

PROSECUTING WEBSITE DEVELOPMENT UNDER THE MATERIAL SUPPORT TO TERRORISM STATUTES: TIME TO FIX WHAT'S BROKEN

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INTRODUCTION

America's ongoing struggle against international terrorism has kindled a spirited debate concerning the development of effective laws and policies to address the greatest threat to national security since the demise of the Soviet Union. Emerging in the wake of the shock, chaos, and horror of the September 11th attacks, the Bush Administration's tactics in its self-described "War on Terror" have fueled this debate while drawing severe criticism from civil libertarians.¹ The most controversial of these tactics have included the use of military tribunals at Guantanamo Bay, aggressive interrogation techniques that have been characterized as torture, and the use of the National Security Agency to conduct domestic surveillance.

In addition, as part of an effort to preempt terrorist activity, federal prosecutors have broadly and "creatively" interpreted the scope of two material support to terrorism statutes² in order to interdict suspected terrorists and their supporters before they have a chance to actually carry out acts of violence.³ These creative interpretations have allowed prosecutors to arrest and detain suspects whom they suspect are not only sympathetic to the cause of the terrorists but who are actively aiding this cause indirectly. Critics have quickly emerged to

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1. See generally DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007); DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003); JOE CONASON, *IT CAN HAPPEN HERE: AUTHORITARIAN PERIL IN THE AGE OF BUSH* (2007); *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* (Richard C. Leone & Greg Anrig, Jr., eds., 2003).

2. 18 U.S.C. §§ 2339A, 2339B (2000).

3. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 *HARV. J. ON LEGIS.* 1, 28–30, 44–47 (2005).

voice their concerns that in adopting this approach, the government has significantly expanded criminal liability and is treading on individual rights protected by the U.S. Constitution, particularly the First Amendment.⁴

A recent case—*United States v. Al-Hussayen*⁵—not only exemplified this creative prosecution strategy but also became an example for many of the government's continuing encroachment on Constitutional rights in post-September 11th America. The case involved the Internet activities of Sami Al-Hussayen, an Islamic graduate student at the University of Idaho. Al-Hussayen was prosecuted under the material support to terrorism statutes for designing, creating, and maintaining websites that were viewed by federal prosecutors as supportive of terrorism.⁶ Although the material support statutes have been used since the September 11th attacks to cover a wide range of activities, the *Al-Hussayen* case was the first time that the government attempted to use the material support statutes to prosecute conduct that consisted almost exclusively of operating and maintaining websites. Even though Al-Hussayen was not convicted, the case attracted national attention and triggered a heated debate focused mainly on one key question: Were Al-Hussayen's Internet activities constitutionally protected free speech or did they cross the line into criminal and material support to terrorism?

This Article uses the factual background of the *Al-Hussayen* case as a point of departure from which to argue that the government may criminally prosecute certain Internet activities that tend to support terrorists but that the material support statutes used in the *Al-Hussayen* case are ill-suited for such prosecutions. Further, the Article will argue that new federal criminal legislation is needed to address the extensive and alarming use of the Internet by terrorist organizations. To help remedy the threat posed by these developments, the Article will outline a new statute to address the difficult task of balancing security with liberty on the Internet. Part I will chronicle the remarkable circumstances leading up to the novel prosecution in the *Al-Hussayen* case, setting the stage for a discussion of the background and purpose of the material support to terrorism statutes. Part II will discuss the development, use, and ultimate failure of the material support statutes

4. See, e.g., *id.* at 47–71 (presenting criticisms of the material support statutes based on due process, freedom of expression, and vagueness concerns).

5. Second Superseding Indictment at 1–13, *United States v. Al-Hussayen*, No. CR03-048-C-EJL (D. Idaho Mar. 4, 2004) [hereinafter Second Superseding Indictment, *Al-Hussayen*].

6. *Id.*

in the *Al-Hussayen* case. Part II will also outline proposed new legislation to rectify the weaknesses inherent in the use of the statutes to prosecute certain Internet activities by terrorists. Finally, Part III will analyze the First Amendment issues potentially raised by prosecution for website activities and explain why the proposed statute passes constitutional muster.

I.

BACKGROUND TO *UNITED STATES V. AL-HUSSAYEN*: MAKING THE CASE FOR MATERIAL SUPPORT TO TERRORISTS

A. *The Investigation and Indictment of Al-Hussayen*

In early 2003, special agents of the Federal Bureau of Investigation (FBI) and local law enforcement officials launched a significant counter-terrorism operation in the unlikeliest of places, the bucolic college town of Moscow, Idaho.⁷ Located in the rolling hills of northern Idaho's pastoral Palouse region, Moscow and its 18,000 citizens were caught completely off-guard by the FBI-led raid that began in the early hours of February 26, 2003,⁸ and ended with Al-Hussayen's dramatic arrest at his on-campus residence.⁹ Al-Hussayen, a citizen of Saudi Arabia, had been attending the University of Idaho since 1999 and was pursuing a Ph.D. in Computer Science.¹⁰ Since his arrival, he had become a member of the University of Idaho community, known for his friendly and unassuming nature and for his public calls for peace in the wake of September 11th.¹¹ Thus, his arrest on suspicion of terrorist-related activities sent shockwaves through Moscow's incredulous, close-knit Muslim community.¹²

The arrest of Al-Hussayen came after a comprehensive year-long investigation by the FBI that began shortly after the events of September 11, 2001.¹³ In October 2001, the FBI initiated an investigation of Al-Hussayen after a local Moscow, Idaho, bank teller became suspi-

7. Paul Shukovsky, *Anti-Terror Forces Arrest Idaho Student; Investigators Suspect He Has Ties to Bin Laden*, SEATTLE POST-INTELLIGENCER, Feb. 27, 2003, at A1.

8. *Id.*; John K. Wiley, *Idaho Student in Terrorism Arrest; Saudi Allegedly Supplied Radical Islamic Group with Computer Expertise, Money*, SEATTLE TIMES, Feb. 27, 2003, at B5.

9. Maureen O'Hagan, *A Terrorism Case that Went Awry*, SEATTLE TIMES, Nov. 22, 2004, at A1.

10. Wiley, *supra* note 8, at B5.

11. *See id.*; Shukovsky, *supra* note 7, at A1.

12. Shukovsky, *supra* note 7, at A1.

13. *Id.*

scious of some of Al-Hussayen's financial transactions.¹⁴ Based on this and other information, FBI agents sought and received court orders that allowed them to tap Al-Hussayen's phones and monitor his personal e-mail accounts.¹⁵ The FBI also conducted physical surveillance of Al-Hussayen's activities on the University of Idaho campus.¹⁶

During the investigation, FBI agents discovered not only "suspicious" financial transactions involving Al-Hussayen's six bank accounts in four different states but also evidence of Al-Hussayen's Internet activities that seemed to connect him with terrorism through websites belonging to organizations that described themselves as Islamic charities.¹⁷ The FBI had long been suspicious of Islamic charities because there was a well-documented pattern of them serving as a legitimate face or "front" for international terrorist organizations.¹⁸ Al-Hussayen's extensive involvement in a major Islamic charity, along with evidence that he had been creating and maintaining websites with content that included exhortation to violence and efforts to recruit new members and fund terrorist activity, further sparked the FBI's interest in investigating his activities.¹⁹

In particular, the FBI investigation revealed that Al-Hussayen was the registered webmaster²⁰ for websites belonging to the Islamic Assembly of North America (IANA), the Al-Haramain Islamic Foundation (AHIF), and Dar Al-Asr.²¹ The IANA and the AHIF purported to be charities dedicated to spreading the cause of Islam, and Dar Al-Asr was an information technology company based in Saudi Arabia.²²

14. O'Hagan, *supra* note 9, at A1.

15. *Id.* As part of this investigation, the FBI read approximately 20,000 of Al-Hussayen's e-mail messages and monitored approximately 9000 of his personal phone calls. *Id.*

16. Application and Affidavit for Search Warrant at 1–2, 23, United States v. Al-Hussayen, No. CR03-048-C-EJL (D. Idaho Feb. 21, 2003).

17. Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 4–5. The indictment alleged that Al-Hussayen maintained at least six U.S. bank accounts in Indiana, Texas, Idaho, and Michigan. *Id.* at 4.

18. See *The HAMAS Asset Freeze and Other Government Efforts to Stop Terrorist Funding: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 11–12 (2003) (statement of John Pistole, Assistant Director, Counterterrorism Division, Federal Bureau of Investigations); LORETTA NAPOLEONI, TERROR INCORPORATED: TRACING THE DOLLARS BEHIND THE TERROR NETWORKS 124–27 (2005).

19. Paul Shukovsky, *Idaho Student Eludes Agents; U.S. Suspects He Had Ties to Al-Qaida*, SEATTLE POST-INTELLIGENCER, Mar. 21, 2003 at B1.

20. A webmaster is "[a] person whose occupation is designing, developing, marketing, or maintaining websites." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1949 (4th ed. 2000).

21. Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 5.

22. *Id.* at 3.

Al-Hussayen's most extensive involvement appeared to be with the IANA, an organization known to advocate Wahhabism, a conservative and radical sect in modern Islam closely associated with modern international terrorism.²³ Founded in 1993, the IANA conducted its activities as an Islamic charity with its headquarters in Ann Arbor, Michigan.²⁴ According to its own website, the IANA's goals include

[u]nify[ing] and coordinat[ing] the efforts of the different dawah oriented organizations [organizations dedicated to propagating Islam], . . . observ[ing] and analyz[ing] the current events in the Muslim world, . . . [tying] the Muslims of America into what is happening in the Muslim world and assist[ing] them in understanding the events and the implications of the current events.²⁵

Notwithstanding its benign self-description, the IANA had been labeled as a Muslim extremist organization by the Saudi Embassy, and the FBI had reason to believe that the IANA was actively involved in fundraising for fundamentalist Muslim terrorist organizations.²⁶ The FBI concluded that Al-Hussayen played a major role in the IANA organization, not only by serving as an officer in the IANA but also through his substantial personal efforts in creating, operating, and maintaining websites that appeared to be designed and intended to recruit mujahideen²⁷ and raise funds for violent jihad.²⁸ The FBI discovered that Al-Hussayen designed and maintained "www.al-multaqa.com," an IANA website that published articles extolling the virtues of mujahideen; describing and encouraging jihad; and praising shaheed, the act of dying as a martyr, as the ultimate honor for a Muslim.²⁹

According to the FBI, Al-Hussayen also created and maintained websites for the Al-Haramain Islamic Foundation (AHIF), another

23. See Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.; Network of Wahhabi Mosques, Schools, Web Sites Probed by FBI*, WASH. POST, Oct. 2, 2003, at A1.

