.

[46] *Mehanna*, 735 F.3d at 42 (citing United States v. Al Kassar, 660 F.3d 108, 129 (2d Cir. 2011)).

extrinsic evidence[47] of a defendant's motive or intent to supply a foreign terrorist organization with *any* material support. Interpreting the term "knowingly" under § 2339B in these two ways would align with *Holder*'s decision that material support need not be intended to further terrorist activities.[48] In addition, this would also align with the decision in *Mehanna*, which used evidence of overseas travel, the defendant's prior statements, and pro-terroristic paraphernalia in the defendant's possession to show motive or intent to supply aid.[49] Requiring more evidence and intentionality under § 2339B will likely prevent American citizens from being over-criminalized under the material support statute for posting certain expressions on social media platforms.

Unfortunately, if the Supreme Court adopted the requirements noted above it would be but one pail of water removed from a flooded ship, namely the over-inclusive and often-difficult application of 18 U.S.C. § 2339B that courts must undertake. The next Part of this Article examines what constitutes an "attempt" under § 2339B, and considers at what point a person takes a *substantial step* towards attempting to provide material support using social media.

III. Is There Intent, Under Attempt?

A defendant need not possess the specific intent to provide material support or resources to an FTO that furthers terrorist activities.[50] Section 2339B does not contain a specific intent requirement and only requires an accused individual to know that an organization has been designated an FTO, engages or engaged in acts of terrorism, or engages or engaged in acts of terrorist activity.[51] This general intent requirement under § 2339B presents an interesting hurdle when courts determine whether a person *attempted* to provide material support to an FTO. The Second Circuit outlined a standard for attempted material support in *United States v. Farhane*.[52] The court stated that in order to be found guilty of attempting to provide material support or resources to a known FTO, a conviction requires "proof that a defendant (a) had the *intent* to commit the

---

[47] Extrinsic evidence such as pro-terroristic paraphernalia in the defendant's possession may show motive or intent to supply aid. *See also supra* notes 38–40 and accompanying text.

[48] Holder v. Humanitarian Law Project, 561 U.S. 1, 16–17 (2010) (holding that "specific intent to further the organization's terrorist activities" is not a requirement under § 2339B).

[49] *See* discussion *supra* Part II; *Mehanna*, 735 F. 3d at 60–61; *see supra* notes 35–41 and accompanying text.

[50] *See Holder*, 561 U.S. at 16–17 (holding that under § 2339B, "specific intent to further the organization's terrorist activities" is not required).

[51] Emily G. Knox, Note, *The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists*, 66 Hastings L.J. 295, 306 (2014) (quoting *Holder*, 561 U.S. at 16–17) ("[T]he Court [in *Holder*] held that the necessary mental state for a violation of § 2339B is 'knowledge about the organization's connection to terrorism, *not* specific intent to further the organization's terrorist activities.'").

[52] United States v. Farhane, 634 F.3d 127 (2d Cir. 2011).

object crime and (b) engaged in conduct amounting to a substantial step towards its commission."[53] This dual prong test for attempt coupled with the general intent requirement of § 2339B, which does not require a person to have the intent to further an FTO's terrorist activities, presents courts with a very difficult analysis of precisely when a defendant is guilty of attempting to provide material support to an FTO using social media postings. How can someone be found guilty of attempting to provide material support using social media, if it was never *intended* for that speech to be material support or resources? Further, at what point while using social media does a person take a substantial step towards providing the material support in question?

In *Farhane*, the Second Circuit upheld the defendant's conviction under § 2339B because the defendant attempted to provide material support to an FTO using both conduct and speech.[54] The defendant in *Farhane* was a United States citizen who desired to provide expert medical advice and aid to Al Qaeda.[55] In order for the government to prove that the defendant *attempted* to provide material support to Al Qaeda, it first had to provide evidence that the defendant possessed the "intent to commit the object crime."[56] The government provided this evidence by offering speech made by the defendant prior to the start of his trial, which showed his support of Al Qaeda and his plan to join Al Qaeda in the future.[57] After establishing that the defendant had the intent to commit the object crime of providing material support to an FTO, the government then needed to show that the defendant took "a substantial step towards it commission."[58] The Second Circuit ultimately agreed with the government's position that the defendant took a substantial step by meeting a "purported al Qaeda member;" "making travel arrangements overseas;" "swearing an oath of allegiance to al Qaeda;" "promising to be on call . . . to treat wounded al Qaeda members;" and "providing private and work contact numbers for al Qaeda members to reach him," thereby satisfying the second prong of the attempt analysis.[59]