24. See Islamic Assembly of North America, IANA History, <http://www.iananet.org/history.htm> (last visited Nov. 29, 2007); Islamic Assembly of North America, IANA, <http://www.iananet.org> (last visited Nov. 29, 2007).

25. Islamic Assembly of North America, About IANA, <http://www.iananet.org/about.htm> (last visited Nov. 29, 2007).

26. Schmidt, *supra* note 23, at A1.

27. Mujahideen are "guerilla fighters in Islamic countries, esp. supporting Muslim fundamentalism." THE OXFORD ENCYCLOPEDIA ENGLISH DICTIONARY 952 (1991).

28. Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 3-5. Jihad is "a holy war. One of the basic duties of a Muslim, prescribed as a religious duty by the Koran and by tradition, is to struggle against external threats to the vigour of the Islamic community . . ." THE OXFORD ENCYCLOPEDIA ENGLISH DICTIONARY, *supra* note 27, at 765.

29. Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 6.

self-described Islamic charity with its world headquarters in Saudi Arabia and offices in the United States (Ashland, Oregon), Chechnya, Bosnia, Somalia, Indonesia, Pakistan, and Kenya.³⁰ The indictment alleged that AHIF used the websites designed and managed by Al-Hussayen as one of the ways it carried out its mission of disseminating fundamentalist pro-jihadist Islamic materials.³¹

In addition to his extensive involvement with these purported charities, Al-Hussayen also provided internet services for two Saudi clerics.³² These sites published fatwas³³ by Safar Al-Halawi and Salman Al-Ouda justifying and encouraging violent jihad, including suicide attacks.³⁴ Al-Hawali and Al-Ouda had been identified after the first World Trade Center bombing in 1993 as spiritual advisors to Osama bin Ladin, the putative leader of Al-Qaeda.³⁵

Furthermore, the FBI determined that Al-Hussayen had set up a web-based system where contributions could be made to HAMAS,³⁶ a

30. *Id.* at 3–4.

31. *Id.* at 5. The AHIF was later identified as a front for Al-Qaeda and added to a list of organizations banned in 2002 by the United Nations Security Council Committee established pursuant to Resolution 1267 and known as the Al-Qaida and Taliban Sanctions Committee. See AL-QAIDA & TALIBAN SANCTIONS COMM., UNITED NATIONS, THE NEW CONSOLIDATED LIST OF INDIVIDUALS AND ENTITIES BELONGING TO OR ASSOCIATED WITH THE TALIBAN AND AL-QAIDA ORGANISATION AS ESTABLISHED AND MAINTAINED BY THE 1267 COMMITTEE 53 (Nov. 2007), <http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>; United Nations, The Al-Qaida and Taliban Sections Committee, <http://www.un.org/sc/committees/1267/index/shtml> (last visited Nov. 29, 2007). According to the indictment, at the time of Al-Hussayen's arrest, the U.S. State Department had designated numerous branches of the AHIF as "Specially Designated Global Terrorists pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §1701, as implemented by Executive Order 13224." Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 3.

32. Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 7.

33. A fatwa is a "legal opinion or ruling issued by an Islamic scholar." THE AMERICAN HERITAGE COLLEGE DICTIONARY 506 (4th ed.2002).

34. See Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 5–8; Betsy Z. Russell, *Four Fatwas Shown to Jury, Religious Justifications for Suicide Attacks Were Posted on Web Site Maintained by Idaho Student*, SPOKESMAN-REVIEW (Spokane, Wash.), May 14, 2004, at B1 [hereinafter Russell, *Four Fatwas*].

35. Al-Hawali "[i]s currently secretary general of the Supreme Council of Global Jihad [and] was one of the 26 Saudi scholars who issued an open letter in late 2004 calling on Iraqis to fight the US. [He i]s closely associated with Salman al-'Awda [Ouda] and is considered by some to be a significant mentor to Usama bin Ladin. [He] [i]s named as a 'theologian of terror' in the 10.2004 petition to the UN signed by 2,500 Muslim intellectuals calling for a treaty to ban the religious incitement to violence." MILITANT IDEOLOGY ATLAS 344 (William McCants ed., 2006), [available at http://ctc.usma.edu/atlas/Atlas-ResearchCompendium.pdf](http://ctc.usma.edu/atlas/Atlas-ResearchCompendium.pdf).

36. Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 8. The website "www.islamway.com" provided a link to "www.palestine-info.org 'for donations' to HAMAS." *Id.* Another website developed and maintained by Al-Hussayen, "www.al-multaqa.com," included hyperlinks to the same page for donations to HAMAS. *Id.*

Palestinian terrorist organization best known outside the Palestinian territories for its suicide bombings.³⁷ According to the indictment, the website Al-Hussayen helped create, operate, and maintain—“www.islamway.com”—included links to a variety of articles, speeches, and lectures promoting violent jihad in Israel.³⁸

According to the FBI, Al-Hussayen also maintained and moderated an email group that allegedly served the purpose of facilitating the recruitment of mujahideen for violent jihad.³⁹ This site allegedly contained a posting that Al-Hussayen made to all members of the group urging them to donate money to support those who were participating in violent jihad.⁴⁰ Another posting attributed to Al-Hussayen included materials entitled “Virtues of Jihad” and glorified those who die while performing violent jihad.⁴¹ According to the indictment, Al-Hussayen also stated in his postings that the “problem with Islam today is that Muslims have given up on violent jihad and are not practicing it enough.”⁴² In addition to these personal postings, the indictment also alleged that in his role as webmaster, he had control of the content of the websites—that is, he had the power to review all postings and delete the ones that were inappropriate, irresponsible, or criminal.⁴³

Based on this information, Al-Hussayen was ultimately charged in a second superseding indictment with two counts of violating 18 U.S.C. § 2339A and one count of violating 18 U.S.C. § 2339B.⁴⁴ The first § 2339A count alleged that Al-Hussayen had conspired to provide and conceal material support or resources to terrorists, and the second count under § 2339A charged him with *actually* providing ma-

37. Council on Foreign Relations, Hamas, <http://www.cfr.org/publication/8968/> (last visited Nov. 29, 2007).

38. Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 8. One page within the site allegedly included a section entitled “What is your role?” This question was answered on the same page as follows: “Participate with money, and this is [via] The Palestinian Information Center (the official mouthpiece of the Islamic Resistance Movement, HAMAS), which opens the door of donations for all Muslims to assist their brothers in their honorable jihad against the dictatorial Zionist Jewish enemy.” *Id.*

39. *Id.* at 9.

40. *Id.* at 8–9.

41. *Id.* at 9.

42. *Id.* at 9–10.

43. *Id.* at 5. One of the e-mail group postings included detailed instructions on how to travel to and train at a particular terrorist training camp outside the United States; another posting included an “urgent appeal” to Muslims serving in the U.S. military for information about potential terrorist targets including American military bases, logistical support (including drinking water) for bases, storage facilities for weaponry and ammunition, and routes followed by oil tankers. *Id.* at 10.

44. *Id.* at 11–13.

terial support or resources to terrorists.⁴⁵ He was also charged with a sole count under § 2339B for conspiracy to provide material support to HAMAS, a U.S. State Department-designated foreign terrorist organization (FTO).⁴⁶ Although not the focus of this Article, it is important to note that Al-Hussayen was additionally charged with four counts of making false statements to the United States under 18 U.S.C. §§ 1001(a)(2) and 3238, and seven counts of visa fraud under 18 U.S.C. §§ 1546(a), 3237, and 3238.⁴⁷ Al-Hussayen also faced separate deportation proceedings for violating U.S. immigration laws. These proceedings were conducted during the criminal trial, since the immigration judge denied Al-Hussayen's motion to stay the proceedings.⁴⁸

The criminal trial finally began in Boise in April 2004, more than a year after Al-Hussayen was taken into custody,⁴⁹ and reached its climactic conclusion over six weeks later when the jury returned a mixed verdict.⁵⁰ The jury found Al-Hussayen not guilty of all three material support counts, one of the false statement counts, and one of the visa fraud counts, but it was unable to reach a decision on three

45. *Id.* at 11–12.

46. *Id.* at 12–13. The Secretary of State may designate an organization as a foreign terrorist organization (FTO) if the Secretary finds that “(A) the organization is an [FTO]; (B) the organization engages in terrorist activity . . . ; and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.” 8 U.S.C. § 1189(a)(1) (2000). Prior to designating an organization as an FTO, the Secretary must notify certain members of Congress and publish the designation in the Federal Register. *Id.* § 1189(a)(2)(A). The designation is effective upon publication. *Id.* § 1189(a)(2)(B).

47. Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 17–24. The false statement charges were alleged as violations of 18 U.S.C. §§ 1001(a)(2) and 3238. *Id.* at 17, 19, 21–22. The basis for these charges was the government's contention that Al-Hussayen had claimed that his sole purpose in entering the United States was to study at the University of Idaho when, in fact, his purpose was to work as a key officer in the IANA. *Id.* at 13–24. The visa fraud charges were filed under 18 U.S.C. §§ 1546(a), 3237, and 3238. *Id.* at 17–24. The basis for these charges was essentially the same as for the false statement counts. The government contended that Al-Hussayen had provided false information in his student visa application by not declaring his extensive activities with the IANA. *Id.* at 13–24. Despite all of the work that Al-Hussayen had done with the IANA, he never reported his affiliation with the IANA on his visa application and failed to disclose his relationship with the IANA on several occasions when he re-entered the United States. *Id.*

48. See Besty Z. Russell, *Cleared of Charges, Sami Al-Hussayen Heads Home to Family, He Travels to Saudi Arabia after Months in Jails*, SPOKESMAN-REVIEW (Spokane, Wash.), July 22, 2004, at B1 [hereinafter Russell, *Cleared of Charges*].

49. See Hans Sherrer, *Innocent Muslim Student Prosecuted as a Terrorist and Jailed for 17 Months*, JUSTICE: DENIED, Summer 2004, at 10, 10.

50. Verdict at 1–2, *United States v. Al-Hussayen*, No. CR03-048-C-EJL (D. Idaho June 10, 2004).

additional false statement counts and five visa fraud counts.⁵¹ The trial judge declared a mistrial as to these eight counts, leaving open the possibility of a second trial with respect to the counts on which the jury had been unable to reach a decision.⁵²

Following the verdict, negotiations between the U.S. Attorney's Office and Al-Hussayen's attorneys resulted in an agreement under which Al-Hussayen waived his right to object to deportation in exchange for the government's agreement to dismiss the eight counts on which the jury had hung.⁵³ In essence, Al-Hussayen agreed to go back to Saudi Arabia rather than face a retrial on the remaining visa and false statement charges. Al-Hussayen returned to Saudi Arabia in July 2004, thus ending his long ordeal.⁵⁴ His departure brought some measure of closure to the case but left many critical questions unresolved as to charging similar cases in the future. As Part II discusses, these unresolved questions arise from the history, focus, and language of the material support statutes.

II.

THE FAILURE OF THE MATERIAL SUPPORT STATUTES IN THE *AL-HUSSAYEN* CASE

A. *The Material Support to Terrorism Statutes*

The material support to terrorism charges—under 18 U.S.C. §§ 2339A and 2339B—were predicated on Al-Hussayen's alleged design and maintenance of websites for charitable organizations that the government believed were encouraging jihad, recruiting terrorists, and funneling money to international terrorist groups. Although frequently referred to as USA PATRIOT Act innovations,⁵⁵ §§ 2339A and 2339B in their original forms predate the USA PATRIOT Act by more than half a decade.⁵⁶ The first material support to terrorism statute enacted by Congress, 18 U.S.C. § 2339A, was passed as part of the Violent Crime Control and Law Enforcement Act of 1994.⁵⁷ As

51. *Id.* at 1–4.

52. Jury Trial – Day 34 – Final Day at 1, *United States v. Al-Hussayen*, No. CR03-048-C-EJL (D. Idaho June 10, 2004).

53. *See* Russell, *Cleared of Charges*, *supra* note 48, at B1.

54. *Id.*

55. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 805(a), 115 Stat. 272, 377–78.

56. For an excellent discussion of the evolution of U.S. laws aimed at addressing international terrorism, see *Chesney*, *supra* note 3, at 4–21.

57. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022–23 (codified as amended at 18 U.S.C. § 2339A (2000)).

amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)⁵⁸ and in effect at the time of the Al-Hussayen prosecution, § 2339A provided in relevant part:

§ 2339A. Providing material support to terrorists

(a) OFFENSE.—Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [certain sections of the U.S. Code prohibiting terrorist activities⁵⁹] . . . or

58. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255.

59. Section 2339A defines these terrorist activities by cross-referencing to numerous sections of the U.S. Code. These sections are: 18 U.S.C. § 32 (2000 & Supp. III 2003) (prohibiting the destruction of aircraft or aircraft facilities); 18 U.S.C. § 37 (prohibiting violent acts at international airports); 18 U.S.C. § 81 (prohibiting arson of buildings or equipment within special maritime and territorial jurisdiction of the United States); 18 U.S.C. § 175 (prohibiting possession or transfer of biological weapons); 18 U.S.C. § 229 (prohibiting possession or transfer of chemical weapons); 18 U.S.C. § 351 (prohibiting assassination, kidnapping, or assault of enumerated federal officials); 18 U.S.C. § 831 (prohibiting activities related to nuclear materials); 18 U.S.C. § 842(m) (prohibiting importation or exportation of plastic explosives without a detection device); 18 U.S.C. § 842(n) (prohibiting transfer or possession of plastic explosives without a detection device); 18 U.S.C. § 844(f) (prohibiting destruction of property owned by the United States); 18 U.S.C. § 844(i) (prohibiting destruction of property used in interstate commerce); 18 U.S.C. § 930(c) (prohibiting killing of a person in the course of possessing firearms or dangerous materials in federal facilities); 18 U.S.C. § 956 (prohibiting conspiring to kill, kidnap, maim, or injure persons or damage property in a foreign country); 18 U.S.C. § 1114 (providing for prosecution of persons who kill or attempt to kill any officer or employee of the United States); 18 U.S.C. § 1116 (providing for prosecution of persons who kill or attempt to kill any foreign officials or internationally protected guests); 18 U.S.C. § 1203 (prohibiting taking of hostages); 18 U.S.C. § 1361 (prohibiting damage to government property); 18 U.S.C. § 1362 (prohibiting damage to communication lines, stations, or systems); 18 U.S.C. § 1363 (prohibiting damage to property within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. § 1366 (prohibiting damage to energy facilities); 18 U.S.C. § 1751 (prohibiting assassination, kidnapping, or assault of U.S. President or staff); 18 U.S.C. § 1992 (prohibiting attacks on trains); 18 U.S.C. § 1993 (prohibiting attacks against mass transportation systems); 18 U.S.C. § 2155 (prohibiting damaging national-defense materials, premises, or utilities); 18 U.S.C. § 2156 (prohibiting production of defective national-defense material, premises, or utilities); 18 U.S.C. § 2280 (prohibiting taking or damaging ships); 18 U.S.C. § 2281 (prohibiting seizing or damaging fixed maritime platforms); 18 U.S.C. § 2332 (providing criminal penalties for killing of U.S. nationals); 18 U.S.C. § 2332a (prohibiting use of weapons of mass destruction); 18 U.S.C. § 2332b (prohibiting acts of violence that transcend national boundaries); 18 U.S.C. § 2332f (prohibiting bombing of public places); 18 U.S.C. § 2340A (prohibiting torture); 42 U.S.C. § 2284 (2000 & Supp. III 2003) (prohibiting sabotage or unauthorized use of nuclear facilities or fuel); 49 U.S.C. § 46502 (2000 & Supp. III 2003) (prohibiting air piracy); 49 U.S.C. § 60123(b) (prohibiting willfully damaging or destroying an interstate gas pipeline facility).

attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both

(b) DEFINITION.—In this section, the term “material support or resources” means 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, transportation, and other physical assets, except medicine or religious materials.⁶⁰

The original version of § 2339A did not include the “expert advice or assistance” language;⁶¹ this clause was added in 2001 to § 2339A and, by reference, to § 2339B by the USA PATRIOT Act.⁶² Indeed, the inclusion of this language was critical in the *Al-Hussayen* case, as will be discussed below, because the prosecution expansively interpreted “expert advice or assistance” to encompass Al-Hussayen’s Internet activities.

Additionally, the legislative history of § 2339A provides some background to the First Amendment issue that this Article addresses in Part III. The original version of § 2339A included the following language:

ACTIVITIES PROTECTED BY THE FIRST AMENDMENT.—An investigation may not be initiated or continued under this section based on activities protected by the First Amendment to the Constitution, including expressions of support or the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group.⁶³

However, with the passage of AEDPA, this language in § 2339A was deleted.⁶⁴ According to the House Committee Report, the reason for deleting this language was that Congress believed that judges were better suited as arbiters of constitutional norms than FBI agents who might be initiating investigations of alleged violations of § 2339A.⁶⁵ In other words, Congress considered FBI agents ill-suited to make an upfront determination as to what would constitute activities protected by the First Amendment and believed that this was a legal question

60. 18 U.S.C. § 2339A (2000 & Supp. III 2003).

61. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005(a), 108 Stat. 1796, 2022.

62. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 805(a), 115 Stat. 272, 377.

63. Violent Crime Control and Law Enforcement Act § 120005(a), 108 Stat. at 2023.

64. 18 U.S.C. § 2339A (2000) (noting that “Pub. L. 104-132 [AEDPA] . . . struck out sub-sec. (c) which authorized investigations into possible violations, except activities involving First Amendment rights”).

65. See H.R. REP. NO. 104-383, at 82 (1995).

better suited for judges. In addition, to make the statute consistent with the purposes of § 2339B, the allowance for “expressions of support or the provision of financial support” was deleted as well.⁶⁶

In addition to being charged with a violation of § 2339A, Al-Hussayen was also charged with a violation of § 2339B, which provided in relevant part:

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) PROHIBITED ACTIVITIES.—

(1) UNLAWFUL CONDUCT.—Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

. . . .

(g) DEFINITIONS.—As used in this section—

. . . .

(4) the term “material support or resources” has the same meaning given that term in section 2339A [including the definitions of “training” and “expert advice or assistance” in that section]⁶⁷

This provision was enacted in 1996 as part of the same AEDPA legislation that amended § 2339A⁶⁸ and was designed to cover what was perceived as a gap in the law left open by § 2339A.⁶⁹ The passage of § 2339B was motivated, in part, by government concerns that terrorist groups were using funds donated to purported humanitarian and charitable organizations to support acts of violence in their campaigns of terror.⁷⁰ This concern had metamorphosed from the late

66. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (1996). Since one of the primary purposes of § 2339B was to address financial support to terrorist organizations, this amendment to § 2339A was an attempt to bring § 2339A into harmony with § 2339B’s purposes and avoid disparate approaches for the two statutes. See Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL’Y 461, 462–63 (2005).

67. 18 U.S.C. § 2339B (2000 & Supp. III 2003).

68. AEPDA §§ 303, 323, 110 Stat. at 1250–53, 1255.

69. See *Aiding Terrorists – An Examination of the Material Support Statute: Oversight Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004), http://judiciary.senate.gov/testimony.cfm?id=1172&wit_id=3394 [hereinafter *Aiding Terrorists*] (statement of Robert M. Chesney, Assistant Professor of Law, Wake Forest University School of Law).

70. H.R. REP. NO. 104-383, at 43–44 (1995).

1970s and early 1980s, when the United States was encouraging all forms of financing to support the mujahideen in their the anti-Soviet jihad.⁷¹ However, by the post-September 11th era, Congress had recognized the threat posed by charities that had become major financial conduits for armed anti-American Islamist groups.⁷² Even though § 2339B adopted the definition of material support to terrorism contained within § 2339A, it was written so donors could no longer provide funds to terrorist organizations under the pretext that the funds were intended for humanitarian purposes. Congress believed that § 2339A continued to leave open this source of terrorist funding, and Congress now had determined to close it.⁷³ Under the newly-created § 2339B, all donations to designated foreign terrorist organizations (FTOs) would be prohibited, even if the donors intended their money go only to the non-violent or humanitarian wings of the designated FTOs.⁷⁴

*B. The Application of the Material Support Statutes
to Al-Hussayen's Case*

Before the trial began, Al-Hussayen's counsel filed motions arguing that prosecution under these material support statutes for Al-Hussayen's Internet activities would violate his rights to freedom of association and freedom of speech guaranteed by the First Amendment.⁷⁵ However, the trial judge was not persuaded by these arguments and ruled that the First Amendment did not foreclose prosecution for these activities.⁷⁶

Although the charges of material support based on Al-Hussayen's Internet activities survived motions to dismiss,⁷⁷ the prosecu-

71. See Tom Campaigne, *The Afghan War – U.S. Should Seek Soviet Withdrawal*, SEATTLE TIMES, Aug. 21, 1987, at A9.

72. NAPOLEONI, *supra* note 18, at 124–27.

73. See *Aiding Terrorists*, *supra* note 69 (statement of Robert M. Chesney, Assistant Professor of Law, Wake Forest University School of Law).