The Second Circuit's holding in *Farhane*, while not involving social media, provides the framework analysis a court must use when deciding whether a person attempts to provide material support in the form of speech.[60] A court has found that a citizen's speech may be used as an evidentiary basis to estab-

---

[53] *Id.* at 145 (emphasis added).

[54] *Id.*

[55] *Id.* at 132–34.

[56] *Id.* at 145 (holding that the "object crime" was providing material support to Al Qaeda).

[57] *Id.* at 145–46.

[58] *Id.* at 145.

[59] *Id.* at 149.

[60] *Id.* at 145, 170 (holding that defendant's speech showed both his "intent to commit the object crime" and qualified as a "substantial step towards its commission").

lish motive or intent.[61] In *United States v. Nagi*, the United States District for the Western District of New York found that speech transmitted over social media can be used as evidence that a defendant intended to either support or join an FTO.[62] However, using a defendant's social media postings to show that the defendant intended to commit the object crime only satisfies the first prong of the attempt analysis.[63]

In order to satisfy the second prong of an attempt analysis under § 2339B, a defendant must take "at least one substantial step toward the actual commission of the charge[d] crime."[64] Under *Farhane*, a "'substantial step' must be 'something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime.'"[65] This principle proves difficult when applied to social media usage by American citizens, as courts today are inconsistent in determining what constitutes a substantial step when social media content is at issue. Some courts have found that a person satisfies not only the intent prong of the attempt analysis, but also the substantial step prong by making social media postings for others to see.[66] In *United States v. Ahmad* in 2011, Jubair Ahmad pleaded guilty to providing material support to Lashkar-e-Tayyiba ("LeT"), a designated FTO, in the United States District Court for the Eastern District of Virginia.[67] Ahmad was sentenced to twelve years imprisonment for posting a five-minute propaganda video to YouTube on behalf of LeT and later revising that video at the request of LeT.[68] The Ahmad case is significant going forward because the court allowed the government to assert that the defendant did attempt to provide material support to an FTO through social media after coordinating with members of LeT.[69] Therefore, federal courts are beginning to hold that a person can successfully attempt to provide, or in rare cases actually provide, material support to foreign terrorist organizations strictly by using social media.

The Ahmad case and the others like it[70] are crucial in distinguishing how

---

[61] United States v. Kaziu, 559 F. App'x 32, 35 (2d Cir. 2014) (quoting Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993)) (finding that the First Amendment does not "prohibit the evidentiary use of speech to . . . prove motive or intent").

[62] United States v. Nagi, No. 15-MJ-2122, 2015 WL 4611914, at *1-2 (W.D.N.Y. July 31, 2015).

[63] *Id.* at 2 ("The volume and nature of the social media usage, however, indicate that Nagi has formed a strong intent to join and support ISIL . . . .").

[64] United States v. Mehanna, 735 F. 3d 32, 53 (1st Cir. 2013).

[65] *Farhane*, 634 F.3d at 147 (quoting United States v. Manley, 632 F.2d 978, 987 (2d Cir. 1980)).

[66] *See* Moshirnia, *supra* note 22, at 435 (discussing a case where a defendant was "charged with violating 18 U.S.C. § 2339B for the production of a YouTube video.").

[67] United States v. Ahmad, No. 1:11CR554, 2011 WL 6005308 (E.D. Va. Dec. 2, 2011).

[68] Moshirnia, *supra* note 22, at 435.

[69] WFO, *supra* note 30.