74. See *id.* See also Stacy, *supra* note 66, at 462–63.

75. See Memorandum in Support of Motion to Dismiss the Indictment on Freedom of Religion, Association, and Speech Grounds at 1–15, *U.S. v. Al-Hussayen*, No. CR03-048-C-EJL (D. Idaho Dec. 31, 2003). Al-Hussayen's status as a resident alien has no bearing on whether the First Amendment applies as the Supreme Court has interpreted First Amendment protections as extending to resident aliens. *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that resident aliens have First Amendment rights).

76. *United States v. Al-Hussayen*, 2004 U.S. Dist. LEXIS 29793, at *8–9 (D. Idaho Apr. 7, 2004) (order denying defendant's motion to dismiss). Judge Lodge noted the First Amendment implications of defendant's motion to dismiss, but he chose to rule on them separately and denied the motion nonetheless. *Id.*

77. *Id.* at *9–10.

tion was unable to overcome significant questions about the theoretical underpinnings of its case. It ultimately failed in its efforts to convince a jury that Al-Hussayen's websites constituted material support to terrorism.⁷⁸ Given the rapid advance of Internet technologies and substantial uncertainty—not only in the general public but even within the courts—concerning the extent of First Amendment protections, a prosecution for Internet activity under the broadly-worded material support statutes was risky to the government from the outset, especially when one considers that neither of the material support statutes contains the words “Internet,” “websites,” or even “computer.”⁷⁹

Due to U.S. jury secrecy requirements,⁸⁰ the precise reasons that jurors decided to acquit Al-Hussayen will never be made fully public. The *Al-Hussayen* defense team essentially conceded the underlying facts, choosing instead to argue that these acts were protected by the First Amendment.⁸¹ A reasonable inference is that the jury was ultimately unconvinced that Al-Hussayen's Internet activities, even if they occurred as alleged by the prosecution, amounted to the material support to terrorism prohibited by the statutes. In an interview after the *Al-Hussayen* case, a member of the jury summarized the prosecution's problems, stating that “[t]here was a lack of hard evidence There was no clear-cut evidence that said he was a terrorist, so it was all on inference.”⁸²

Although the jury was looking for “hard evidence” of Al-Hussayen's support for terrorism—e.g., providing weapons to terrorists, hiding terrorists, or even driving them to a target—they were instead provided with vast amounts of evidence showing that Al-Hussayen had built Internet websites that the government claimed were aimed at recruiting, funding, and encouraging jihadists in their worldwide campaigns of violence. The evidence of Internet activity apparently was not the “hard evidence” that the jurors expected for the prosecution of an alleged terrorist.

78. See Verdict at 1–2, *United States v. Al-Hussayen*, No. CR03-048-C-EJL (D. Idaho June 10, 2004).

79. See 18 U.S.C. §§ 2339A, 2339B (2000 & Supp. III 2003).

80. See 18 U.S.C. § 1508 (2000) (prohibiting recording of or listening to jury deliberations); FED. R. EVID. 606 (restricting ability of jurors to testify in cases in which they are sitting and providing that a juror may not testify as to matters and statements occurring during the course of the jury's deliberations except in situations where extraneous prejudicial information may have been improperly brought to the jury's attention).

81. See Memorandum in Support of Motion to Dismiss the Indictment on Freedom of Religion, Association, and Speech Grounds, *supra* note 75, at 1–15.

82. Bob Fick, *Saudi Is Acquitted in Boise*, ASSOCIATED PRESS, June 11, 2004.

Beyond the mere results of what could be considered an isolated, anomalous jury verdict, there are three main reasons that the material support statutes are inadequate for prosecuting these types of Internet activities. As the rest of this Section will discuss, first, these statutes are not specifically directed at Internet activity; second, the statutes are too vague and do not provide sufficient notice; and finally, they do not collectively provide a specific intent element sufficient to pass constitutional muster within the First Amendment framework established by Supreme Court precedent.

The Internet's stunning and disconcerting rise to dominance has left hidebound legal definitions struggling to keep up. Because of the Internet's unique and pervasive influence, the public needs specific notice as to the legal limitations associated with this powerful medium. In *Grayned v. City of Rockford*, the Supreme Court has clearly explained the significance of this proposition:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . Vague laws may trap the innocent by not providing fair warning. . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . . [W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms."⁸³

The material support statutes are broadly written with language aimed at the provision of funding and services, categories quite distinct from building websites to support a cause. The rise of the Internet, like all technological advances, has brought with it many highly specialized words and phrases that have become part of not only common parlance in English but in many languages around the world as well.⁸⁴ Terms such as "networking," "router," "firewall," "instant messaging," and "blog" were virtually unknown by the average citizen a scant fifteen years ago. Now, it is difficult to navigate modern society without at least some rudimentary understanding of these terms. The evolution of Internet language and rapidly emerging ideas about virtual or cyberspace compel the enactment of legislation that incorporates these new concepts and is addressed to the unique challenges that the new medium brings—many traditional ways of

83. 408 U.S. 104, 108–09 (1972) (citations omitted).

84. See John Hadoulis, *Too Much English on Web 'Risks Crowding out Other Cultures'*, AGENCE FRANCE PRESSE, Nov. 1, 2006.

describing and relating to the virtual world are no longer adequate.⁸⁵ More sophistication deserves more accurate language, and the material support statutes were not fashioned with the Internet in mind.

The plain language of the material support statutes does not give adequate notice that website creation and maintenance might expose one to criminal liability, as demonstrated by the confused and often diametrically opposed holdings that have emerged from U.S. federal courts attempting to interpret these statutes. For example, in *United States v. Sattar*, the Southern District of New York found § 2339B unconstitutionally vague in that it had been used to criminalize mere use of phones and other means of communication.⁸⁶ The *Sattar* court also found that it was not clear from the statute what behavior constituted an impermissible provision of personnel to an FTO.⁸⁷ Similarly, the Court of Appeals for the Ninth Circuit affirmed the conclusion of the Federal District Court for the Central District of California that the terms “personnel” and “training” in § 2339A(b)(1) were impermissibly vague.⁸⁸ The court reasoned that “[s]omeone who advocates the cause of [an FTO] could be seen as supplying them with personnel” and rejected the government’s suggestion that the court read into the statute a requirement that the prohibited activity be performed “under the direction or control” of the foreign terrorist organization.⁸⁹ In contrast, in *United States v. Lindh*, the Eastern District of Virginia held that the term “personnel” in the definition of material support is not unconstitutionally vague, finding that the term personnel “refers to individuals who function as employees or quasi-employees—those who serve under the foreign entity’s direction or control.”⁹⁰ In *United States v. Goba*, the Western District of New York held that the term “training” was not unnecessarily vague, essentially adopting the *Lindh* court’s reasoning and implicitly rejecting the Ninth Circuit’s holding

85. See Edwin Diamond & Stephen Bates, *Law and Order Comes to Cyberspace*, TECHNOLOGY REVIEW, Oct. 1995, at 22, 24; Eric Sinrod, *Perspective: A Cyberspace Update for a Hoary Legal Doctrine*, CNET.COM, Apr. 6, 2007, http://www.news.com/A-cyberspace-update-for-hoary-legal-doctrine/2010-1030_3-6172900.html (discussing the challenge of using traditional legal constructs to address problems evolving with advances in internet and computer technology).

86. 272 F. Supp. 2d 348, 358 (S.D.N.Y. 2003).

87. *Id.* After this decision, the U.S. Attorney recharged the case under 18 U.S.C. § 2339A, and the court upheld the prosecution on the ground that § 2339A contained a specific intent requirement and was not impermissibly vague. *United States v. Sattar*, 314 F. Supp. 2d 279, 286, 301–03 (S.D.N.Y. 2004).

88. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137–38 (9th Cir. 2000), *aff’d*, 352 F.3d 382 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004).

89. *Id.* at 1137–38.

90. 212 F. Supp. 2d 541, 573–74 (E.D. Va. 2002).

in *Humanitarian Law Project v. Reno*.⁹¹ If U.S. federal courts, with highly competent and learned judges, are unable to consistently agree on what the statutes mean, it is unlikely that “ordinary people can understand what conduct is prohibited,” the standard required by the void-for-vagueness doctrine.⁹²

The Supreme Court has also expressed that the constitutionality of a statute may depend on whether it incorporates adequate mens rea elements.⁹³ Section 2339B establishes essentially a strict liability regime whose inadequately crafted mens rea elements have also been litigated in federal court.⁹⁴

In *Humanitarian Law Project v. U.S. Department of Justice*, the Court of Appeals for the Ninth Circuit addressed the question of whether § 2339B requires proof that the defendant knew that the organization was a designated FTO.⁹⁵ In order to avoid declaring the entire statute unconstitutional, the court construed § 2339B to require proof that a person charged with violating the statute had “knowledge, either of the organization’s designation [as an FTO] or of the unlawful activities that caused it to be so designated.”⁹⁶ Relying on a cardinal principle of statutory construction requiring courts to avoid construing statutes in a manner that renders them unconstitutional, the court stated that this interpretation was necessary “to avoid the serious due process concerns raised by § 2339B.”⁹⁷

91. 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002), *aff’d*, 240 F. Supp. 2d 242 (W.D.N.Y. 2003) (denying defendants’ motions to revoke their detention order).

92. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

93. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979).

94. *See Stacy*, *supra* note 66, at 467–72 (2005). *See also United States v. Assi*, 414 F. Supp. 2d 707, 719–20 (E.D. Mich. 2006) (analyzing the mens rea elements of § 2339B); *United States v. Al-Arian*, 329 F. Supp. 2d 1294 (M.D. Fla. 2004) (holding that § 2339B requires the government to prove beyond a reasonable doubt that the defendant knew the organization in question was a foreign terrorist organization (FTO) or had committed unlawful activities that caused it to be so designated and that he was furnishing material support, with specific intent that the support would further the illegal activities of the FTO); *Humanitarian Law Project v. U.S. Dep’t of Justice*, 352 F.3d 382, 385 (9th Cir. 2003), *vacated en banc*, 393 F.3d 902, 903 (9th Cir. 2004).

95. *Humanitarian Law Project*, 352 F.3d at 385.

96. *Id.* at 402–03.

97. *Id.* at 393–94. In *Humanitarian Law Project v. U.S. Dep’t of Justice*, 393 F.3d 902, 903 (9th Cir. 2004), the Ninth Circuit, sitting en banc, vacated the judgment regarding the terms “personnel” and “training” in light of an amendment to 18 U.S.C. § 2339B that was enacted as part of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638. Section 2339B was amended to read:

To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity

Significantly, § 2339A, in contrast with § 2339B, contains a specific intent mens rea requirement established by the language “*knowing or intending* that they are to be used in preparation for, or in carrying out, a violation of . . .” in subparagraph (a).⁹⁸ The court in *United States v. Sattar* relied upon this specific intent aspect to hold the statute constitutional in a federal prosecution.⁹⁹ In *Sattar*, after the U.S. Attorney recharged the case under § 2339A because the § 2339B charges were dismissed, the court upheld the prosecution on the basis that § 2339A’s specific intent requirement allowed the indictment to proceed because this mens rea requirement cured any previous vagueness concerns that had existed under § 2339B.¹⁰⁰

One could argue that prosecutors could simply charge under § 2339A and avoid using § 2339B. However, this does not satisfy the need for Internet-specific legislation required because of the Internet’s ubiquitous presence in American life. In addition, the problem is compounded by the fact that the statutes are conjoined like Siamese twins by § 2339B’s incorporation of the definition of “material support and resources” by reference from § 2339A(b)(1).¹⁰¹ Since both statutes use this same broadly-worded language, simply charging under § 2339A does not solve the problem—a new statute where the focus is on the technology of the Internet, and not just an afterthought, makes it more likely to effectively and fairly address the problem. The impetus for the enactment of § 2339B was Congress’s desire to stem the flow of financial assistance being provided to FTOs,¹⁰² and its facially less demanding mens rea standard has garnered more attention from federal prosecutors.¹⁰³ However, § 2339A is in a sense broader and is potentially applicable to a wider array of activities because it applies irrespective of any ties to FTOs. Yet it, too, speaks in vague and uncertain terms that raise significant due process concerns.¹⁰⁴ Although using § 2339A would avoid the mens rea concerns arising from the

(as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989). Intelligence Reform and Terrorism Prevention Act of 2004 § 6603.

98. 18 U.S.C. § 2339A (2000 & Supp. III 2003) (emphasis added).

99. *United States v. Sattar*, 314 F. Supp. 2d 279, 301–02 (S.D.N.Y. 2004).

100. *Id.* at 286, 301–02.

101. *See* 18 U.S.C. § 2339B(g)(4).

102. *See supra* notes 67–74 and accompanying text.

103. *See* Stacy, *supra* note 66, at 461–63.

104. *See* *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (holding a Chicago city ordinance violated the Due Process Clause of the Fourteenth Amendment because of its vague and uncertain terms and the potential for arbitrary enforcement).

use of § 2339B, the government would still be employing a vague, generalized statute that leaves too much uncertainty as to what is prohibited, and too little guidance for attorneys, judges, and jurors.

In order to fairly criminalize this type of Internet activity, Congress must remove these types of Internet prosecutions from the material support statutes and approach the problem with specifically tailored legislation. The public would be much better served by starting afresh. The acquittal of Al-Hussayen in combination with a critical analysis of the statute in the context of website development leads to the conclusion that new legislation focusing on this type of Internet activity is necessary.

Moreover, because of widespread notions that anything goes on the Internet, it is plausible that an individual might erroneously believe that building a website would never rise to the level of material support to terrorism. Without clearer distinctions as to what constitutes material support with respect to Internet activities, future cases will proceed uncertainly, with little sense of predictability for the defendant or the government. Establishing a more specific, concrete set of elements defining an offense targeting Internet activity would likely result in more selectivity, efficiency, and fairness in future prosecutions.

C. The Proposed Internet-Specific Legislation

In retrospect, it appears that the prosecution of Al-Hussayen under the material support to terrorism statutes was an ill-advised attempt to expand the reach of the material support statutes beyond the ambit of the activity that they were designed to proscribe. Given the substantial government interest at stake, the government needs properly tailored and constitutionally sound means of addressing the unique threat posed by terrorists' use of the Internet. While the government was correct in viewing Al-Hussayen's alleged activities as potentially criminal, these statutes were the wrong tools for initiating a prosecution.

This Article proposes the enactment of the following statute as a means of addressing the problems in pursuing these types of activities under the currently existing material support statutes:

§ 2339E. Use of Internet Websites with Specific Intent to Facilitate Terrorism

(a) Offense.—Any person who:

(1) Establishes and maintains Internet websites or posts detailed information on such websites with the specific intent to recruit per-

sons to join terrorist organizations (as designated under Sec. 219 of the Immigration and Naturalization Act), or with the specific intent to recruit persons to engage in acts of violence against the United States or citizens of the United States, or

(2) Establishes and maintains Internet websites or posts detailed information on such websites with the specific intent to encourage violent attacks against the United States government or its citizens, to include, but not limited to, violations of those United States Code sections set forth in 18 U.S.C. § 2339A(a), or

(3) Establishes, maintains, or posts detailed information on Internet websites with the specific intent to assist, encourage, or facilitate funding to designated terrorist organizations in violation of 18 U.S.C. § 2339B, or

(4) Attempts or conspires to do such acts as defined by paragraphs (1) through (3)

shall be fined under this title, imprisoned not more than twenty (20) years, or both, and, if the death of any person directly results from such acts, shall be imprisoned for any term of years or for life. Violations of this section may be prosecuted in any Federal judicial district through which any computer network providing access to such Internet website passes or in any other Federal judicial district as provided by law.

(b) To violate subparagraphs (1) and (3), a person must have knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

(c) Limitations.—Advocacy of peaceful change and criticism of United States officials or United States policy is specifically excluded from the proscriptions of this statute.

This statute is beneficial to society because it provides a discrete and legal means of addressing the growing dangers of terrorist use of the Internet. It provides notice and specificity to the public while also constraining the power of prosecutors who might seek to apply the broad material support statutes in an arbitrary and unguided fashion. Because of the obvious First Amendment implications of the proposed statute, this Article will first examine its potential impact on the freedom of expression that is so integral to the importance of the Internet in modern life.

III.

THE FIRST AMENDMENT DOES NOT PROHIBIT
ENFORCEMENT OF THE PROPOSED LEGISLATION

In the *Al-Hussayen* prosecution, evidence indicating that Al-Hussayen had created websites containing material intended to advance the cause of international terrorist organizations was balanced against notions of freedom of speech.

Although the trial court ruled that Al-Hussayen's Internet activities were not protected by the First Amendment, the rationale for this decision was never set forth on the record, nor was the ruling subject to appellate review since Al-Hussayen was acquitted.¹⁰⁵ Notwithstanding the absence of express analysis of the First Amendment issues, there is substantial legal support for the court's conclusion that the First Amendment does not protect these types of Internet activities. Additionally, the same analysis suggests that the proposed Internet-specific legislation would not violate the First Amendment. However, as will be discussed below, it is possible to argue that *Brandenburg v. Ohio*¹⁰⁶ protects Al-Hussayen's Internet activity because it falls into the realm of abstract advocacy.

In beginning the First Amendment analysis, it is necessary to first determine whether the contested activities actually qualify as "speech." In *Texas v. Johnson*, the U.S. Supreme Court held that in determining whether something is speech, the first consideration is "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"¹⁰⁷ Al-Hussayen allowed or personally posted information on the websites that he controlled in order for people to understand the information and the nature of its content. Because the information on the websites was written in simple and unpretentious language,¹⁰⁸ there seems to be a great likelihood that it would be understood by those who read it. Therefore, a reasonable

105. See *United States v. Al-Hussayen*, 2004 U.S. Dist. LEXIS 29793, at *8-9 (D. Idaho Apr. 7, 2004) (order denying defendant's motion to dismiss). Although Al-Hussayen also made arguments at trial that the prosecution implicated his First Amendment rights to freedom of association, this Article addresses only the freedom of speech aspects of the prosecution.

106. 395 U.S. 444 (1969).

107. 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

108. See Second Superseding Indictment, *Al-Hussayen*, *supra* note 5, at 9. An example of this language was contained in a February 2, 2000, posting by Al-Hussayen to all members of a newsgroup when he urged them to donate money to support those who were participating in violent jihad to "provide 'them with weapons and physical strength to carry on with the war against those who kill them.'" *Id.*

conclusion is that Al-Hussayen's Internet activities were "speech" and potentially protected under the First Amendment.¹⁰⁹ The next task is to determine whether these activities fall into one of the categories of speech that the Supreme Court has held is not protected by the First Amendment.

A. *First Amendment Analysis of Whether Speech is Protected*

In general, Supreme Court opinions have consistently recognized the principle that the First Amendment is not an absolute protection for all forms of expression that might qualify as "speech" under *Texas v. Johnson*. These forms of expression have included such categories as obscene material,¹¹⁰ fighting words,¹¹¹ hate speech,¹¹² libel and slander,¹¹³ and commercial speech.¹¹⁴ The Supreme Court in *Chaplinsky v. New Hampshire* summarized this approach as follows:

It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.¹¹⁵

Al-Hussayen's alleged conduct seems to fit best within yet another category of cases in which the Court has dealt with speech that arguably poses some type of threat to public safety or national security. In a series of cases beginning in 1919 with *Schenck v. United States*,¹¹⁶ the Court has recognized significant governmental authority to regulate speech that falls into this category. In *Schenck*, a case arising from World War I, the Court reviewed the conviction of a defendant for conspiracy to cause insubordination in the armed forces and to obstruct recruiting in violation of the Espionage Act of 1917.¹¹⁷ The defendant had passed out leaflets that the government considered

109. While reasonable people might differ on whether Al-Hussayen's Internet activities qualify as speech, this Article will assume that they do.

110. See *Roth v. United States*, 354 U.S. 476, 485 (1957).

111. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

112. See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

113. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 268–69 (1964).

114. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n*, 447 U.S. 557, 563 (1980).

115. *Chaplinsky*, 315 U.S. at 572.

116. 249 U.S. 47 (1919).

117. *Id.* at 48–49. The Espionage Act of 1917 prohibited any person from willfully making or conveying false reports or false statements with intent to interfere with military success or "to promote the success of its enemies" and from "obstruct[ing] the recruiting or enlistment service of the United States." Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (current version at 18 U.S.C. § 2388 (2000 & Supp. V 2005)).

as encouraging conduct that hampered the war effort.¹¹⁸ Justice Holmes, writing for a unanimous Court, held that the First Amendment did not protect speech that encouraged insubordination and obstructed recruiting during World War I.¹¹⁹ The Court upheld the conviction, and in the opinion's most famous passage, Justice Holmes set forth the "clear and present danger" standard: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."¹²⁰ Holmes further emphasized the significance of the national and international political context, stating that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."¹²¹

Later that year, when the Court upheld a conviction under the Espionage Act in *Abrams v. United States*, Holmes found himself writing a dissenting opinion.¹²² Although Holmes dissented, it was not because he had renounced the principles set forth in *Schenck* but rather on the ground that he felt the evidence of the required mens rea was insufficient to convict in this particular case.¹²³ In his influential dissent, Holmes attempted to both refine and reaffirm his "clear and present danger" test by introducing a requirement of imminence.¹²⁴ His articulation of imminence as part of the clear and present danger test, although influential in later cases, was largely ignored for the next fifty years as the Court adopted a reasonableness approach that was characterized by significant deference to legislatures.¹²⁵ This approach dominated the Court's First Amendment jurisprudence until

118. *Schenck*, 249 U.S. at 49.

119. *Id.* at 52.

120. *Id.*

121. *Id.* During the same term, the Court upheld convictions in two other cases based on the Espionage Act using the same rationale as it used in *Schenck*. See *Debs v. United States*, 249 U.S. 211, 215–17 (1919); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

122. 250 U.S. 616, 624–29 (Holmes, J., dissenting) (1919).

123. *Id.* at 626–27 (Holmes, J., dissenting).

124. *Id.* at 628 ("It is only the present danger of *immediate* evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion . . .") (emphasis added).

125. In the 1920s and 1930s, the court used a "reasonableness" approach, upholding "the laws and their applications so as the government's law and prosecution were reasonable." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 992–94 (3d ed. 2006) (discussing the U.S. Supreme Court's holdings in *Gitlow v. New York*, 268 U.S. 652 (1925), and *Whitney v. California*, 274 U.S. 357 (1927)).

the waning days of the 1960s when the Supreme Court decided *Brandenburg v. Ohio*.¹²⁶ Of particular pertinence to the *Al-Hussayen* case is that Holmes' opinions in *Schenck*, *Abrams*, and other cases during this period consistently advance the proposition that when the country is on a war footing, legislation that may punish or restrict speech should be given greater deference because of the unique dangers to national security that such speech may pose.

A series of cases in the next several decades dotted the First Amendment landscape as the Court continued to grapple with the challenge of balancing rights of speech and association with measures aimed at protecting the United States from the perceived threat posed by a new enemy, international Communism. The most important of these cases were decided during the McCarthy Era, when the Court was called upon to review convictions under the Smith Act.¹²⁷ The Smith Act made it a crime to:

knowingly or willfully advocate[], abet[], advise[], or teach[] the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence . . .

[or for anyone to] organize[] or help[] or attempt[] to organize any society, group, or assembly of persons who teach, advocate, or encourage [such an] overthrow . . . ; or [to] become[] or [be] a member of, or affiliate[] with, any such society, group, or assembly of persons¹²⁸

During the McCarthy Era, the Smith Act became the statute of choice for those who wanted to persecute individuals and organizations with Socialist or Communist leanings.¹²⁹ Because its employment was motivated by the intent to destroy these competing ideologies,¹³⁰ much controversy surrounded perceived attempts to suppress purely political speech in contravention of the First Amendment. Thus, the U.S. Supreme Court's interpretation of the Smith Act

126. 395 U.S. 444 (1969).

127. June 28, 1940, ch. 439, tit. I, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (2000)). See *Dennis v. United States*, 341 U.S. 494, 495 (1951); *Yates v. United States*, 354 U.S. 298, 300 (1957).

128. 18 U.S.C. § 2385 (2000).

129. See 10 THE NEW ENCYCLOPAEDIA BRITANNICA 899 (15th ed. 1993) ("After World War II [the Smith Act] was made the basis of a series of prosecutions against leaders of the Communist Party and the Socialist Workers Party.").

130. See MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES 5-7 (1977) ("The Smith Act came into being because some anti-Communists were determined to mobilize the legal order against the CPUSA [Communist Party USA]").

in a series of cases marked the Court's first steps toward the modern First Amendment jurisprudence that culminated with the *Brandenburg* decision in 1968.

In 1951, the Court decided *Dennis v. United States*, a case in which the Court reviewed the convictions of several defendants under the Smith Act.¹³¹ The Court upheld the convictions, holding that the Smith Act did not inherently violate the First Amendment.¹³² Significantly for the analysis here, the Court ruled that while the *abstract teaching* of communist philosophies was protected under the First Amendment, *active advocacy* which constituted a "clear and present danger" threatening national security was subject to criminalization by the government.¹³³ The Court concluded that when the risk of harm to the government is so enormous, the likelihood of success and the imminence of the threat are not particularly determinative factors when deciding whether the government may regulate the speech at issue.¹³⁴

Six years later, the Court decided *Yates v. United States*, yet another case where a conviction under the Smith Act was being challenged.¹³⁵ In *Yates*, the Court reversed the Smith Act convictions of fourteen individuals who had been prosecuted for being members of the Communist Party, holding that mere passive membership in the Communist Party was insufficient to sustain convictions.¹³⁶ Writing for the Court, Justice Harlan declared that:

[The] indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as to reasonably justify the apprehension that action will occur.¹³⁷

The language in *Yates* reinforced the *Dennis* Court's rationale that an essential distinction must be made between those who actually urge others to do something illegal and those who merely urge others to *believe* in something. *Yates* also seemed to resuscitate the "immi-

131. 341 U.S. 494, 495 (1951).

132. *Id.* at 515–17.

133. *Id.* at 502, 517.

134. *Id.* at 509 ("Obviously, the words [clear and present danger] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited The damage which such attempts create both physically and politically to a nation makes it impossible to measure validity in terms of the probability of success, or the immediacy of a successful attempt.").

135. 354 U.S. 298, 300 (1957).

136. *Id.* at 301–03, 329–31.

137. *Id.* at 321.

nence” and “likelihood of success” factors that *Dennis* had seemingly extinguished.¹³⁸ On the whole, the Court’s decisions in this line of cases, although varying in rationale and somewhat schizophrenic, showed a decided preference for significant deference to the government when dealing with the use of speech that the government considers a threat to national security or public safety.

However, in 1969, in a terse *per curiam* opinion in *Brandenburg v. Ohio*, the Supreme Court seemed to take a more restrictive view of the government’s ability to criminalize such advocacy, despite purporting to follow the Court’s reasoning in *Dennis*.¹³⁹ *Brandenburg* involved Ohio’s prosecution of a rural Ku Klux Klan (KKK) leader under an Ohio criminal syndicalism statute for his participation in a KKK rally.¹⁴⁰ During the rally, the KKK members burned a cross and the defendant made a speech referring to “revengeance” against “niggers” and “Jews” and announced plans for a march.¹⁴¹ Even though the defendant never directly threatened or encouraged the participants in the rally to take any action, he was convicted of advocating violence under the Ohio statute for his participation in the rally and his speech.¹⁴² As reproduced in the Court’s opinion, the Ohio statute proscribed “‘advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform’” and “‘voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.’”¹⁴³ In reversing *Brandenburg*’s conviction, the Court stated that its free speech jurisprudence does “not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁴⁴

Adopting the crux of *Yates*’ analytical framework, the decision in *Brandenburg* once again emphasized the “imminence” and “likeli-

138. Compare *id.* at 321–22 (stating that advocacy of abstract ideas “is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*”), with *Dennis* 341 U.S. at 509 (“The damage which such attempts [to overthrow the Government by force] create . . . makes it impossible to measure validity in terms of the probability of success, or the immediacy of a successful attempt.”).

139. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

140. *Id.* at 444–45.

141. *Id.* at 446, 446 & n.1.

142. *Id.* at 444–45.

143. *Id.* (citing OHIO REV. CODE ANN. § 2923.13).

144. *Id.* at 447.

hood of success” factors.¹⁴⁵ Due to the reemergence of these factors, many have interpreted *Brandenburg* as imposing a major obstacle to the government’s prosecution of those who, like Al-Hussayen, merely advocate lawless or dangerous behavior.¹⁴⁶ Indeed, the language of *Brandenburg* arguably requires that the advocacy have a *likelihood* of producing *imminent* lawless behavior. Under this interpretation, the inciting statement and the act it is inciting would need to be in very close proximity; prosecuting Internet activities such as Al-Hussayen’s would likely fail because it would be difficult to prove that the recipients of these messages are likely to commit the crime immediately or very soon after receiving the information.¹⁴⁷ Thus, most of the activity of which Al-Hussayen was accused would fall squarely within the First Amendment protections seemingly provided by *Brandenburg*.¹⁴⁸ However, this is not the only possible interpretation of the much conflicted precedent in this area.

In *Scales v. United States*, the Court held that while the advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution, for those who have guilty knowledge and specific intent or aim to overthrow the government, even mere active membership in an organization may be prosecuted.¹⁴⁹ In reaching its decision, the Court established the requirement that for the government to punish such association, it must prove that the individ-

145. *Id.* at 447–49.

146. See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *STAN. L. REV.* 719, 755 (1975).

147. Much of the broad First Amendment protection that many interpret *Brandenburg* to mandate depends on the meaning of the word “imminent.” Despite the passage of almost forty years since the Court issued its opinion in *Brandenburg*, the meaning of the word “imminent” remains problematic. The most obvious meaning of an imminent event is one that is “about to occur.” *THE AMERICAN HERITAGE COLLEGE DICTIONARY*, *supra* note 33, at 693. Some have argued that “imminent” may be broadly applied to context, without being subject to temporal restriction. See Robert S. Tannenbaum, Comment, *Preaching Terror: Free Speech or Wartime Incitement?*, 55 *AM. U. L. REV.* 785, 790–91 (2006). This is a strained interpretation of *Brandenburg*.