[70] Paul J. Webber, *Son of Army Doctor Gets 10 Years on Terrorism Charge*, MILITARY

courts analyze whether someone attempts to provide material support using social media. In these cases, the defendants had contact with the FTO and are either told to post something on social media, or believe that the social media posting will provide material support and resources to that FTO. This *coordination* between the defendants and the corresponding foreign terrorist organizations should be the deciding factor that courts utilize when analyzing whether a defendant *attempted* to provide material support or resources to a foreign terrorist organization. Unfortunately, the Supreme Court in *Holder v. Humanitarian Law Project* failed to define what coordination is, making this crucial determination difficult to apply.[71]

IV. THE SLOWLY EVOLVING, LESS AMBIGUOUS DEFINITION OF MATERIAL SUPPORT?

In addition to the coordination requirement, courts must also determine whether what is posted on social media constitutes material support or resources in the first place. Could simply re-tweeting a pro-terrorist remark be deemed material support?[72]

The definition of material support and resources is not contained in § 2339B; instead, § 2339B "incorporates by reference" the definition from 18 U.S.C. § 2339A ("§ 2339A").[73] This incorporation by reference occurs because both statutes share similar purposes.[74] Section 2339B was enacted to prevent citi-

---

.COM (Sept. 25, 2015), http://www.military.com/daily-news/2015/09/25/son-of-army-doctor-gets-10-years-on-terrorism-charge.html (explaining that a defendant pleaded guilty to charges of recruiting terrorists after being "accused of using Internet message boards to identify potential terrorists"); Southern California Criminal Defense Attorney, *Using Social Media to Facilitate Terrorism Can Lead to Federal Charges* (18 U.S.C. § 2339B), SOUTHERN CAL. DEF. BLOG (Jan. 6, 2014), http://www.southerncalifornia defenseblog.com/2014/01/using_social_media_to_facilita.html (describing a case where a defendant was "convicted of federal terrorism charges after using Facebook to connect with al-Qaeda").

[71] *See* Moshirnia, *supra* note 22, at 430 (explaining that *Holder* is unclear on its coordination requirement).

[72] *See* In re Appl. of the United States for an Order Pursuant to 18 U.S.C. § 2703(d), 830 F. Supp. 2d. 114, 118 (E.D. Va. 2011) ("In addition to posting their own tweets, [Twitter] users may send messages to a single user ('direct messages') or repost other users' tweets ('retweet')."); *see also* Mike Masnick, *Is Retweeting ISIS 'Material Support of Terrorism'?*, TECHDIRT (Feb. 25, 2015, 9:20 AM), https://www.techdirt.com/articles/20150224/12545730130/social-media-isis-material-support-terrorism-documenting-war-crimes.shtml (discussing the internet and "material support" for terrorism).

[73] Incorporation by reference is a "method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." *Incorporation by Reference*, BLACK'S LAW DICTIONARY (8th ed. 2014).

[74] *See* 18 U.S.C. § 2339B (2012); 18 U.S.C. § 2339A (2012).

zens from providing material support to foreign terrorist organizations,[75] while § 2339A was enacted to prevent citizens from providing material support to *terrorists*.[76] This difference in statutory purpose may seem insignificant at first glance, but it is crucial in analyzing whether a person actually provided or attempted to provide material support.

The important difference between § 2339A and § 2339B is the intent requirement of both statutes. As explained above, the Supreme Court in *Holder* was clear that a person or organization does not have to intend for the support or resources provided to further the foreign terrorist organization's goals.[77] Rather, § 2339B only requires that a person or organization know that the support or resources provided are going to a designated foreign terrorist organization, an organization that engages is acts of terrorism, or an organization that engages in terrorist activity.[78] In contrast § 2339A does require the specific intent to further terrorist activity under its culpability standards.[79] Under § 2339A, a person or organization must know or intend for the support or resource provided to actually assist in the preparation of or the carrying out of a statutory crime.[80] This difference in intent is important when applied to the statutory definition of material support because what might be considered an accident under § 2339A might be found to be material support under § 2339B.

Turning to the statutory definitions of material support or resources, both § 2339B and § 2339A define material support as

> any 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.[81]

Further, § 2339A[82] adds that "the term 'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge" and that "the term 'expert advice or assistance' means advice or assistance derived

---

[75] 18 U.S.C. § 2339B.

[76] 18 U.S.C. § 2339A.

[77] *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 16–17 (2010); *supra* Part II.