148. However, the two cases most frequently cited to solidify the *Brandenburg* test may be inapplicable to Al-Hussayen’s case in that they were dealing with relatively small-scale domestic matters not seriously implicating national security. See *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (refusing to allow a state to punish a protester’s angry words to a policeman on the grounds that they would lead to violence); *Nat’l Ass’n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 928–30 (1982) (holding that in the absence of a showing that violent activity followed, an organizer who made impassioned speeches that contained references to violence could not be held liable).

149. 367 U.S. 203, 229–30 (1961).

ual actively affiliated with the group knowing of its illegal objectives and with the *specific intent* of furthering those goals.¹⁵⁰

A recent case reaffirmed the viability of *Scales* in addressing First Amendment issues. In *Rice v. Paladin Enterprises*, the Court of Appeals for the Fourth Circuit read *Brandenburg* very narrowly and relied in part upon the specific intent requirement of *Scales* in coming to the conclusion that while *Brandenburg* protects mere *abstract* advocacy, it is not an absolute bar to liability in all circumstances.¹⁵¹ In other words, when a criminal *mens rea*—e.g., specific intent to bring about a certain illegal result—is combined with words that might otherwise be protected, that combination results in criminal liability for which the First Amendment offers no protection. In holding that the First Amendment did not bar a suit against the publisher of a hit man instruction book, the court found that *Brandenburg*'s protection of abstract advocacy did not apply because the book was a detailed instructional manual on how to commit murder for hire and avoid discovery and prosecution.¹⁵² The defendant publisher stipulated that by publishing and selling the hit man book, it assisted in the perpetration of the very murders for which the plaintiffs were attempting to hold it liable, believing that the First Amendment would provide a complete defense for its actions.¹⁵³ *Paladin*'s decision to so stipulate backfired when the court concluded that there is no First Amendment protection in such a case if (1) the defendant has a specific intent of assisting and encouraging the commission of criminal conduct, and (2) the alleged assistance and encouragement takes a form other than abstract advocacy.¹⁵⁴ Citing *Brandenburg* as authority, the court stated that “[t]he cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law.”¹⁵⁵ In denying certiorari, the Supreme Court passed up an opportunity to state definitively whether the Fourth Circuit's interpretation was correct.¹⁵⁶ Thus, questions remain as to precisely how to apply *Brandenburg* and the limits of its holding.

Since neither *Brandenburg* nor its progeny establish how imminence and likelihood are to be assessed, one possible interpretation suggested by *Dennis* is that the greater the potential harm, the less

150. *Id.*

151. *See* 128 F.3d 233, 248–49 (4th Cir. 1997).

152. *See id.* at 242–43.

153. *Id.* at 241.

154. *Id.* at 242–43.

155. *Id.* at 246.

156. *See* 523 U.S. 1074 (1998).

imminence and likelihood will be required. This approach is to be preferred because it has the advantage of recognizing that all cases involving potential free speech issues are not created equal. In situations where the magnitude of legitimate threats to public security are substantial, the Constitution should not counsel an exacting First Amendment analysis in which the imminence and likelihood factors are placed on an equal footing with careful consideration of the magnitude of the threat. An unreasonable and compulsive insistence on requiring the government to meet a high threshold showing on likelihood and imminence as matter of First Amendment jurisprudence would offer small comfort when the institutions of government and the safety of the populace are threatened by speech that may pose a grave threat. Instead, by allowing consideration of the magnitude of the threat to inform the analysis as a threshold matter, a prudent balance between security and freedom of speech can better be maintained. This is certainly in keeping with the *Dennis* Court's view that when the magnitude of the threat is great, the likelihood and imminence considerations should be given little weight.¹⁵⁷

Thus, synthesizing these cases leads to a standard that takes into consideration the Supreme Court's jurisprudence and lower court interpretations discussed above: Internet communications *specifically intended* to enable terrorist groups or to cause acts of terrorist violence that are concrete and detailed in nature may be criminally prosecuted provided that the government has a substantial interest in regulating the communication and provided that the regulation is narrowly tailored to encompass no more Internet activity than is necessary. The government's interest is to be measured by the magnitude of the potential threat against which it seeks to protect its citizens. In light of the failure of the Court to overrule *Dennis*, a case that recognized this type of analysis, this interpretation is consistent with both *Dennis* and *Brandenburg*. Since this rule depends on the magnitude and context of the government interest, the Article now turns to the question of whether the government would have a substantial interest in regulating Internet communications like Al-Hussayan's. This consideration must take into account the domestic and international context within which the Internet activity occurs.

157. See *Dennis v. United States*, 341 U.S. 494, 509 (1951).

B. Application of First Amendment Doctrine to Internet Activities in a Post-September 11th America

In considering how this doctrinal framework relates to the creation, development, and maintenance of websites like the ones in the *Al-Hussayen* case, any post-September 11th analysis should comport with Justice Holmes' repeated observation that in the context of a wartime environment the government's efforts to restrict speech are entitled to greater deference.¹⁵⁸ This is a particularly important factor because *Al-Hussayen's* Internet activity was occurring in the immediate aftermath of the September 11th attacks, and *Al-Hussayen's* websites appear to have been intended to encourage further violence and strengthen international terrorist organizations.

1. The Current Wartime Environment

The United States is currently engaged in a conflict with a number of terrorist groups, which have established kidnapping, torture, and killing of Americans as a primary goal in order to achieve their political objectives.¹⁵⁹ While they have been successful in killing Americans on many different occasions throughout the world,¹⁶⁰ these

158. *Schenck v. United States*, 249 U.S. 47, 52 (1919). President Bush has repeatedly referred to the U.S. "war on terror." See, e.g., Bob Kemper, *Bush: 'We Will Win'; U.S. Condemns Taliban; Pakistani Clerics Urge Talks*, CHI. TRIB., Sept. 30, 2001, at 1; Sheryl Gay Stolberg & Michael R. Gordon, *Bush Invokes the Fallen, Past and Present*, N.Y. TIMES, May 30, 2006, at A12. Although Congress has not declared war, the United States appears to be in a de facto war with certain terrorist movements. Since World War II, the United States has been involved in dozens of armed conflicts without a formal Congressional Declaration of War, including the following: the Vietnam War, the Persian Gulf War (Operation Desert Storm), and the wars in Afghanistan and Iraq. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050, 2060 (2005); Andrew Rudalevige, *The Contemporary Presidency: The Decline and Resurgence and Decline (and Resurgence?) of Congress: Charting a New Imperial Presidency*, 36 PRESIDENTIAL STUD. Q. 506, 510 (2006). Based on this history, it would seem that using a declaration of war as the constitutional touchstone makes little sense.

159. According to the Federation of American Scientists, Al-Qaeda's "[c]urrent goal is to establish a pan-Islamic Caliphate throughout the world by working with allied Islamic extremist groups to overthrow regimes it deems 'non-Islamic' and expelling Westerners and non-Muslims from Muslim countries—particularly Saudi Arabia." Fed'n of Am. Scientists, *Al-Qa'ida (The Base) / World Islamic Front for Jihad Against Jews and Christians / Usama bin Laden*, <http://www.fas.org/irp/world/para/ladin.htm> (last visited Jan. 10, 2008). Al-Qaeda issued statements "saying it was the duty of all Muslims to kill US citizens—civilian or military—and their allies everywhere." *Id.*

160. In the American psyche the most traumatic of these attacks occurred on September 11, 2001; however, this was only the most prominent of hundreds of attacks that have taken tens of thousands of lives from 1961 to 2003. See Bureau of Pub.

actions would not in and of themselves justify the regulation of speech. Rather, it is the potential for the long-term growth of violent radical terrorist groups who plan for large-scale death and destruction that compels the limited regulation inherent in the proposed statute.

The conflict with the terrorist groups has many of the characteristics of war. Since “war” is defined as a “state of open, armed, often prolonged conflict carried on between nations, states, or parties,”¹⁶¹ one can hardly debate that the United States is at war—particularly when one considers that the United States has undertaken protracted ground campaigns in Afghanistan and Iraq since 2001 and 2003, respectively.¹⁶² In addition, the sheer magnitude of the threat that the United States faces in its conflict with terrorist groups may be best judged to some extent by the nature of the attacks on September 11, 2001. On that date, the United States suffered serious attacks on its financial, political, and military centers. The World Trade Center towers and the Pentagon are consummate symbols of United States financial and military might.¹⁶³ While it is an overstatement to characterize the events of September 11th as attempts to overthrow the U.S. government, they certainly were attacks against civilian targets on an unprecedented scale. Although not quite rising to an attempt to overthrow the U.S. government, these attacks may be best characterized as something rather akin to it. Because of this similarity, the Supreme Court’s analysis of the weight to be given to the magnitude factor when facing this type of attack is relevant. As the Court stated in *Dennis*:

Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected.¹⁶⁴

Affairs, Office of the Historian, U.S. Dep’t of State, Significant Terrorist Incidents, 1961–2003: A Brief Chronology (Mar. 2004), <http://www.state.gov/r/pa/ho/pubs/fs/5902.htm>.

161. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 20, at 1938.

162. See Editorial, *The Ground War Begins*, N.Y. TIMES., Oct. 20, 2001, at A22; Jim Dwyer, *Troops Told to Carry Freedom, Not the Flag*, N.Y. TIMES., at A18.

163. See JAMES GLANZ & ERIC LIPTON, CITY IN THE SKY: THE RISE AND FALL OF THE WORLD TRADE CENTER 227–28 (2003); Bijal P. Trivedi, *Why Symbols Become Targets*, NAT’L GEOGRAPHIC TODAY, Sept. 13, 2001, http://news.nationalgeographic.com/news/2001/09/0913_TVsymbol.html; STEVE VOGEL, THE PENTAGON: A HISTORY 296–97, 393 (2007).

164. *Dennis v. United States*, 341 U.S. 494, 509 (1951).