[78] *Id.* at 9, 16–17.

[79] 18 U.S.C. § 2339A(a) (2012) (providing that a person is guilty of providing material support or resources to *terrorists* if they *know* or *intend* for that support "to be used in preparation for, or in carrying out" a statutory violation).

[80] *Id.*

[81] 18 U.S.C. § 2339A(b)(1) (2012); 18 U.S.C. § 2339B(g)(4) (2012).

[82] 18 U.S.C. § 2339B also incorporates by reference from 18 U.S.C. § 2339A the "definitions of 'training' and 'expert advice or assistance.'" 18 U.S.C. § 2339B(g)(4) (2012).

from scientific, technical or other specialized knowledge."[83] Under all of these definitions, only the terms "service" and "personnel" can be applied to social media usage.[84] However, the crucial term to focus on when applying § 2339B to social media is the term "service" and how the Court in *Holder* applied this term to speech.

In *Holder*, the plaintiff (Humanitarian Law Project) wanted to engage in "'political advocacy' on behalf of Kurds living in Turkey and Tamils living in Sri Lanka" but feared that such advocacy might be considered a "service" under § 2339B.[85] The political advocacy was through legal services and speech that Humanitarian Law Project intended to provide to the Kurds and Tamils, who belonged to the foreign terrorist organizations of the PKK and LTTE, respectively.[86] The Court in *Holder* held that "any independent advocacy in which plaintiffs wish to engage is not prohibited by § 2339B."[87] The Court went on to state, however, that "a person of ordinary intelligence would understand the term 'service' to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization."[88] The Court justified its decision by acknowledging that § 2339B only covers a "narrow" amount of speech usually protected by the First Amendment and "that the taint of [an FTO's] violent activities is so great that working in *coordination* with them or at their command legitimizes and furthers their terrorist means."[89] The Court informed Humanitarian Law Project that any advocacy or legal aid it wished to provide to the PKK or LTTE would be deemed service under the material support statute because it was done in coordination with those FTOs.[90]

---

[83] 18 U.S.C. § 2339A(b)(2–3) (2012).

[84] *See* Pierce, *supra* note 20, at 263 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 24 (2010)) (explaining that the Court in *Holder* defined the term "service" as covering "advocacy performed *in coordination with*, or *at the direction of*, a foreign terrorist organization") (emphasis added). There is the distinct possibility that a person or organization might try to impart "expert advice or assistance" or "training" to a foreign terrorist organization through social media. However, this would align more with the Supreme Court's ruling in *Holder*, which found legal aid to fall under the definitions of "expert advice or assistance" and "training." *Holder*, 561 U.S. at 21–22.

[85] *Holder*, 561 U.S. at 23.

[86] *Id.* at 10. LTTE is the acronym for the foreign terrorist group Liberation Tigers of Tamil Eelam ("LTTE"). *Foreign Terrorist Organizations*, U.S. DEPT. OF STATE, http://www.state.gov/j/ct/rls/other/des/123085.htm (last visited June 19, 2016, 9:00 AM). PKK is the acronym for the foreign terrorist group Kurdistan Workers Party ("PKK" or "Kongra-Gel"). *Id.*

[87] *Holder*, 561 U.S. at 24.

[88] *Id.*

[89] *Id.* at 4–5 (emphasis added). The Court in *Holder* was silent as to the definition of "coordination" in its opinion, and the implications and dangers of this will be covered in Part V of this Article.

[90] *Id.* at 5 ("Providing material support in any form would also undermine cooperative international efforts to prevent terrorism and strain the United States' relationships with its

The Court's ruling in *Holder* is significant for the future implications of social media usage in two ways. First, the majority opinion states that speech, or what might normally be referred to as political advocacy, is not protected by the First Amendment when it is performed in coordination with, or at the direction of, a foreign terrorist organization.[91] Second, the majority's opinion allows for speech to be deemed a service to those foreign terrorist organizations, even if that speech is not directed towards furthering any sort of terrorist activity.[92] As applied to social media postings, the Court's ruling in *Holder* could justify the United States government in prosecuting persons who post something on a social media website in coordination with, or at the direction of, a foreign terrorist organization, where that posting could be deemed a service to that organization. The government could contend that a social media posting would "make[ ] it easier for the group to persist, to recruit, and to raise funds."[93]

The government, using this rationale, has in fact been able to prosecute individuals for their activity on social media, and deem their postings a service to foreign terrorist organizations. Recall Jubair Ahmad, who was convicted for posting a propaganda video on YouTube supporting the efforts of the foreign terrorist organization LeT.[94] Ahmad's case is not an outlier either. In 2015, Rahatul Ashikim Khan, a United States citizen and son of a United States Army doctor, pled guilty to providing material support to the Taliban by using Internet message boards to recruit individuals sympathetic to their cause.[95] It is evident from the cases of Ahmad and Kahn that the United States government intends to punish persons who try to recruit members for, and add legitimacy to, foreign terrorist organizations over social media through use of § 2339B. Assistant Attorney General John Carlin has even expressed concerns over the

---

allies, including those that are defending themselves against violent insurgencies waged by foreign terrorist groups.").

[91] *Id.*

[92] *Id.* (reasoning that "terrorist organizations do not maintain firewalls between social, political, and terrorist operations, or financial firewalls between funds raised for humanitarian activities and those used to carry out terrorist attacks").

[93] Noah Bialostozky, *Material Support of Peace? The On-The-Ground Consequences of U.S. and International Material Support of Terrorism Laws and the Need for Greater Legal Precision*, 36 YALE J. INTL. L. ONLINE 59, 64 (2011) (noting that the Court in *Holder* "was persuaded by the fungibility of DTO resources—material support frees up other resources that the DTO may put toward terrorist activities").

[94] United States v. Ahmad, No. 1:11CR554, 2011 WL 6005308 (E.D. Va. Dec. 2, 2011); *see also* WFO, *supra* note 30 (LeT is the acronym for the foreign terrorist group Lashkar-e Tayyiba).

[95] San Antonio Division, *Round Rock Man Sentenced to 10 Years in Federal Prison for Attempting to Provide Material Support to Terrorists*, FED. BUREAU OF INVESTIGATION (Sept. 25, 2015), https://www.fbi.gov/sanantonio/press-releases/2015/round-rock-man-sentenced-to-10-years-in-federal-prison-for-attempting-to-provide-material-support-to-terrorists.

use of social media and its effects on foreign terrorist organizations and their goals, stating "as we disrupt travel and make it harder for potential ISIL recruits in this country to get to Syria and Iraq, ISIL adapts, increasingly encouraging individuals in the West to conduct terrorist attacks at home. No passport or travel required."[96] Consequently, as social media becomes an effective tool for terrorists, the United States government is evermore committed to prosecuting individuals who attempt to provide material support through social media.

Since *Holder*, the speech of American citizens seems to unequivocally meet the statutory definition of service as a form of material support under § 2339.[97] The old adage that a person can advocate for a political purpose as long as it does not incite others to lawless action is no longer the threshold as to what is encompassed and protected by the First Amendment.[98] Today, speech need not lead to imminent lawless actions by others.[99] Rather, any speech that serves to add legitimacy, recruit members, or raise monetary assets for a foreign terrorist organization meets the statutory definition of material support.[100] In *Holder*, the Court realized this expansion of the governmental regulation of speech and qualified it by stating that only speech done in coordination, or at the direction of, a foreign terrorist organization would be punishable under § 2339B.[101] Notwithstanding this qualification, the *Holder* Court failed to define what constitutes coordination under § 2339B, thereby permitting lower courts to differ in their application of the term and leaving open the possibility for over-criminalization of what might be considered independent political advocacy over social

---

[96] Arielle Klepach, Bulletin, *The Rise of Homegrown Terrorism and Material Support Statutes*, COLUM. J. OF TRANSNAT'L L., http://jtl.columbia.edu/the-rise-of-homegrown-terrorism-and-material-support-statutes (last visited Apr. 11, 2016).

[97] United States v. Mehanna, 735 F. 3d 32, 49 (1st Cir. 2013); United States v. Farhane, 634 F.3d 127, 137 (2d Cir. 2011).

[98] *See* Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (holding that inflammatory speech loses its protection under the First Amendment when that speech leads to imminent lawless actions by others).

[99] Holder v. Humanitarian Law Project, 561 U.S. 1, 43–44 (2010) (Breyer, J., with Ginsburg & Sotomayor, JJ., dissenting).

[100] Bialostozky, *supra* note 93, at 64.

[101] *Holder*, 561 U.S. at 13. The Court developed this coordination requirement from the statutory definition of "provision of personnel" under § 2339B(h), which states

> 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.

18 U.S.C. § 2339B(h) (2012) (emphasis added).

media.[102]

V. JUST WHAT IS THE DEFINITION OF COORDINATION?

How a court defines "coordination" determines if a person is guilty or not guilty of providing or attempting to provide material support to an FTO by making a post to social media. Moreover, the absence of a definition of "coordination" in the *Holder* decision has resulted in a plethora of scholarly debate.[103] In fact, Justice Antonin Scalia stated during oral arguments in the *Holder* case, in response to a hypothetical posed by one of the attorneys, that the answer "depends on what coordinating means, doesn't it? And we can determine that in the next case."[104]

In 2011, the "issue of how to interpret and apply the 'coordination' requirement of the material support statute" came to light in the prosecution of Tarek Mehanna ("Mehanna").[105] In *Mehanna*, the First Circuit affirmed a conviction for providing material support to al-Qai'da for "translat[ing] Arab-language materials into English and post[ing] [those] translations on a website."[106] One of the issues on appeal to the First Circuit was whether or not the District Court judge appropriately instructed the jury on what constituted material support.[107] The jury was instructed that in order to find Mehanna guilty of providing material support in violation of § 2339B, he "must be acting in coordination with or at the direction of a designated foreign terrorist organization."[108] The First Circuit affirmed Mehanna's sentence of more than seventeen years in federal prison, and stated that the District Court properly instructed the jury as to what constitutes material support.[109] The First Circuit affirmed relying heavily on the fact that Mehanna traveled to Yemen seeking out al-Qa'ida as sufficient

---

[102] Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 623 (2014) ("One important implication of this analysis is that because the distinction between independent and coordinated speech (or for that matter conduct) becomes central to defining the scope of constitutional protections, it is essential to clearly define that line."); Knox, *supra* note 51, at 313 ("The Court, however, did not clarify how the 'coordination' requirement should be understood or applied."); *see also* Moshirnia, *supra* note 22, at 431 ("The term coordination is not defined as part of any criminal statute in 18 U.S.C."); George D. Brown, *Notes on a Terrorism Trial — Preventive Prosecution, "Material Support" and the Role of the Judge After* United States v. Mehanna, 4 HARV. NAT'L SEC. J. 1, 55 (2012) ("[The judge] denied [Mehanna's] request for an instruction that would, in effect, have ruled out one-way 'coordination,' perhaps leaving some latitude in defining that term.").

[103] *See supra* text accompanying note 102.

[104] Knox, *supra* note 51, at 313 (posing a hypothetical regarding "the potential liability of newspapers publishing a Hamas op-ed").

[105] *Id.* at 313–14; United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013).

[106] *Mehanna*, 735 F.3d at 41.

[107] Knox, *supra* note 51, at 314.

[108] *Id.*

[109] *Id.*

grounds for a conviction, thereby avoiding the need to address what the proper definition of "coordination."[110]

Subsequent a writ for certiorari was filed to Supreme Court.[111] The certified question was "[w]hether a citizen's political and religious speech may constitute a provision of 'material support or resources' to an FTO under the 'coordination' rubric of *Humanitarian Law Project*."[112] As noted in one scholarly journal, "[t]he Supreme Court's denial of certiorari only serves to perpetuate the confusion."[113]

The decision in *Mehanna* and the subsequent denial of certiorari by the Supreme Court are significant in the realm of social media and material support for two reasons. First, *Mehanna* confirmed that speech transmitted over the Internet could be deemed a service to an FTO.[114] Second, in response to Mehanna's argument that coordination was not adequately defined, the "court further clarified that neither the statute itself nor the Court's decision in [*Holder*] require that the person providing the alleged support to an FTO have a direct connection to the FTO."[115] This would imply that a person could satisfy the coordination requirement on a completely "unilateral" basis,[116] meaning that "unilateral action taken on the part of a defendant is enough" to satisfy the coordination requirement under the material support statute, without ever having been in contact or under the direction of an FTO.[117] Therefore, under this broad and somewhat sweeping interpretation, the possibility exists that a person who posts pro-terrorist statements over social media might be found guilty of either providing, or attempting to provide, material support to an FTO without ever having been in contact or under the direction of that FTO.

Given the ambiguity in the Supreme Court's use of the term "coordination" in *Holder,* and the subsequent interpretation of that term by other federal

---

[110] *Id.* at 314–15

[111] Mehanna v. United States, 135 S. Ct. 49 (2014), *cert denied.*

[112] Knox, *supra* note 51, at 315.

[113] *Id.*

[114] Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1683 (2015) (noting that the *Mehanna* court "further stressed that the government's theory rested on the premise that the translations are one type of 'service' and thus amount to provision of material support, which the statute prohibits").

[115] *Id.* at 1683–84.

[116] Brown, *supra* note 102, at 24 (arguing in the alternative that "[r]eadings of [*Holder*] that allow punishment of seemingly independent advocacy on the grounds of a unilateral desire to help a foreign terrorist organization would almost certainly go too far").

[117] *Id.*; *see* Bhagwat, *supra* note 102, at 610 (addressing the argument that when "coordination/membership can be unilateral, . . . it makes the safe harbor of independent advocacy very dangerous indeed, because the supposedly protected speech itself can become proof of coordination"); *see also* Knox, *supra* note 51, at 314 n.119 (stating that "the Second and Eleventh Circuits interpreted the relationship requirement liberally, suggesting that unilateral action on the part of a defendant would be enough to support a material support conviction").

courts, a clarification is undoubtedly warranted by the Supreme Court as to what might constitute coordination when speech is implicated as material support to an FTO. The premise that persons are subject to prosecution for merely posting pro-terrorist comments on social media is most often criticized through the argument that messages alone could not serve as the sole basis for conviction, but rather, those messages should serve as evidence of intent to provide support.[118] The flaw in this position is that it assumes all judges will interpret the meaning of "coordination" the same way. However, the Supreme Court stated "[i]t is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor."[119] Consequently, a uniform test should be developed to the application of the term "coordination" when speech is implicated as material support to an FTO.

The Supreme Court does not have to look far to obtain guidance as to what the test for "coordination" should be. The federal courts' decisions following *Holder* all have a common factor when defendants were found guilty of attempting to provide material support in the form of a service or personnel.[120] That common factor is that each defendant took an affirmative step in attempting, and in some cases succeeding, to contact members of the FTO in an effort to help that FTO in some way. Recall, the First Circuit affirmed the decision by the district court in *Mehanna* because the defendant traveled to Yemen in an attempt to join an FTO.[121] Further, in the case of Jubair Ahmad, he actually made contact and received training from LeT prior to his uploading of a propaganda video to YouTube.[122] Again, in *Farhane*, the Second Circuit found that the defendant had taken an oath to join Al Qaeda and made travel arrangements overseas to provide medical services for Al Qaeda.[123] Therefore, the Supreme Court could align with the decision in *Mehanna*, where no direct communication occurred, and find that a unilateral action on the part of a defendant may constitute coordination if the defendant has taken affirmative actions towards either communicating with or joining an FTO. This affirmative action test would also align with the cases of Jubair Ahmad and *Farhane* because any

---

[118] Brown, *supra* note 102, at 25; Klepach, *supra* note 96.

[119] Thompson v. Thompson, 484 U.S. 174, 523 (1988) (Scalia, J., concurring).

[120] Knox, *supra* note 51, at 314.

[121] United States v. Mehanna, 735 F.3d 32, 50 (1st Cir. 2013); Knox, *supra* note 51, at 314–15.

[122] WFO, *supra* note 30, at 1 (stating that in Austin, Texas, Rahatul Ashikim Khan was convicted of posting messages on the Internet in support of the Taliban after having contacts with individuals associated with the Taliban and helping to recruit members to join the Taliban's cause); San Antonio Division, *supra* note 95.

[123] United States v. Farhane, 634 F.3d 127, 145 (2d Cir. 2011).

speech deemed a service would also serve as evidence of intent to carry out those affirmative actions.

VI. CONCLUSION

In 2010, the Supreme Court's decision in *Holder* balanced the policy interest of national defense with American citizens' inherent right to free speech.[124] The Court was clear that independent political advocacy would not be punishable under § 2339B.[125] However, the Court also acknowledged that more difficult cases might arise under the material support statute and that further analysis of its applicability would be needed.[126] As social media growth continues,[127] so does the risk of terrorist recruiting efforts through it.[128] Despite the fact that the *Holder* decision was issued less than seven years ago, the time to address more difficult cases has arrived.

To avoid criminalizing behavior that was never intended to materially support a foreign terrorist organization, the Court should adopt the First Circuit's two-prong scienter requirement where the first prong of the test requires that the aid must be intentional, and the second "that the defendant know the organization he is aiding is a terrorist organization or engages in acts of terrorism."[129] Adopting this test would allow the Court to remain consistent with its decision in *Holder*, because a person would still have to know that the organization is an FTO or engages in terrorist activity under § 2339B's intent requirement.[130] However, it would shield citizens from being prosecuted for social media actions that were never intended to be aid or support in the first place.

Adopting *Mehanna*'s two-prong scienter requirement would also allow the Court to finally state what the proper test for attempt should be under § 2339B. If the aid was required to be intentional, then the Court could adopt the Second Circuit's attempt requirement found in *Farhane*. Under *Farhane*'s two-prong analysis for attempt, it must be the *intent* of the person to carry out the object crime, and the person must take a substantial step in carrying out that object crime.[131] Therefore, if someone posts something to social media not intending for it to be aid or support, but rather political advocacy, then that post would not satisfy attempt under § 2339B.

---

[124] Holder v. Humanitarian Law Project, 561 U.S. 1, 7 (2010).

[125] *Id.*

[126] *Id.* ("We do not, however, address the resolution of more difficult cases that may arise under the statute in the future.").

[127] Perrin, *supra* note 23.

[128] Yigal Carmon & Steven Stalinsky, *Terrorist Use of U.S. Social Media is a National Security Threat*, FORBES (Jan. 30, 2015), http://www.forbes.com/sites/realspin/2015/01/30/terrorist-use-of-u-s-social-media-is-a-national-security-threat/#36dab23112d0 ("ISIS has grasped the effectiveness of social media . . . .").

[129] United States v. Mehanna, 735 F.3d 32, 42 (1st Cir. 2013).

[130] *Holder*, 561 U.S. at 7.

[131] United States v. Farhane, 634 F.3d 127, 145 (2d Cir. 2011).

Lastly, content-based speech may be deemed material support as a form of service to an FTO after *Holder* and the numerous federal court decisions following *Holder*. The Court should therefore adopt a coordination requirement that requires a person to take affirmative actions to either contact or join an FTO in order to satisfy the coordination requirement associated with the material support of service and personnel. Defining what the coordination requirement instituted by *Holder* is would serve two distinct functions. First, if a person has taken affirmative actions to contact or join an FTO, that person could not escape culpability by claiming mere accidental support under the *Mehanna* and *Farhane* tests above. Second, requiring affirmative action by the accused would still allow courts to find that coordination may be satisfied by a unilateral action without there being any direct contact between the FTO and the defendant.

Adopting these clarifications to the applicability of § 2339B would not only clarify the culpability of social media usage, but it would also ensure that speech would not be over-criminalized and would remain protected under the First Amendment. It is without dispute that the world's fight (not just the United States') against terror is ever evolving and more dangerous. The use of social media by these terrorist organizations adds but one more dynamic that makes the goal of stopping them that much more difficult. However, in the war against terror, courts need clear guidance in adjudging individuals charged with supporting terrorist organizations so as not to over-criminalize constitutionally protected citizen conduct. Nearly fifty years ago, the Supreme Court realized that "[i]mplicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart."[132] It is time that this principle is realized it again.

---

[132] United States v. Robel, 389 U.S. 258, 264 (1967).