As evidence indicates that the same terrorist entities that launched the September 11th attacks are in search of nuclear technology, the magnitude of the threat is potentially even greater.¹⁶⁵ To borrow from the language of *United States v. Yates*, recent history allows the conclusion that in repeated violent attacks, many terrorist groups like Al-Qaeda, which are of “sufficient size and cohesiveness,” have repeatedly shown themselves to be “sufficiently oriented towards action . . . as reasonably to justify apprehension that action will occur.”¹⁶⁶ Using Holmes’ axiom that during wartime the government is entitled to greater deference in restricting certain types of speech,¹⁶⁷ it is reasonable to conclude that the current state of war is sufficient to warrant some degree of deference to the government in the regulation of speech that is directed toward inciting more attacks and funding and supporting the organizations responsible for carrying them out.

2. *The Role of the Internet in Terrorism*

Terrorism experts have reached a consensus that the Internet is a particularly “effective and important tool of contemporary terrorists.”¹⁶⁸ As Gabriel Weimann states in his comprehensive study of terrorists’ use of the Internet, “[t]errorists use the Internet for its commonly accepted benefits: communication, propaganda, marketing, and fund-raising.”¹⁶⁹ Other uses of the Internet by terrorists include data mining, networking, and sharing information.¹⁷⁰ Research has also shown that terrorist groups routinely use the Internet to plan and coordinate attacks on American citizens and allies throughout the world.¹⁷¹ The propaganda uses of the Internet for the broadcast of videos depicting acts of violence are well known.¹⁷² The Internet also facilitates fundraising and recruitment efforts that are particularly important to any sustained terrorist effort; if they were significantly diminished, it would have a fatal effect on the viability of these

165. See Bob Woodward et al., *U.S. Fears Bin Laden Made Nuclear Strides; Concern over ‘Dirty Bomb’ Affects Security*, WASH. POST, Dec. 4, 2001, at A1.

166. *Yates v. United States*, 354 U.S. 298, 321 (1957).

167. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

168. GABRIEL WEIMANN, *TERROR ON THE INTERNET: THE NEW ARENA, THE NEW CHALLENGES* 109 (2006).

169. *Id.* at 50.

170. *Id.* at 31.

171. *Id.* at 129–30.

172. See Duncan Gardham & Caroline Gammell, *Terror Videos Being Posted on YouTube*, DAILY TELEGRAPH (London), Nov. 7, 2007, at 16; Nicholas D. Kristof, Op-Ed., *Terrorists in Cyberspace*, N.Y. TIMES, Dec. 20, 2005, at A31; Sebastian Rotella, *A World Wide Web of Terrorist Plotting*, L.A. TIMES, Apr. 16, 2007, at A1.

organizations.¹⁷³ Ironically, it is radical Islamic groups “who criticize and attack Western modernity, technology, and media who are using the West’s most advanced modern medium, the Internet.”¹⁷⁴

The advent of the unique capabilities of the Internet and the coincident expansion in international terrorist groups and acts of terrorism pose an unprecedented threat to U.S. and international security.¹⁷⁵ The structure of modern terrorist organizations is in many ways similar to the structure of the Internet.¹⁷⁶ Through a decentralized and loosely structured network of cells, modern terrorist groups are able to take full advantage of the Internet’s strengths.¹⁷⁷ The groups locate throughout the world to plan and coordinate their actions in cyberspace without having to congregate in a single physical location, thus providing Hydra-like survivability and regeneration capability for the rest of the organization if one part were to be destroyed.¹⁷⁸

A prime example of the importance and power of the Internet for terrorist groups may be seen in the case of Al-Qaeda. Even though much of Al-Qaeda’s organization and training facilities was lost after it was driven from Afghanistan due to the U.S. invasion of 2001, it has re-emerged in a “virtual Afghanistan” in cyberspace through the power of the Internet.¹⁷⁹ Through the Internet, members and trainees can now log on to a computer and have access to a multimedia virtual training camp complete with instructions on bomb making, suicide bombing, kidnapping, and murder.¹⁸⁰ Al-Qaeda is also effectively using the Internet to incite, recruit, and fundraise¹⁸¹—the same activities that the government alleged Al-Hussayen was conducting with his Internet websites.

173. WEIMANN, *supra* note 168, at 117, 134.

174. *Id.* at 51.

175. *See id.* at 33, 104–10.

176. *Id.* at 25–26.

177. *Id.* *See also* President George W. Bush, The Nature of the Terrorist Threat Today, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), in NATIONAL STRATEGY FOR COMBATING TERRORISM 8, 10 (2003), available at http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf.

178. The Hydra is a “mythical many-headed serpent slain by Hercules that grew two heads in place of each one that was cut off unless the wound was cauterized.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1106 (1993).

179. *See Internet Jihad: A World Wide Web of Terror*, ECONOMIST, July 12, 2007, at 29–30, available at http://www.economist.com/world/displaystory.cfm?story_id=9472498; WEIMANN, *supra* note 168, at 117.

180. *See Internet Jihad: A World Wide Web of Terror*, *supra* note 179, at 30; WEIMANN, *supra* note 168, at 117.

181. WEIMANN, *supra* note 168, at 118–120, 138–140.

Other mature democracies, like the United Kingdom, France, Germany, and Australia, have recognized the potential harm of these types of activities by proposing or passing laws aimed at preventing the encouragement and incitement of terrorism.¹⁸² For example, the United Kingdom's Terrorism Act of 2006 created the offense of "Encouragement of terrorism."¹⁸³ The Act prohibits the publishing of "a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism."¹⁸⁴ Indirect encouragement includes every statement that "glorifies the commission or preparation (whether in the past, in the future or generally)" of terrorist acts and "is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them."¹⁸⁵

In contrast, the trend in the United States is toward a broader view of freedom of speech as embodied in the First Amendment, particularly with respect to regulation of Internet content. In *Reno v. American Civil Liberties Union*, the Supreme Court found that the Internet is entitled to the full First Amendment protection given to media such as the print press, refusing to concede that it should be subject to the greater regulation allowed over broadcast media.¹⁸⁶ The Court based its conclusion that the Internet is more analogous to print media than broadcast media on a number of factors that have been cast into doubt due to evidence accumulated since *Reno*. For example, the Court relied upon the lower court's determination that the risk that minors may "encounter[] indecent material by accident is remote because a series of affirmative steps is required to access specific material," and that the Internet is "not as 'invasive' as radio or television."¹⁸⁷ Indeed, the Court adopted the district court's conclusion that "[u]sers seldom encounter content by accident."¹⁸⁸ To the contrary, studies have shown that the incidence of inadvertent access to pornography is much higher than the Court described, calling into

182. See George H. Pike, *Global Reach of Anti-Terrorism Laws*, INFORMATION TODAY, Jan. 1, 2006, at 17-19.

183. Terrorism Act, 2006, c. 11, § 1 (Eng.).

184. *Id.* at § 1(1).

185. *Id.* at § 1(3). The Act also prohibits the "dissemination of terrorist publications." *Id.* § 2.

186. 521 U.S. 844, 868-70 (1997).

187. *Id.* at 867-69.

188. *Id.* at 869 (internal citations omitted).

question the entire basis for the Court's opinion that the Internet is more like a magazine or a newspaper than like television.¹⁸⁹

Nowadays the Internet is more analogous to broadcast media like television since in many American homes it is "on" twenty-four hours a day and is accessed with ease similar to television. The Internet also has more in common with broadcast media like television and radio than with print media because, unlike print media such as books, magazines, and newspapers, the Internet does not have fixed content and must not be physically picked up and manipulated. When content is contained in a physical form, it is much easier to limit access and control distribution. However, with the Internet and television, all one has to do is manipulate a keyboard or a remote and "click." Users of these media have access to an almost unlimited number of channels or websites, the Internet analog.

The *Reno* Court failed to give a balanced account of both the strengths and weakness of the Internet, choosing to focus mainly on the unique features of the Internet that it considered strengths: a vast virtual library of information, the ability of those with limited means to publish, a decentralized structure, the lack of significant control or supervision, and ease of access.¹⁹⁰ However, in *Reno*, the Court misguidedly or disingenuously downplayed the risks of children being inadvertently exposed to damaging pornography.¹⁹¹ In light of the Court's mischaracterization in *Reno* and the stakes at play in the ongoing war against terrorists, it is clear that there are compelling reasons to revisit the flawed *Reno* holding in light of logic and the advancing, increasingly sophisticated, and Internet-reliant terrorist threat. If the Supreme Court had decided that the Internet was more like broadcast media than print media in 1997, it is likely that more progress would have already been made to limit terrorists' use of the Internet.

The world has changed a great deal since the *Reno* decision was handed down in 1997, and the Court failed to foresee and account for the potentially dangerous synergy between the rise of decentralized

189. See U.S. GEN. ACCOUNTING OFFICE, NO. GAO-03-1115T, FILE-SHARING PROGRAMS: CHILD PORNOGRAPHY IS READILY ACCESSIBLE OVER PEER-TO-PEER NETWORKS 2 (2003); Max Bakke, *Students Got Porn Site Link: 3rd-Graders' Field Trip Information Inadvertently Led to Old Domain*, KNIGHT RIDDER TRIB. BUS. NEWS, Apr. 3, 2007, at 1; Bella English, *The Secret Life of Boys; Pornography is a Mouse Click Away, and Kids Are Being Exposed to It in Ever-Increasing Numbers*, BOSTON GLOBE, May 12, 2005, at D1; Tom A. Peter, *Internet Filters Block Porn, but Not Savvy Kids*, CHRISTIAN SCI. MONITOR, Apr. 11, 2007, at 13.

190. *Reno*, 521 U.S. at 849–53.

191. See Marianne Szegedy-Maszak, *Ensnared; Adding 200 Sites a Day, Internet Pornography Seduces with Never-Ending Variety—and Creates a New Group of Sexual Addicts*, L.A. TIMES, Dec. 26, 2005, at F1.

terrorist groups and the similarly decentralized and powerful multimedia communications medium that the Internet has become. In addition, because the *Reno* Court was not faced with an issue which arguably directly affected national security, its decision provides little illumination in the face of the evolving terrorist threats in a post-September 11th world.

The Internet is a critical tool for modern terrorist organizations, and the U.S. government, like those of other countries, has a substantial interest in regulating advocacy on this medium that is specifically intended to encourage violent attacks on the United States and its citizens—particularly messages targeted to assist in the recruitment of a new crop of terrorists and efforts designed to raise funds for terrorist organizations. The scale, scope, and rapidity of terrorist attacks demonstrate the magnitude of the potential threat in the current world situation, and those tasked with protecting the populace need to intervene earlier in the process to ensure public safety. This earlier intervention includes efforts to starve terrorist organizations of the continuous source of money and personnel—the Internet—that is the life blood of their operations. Due to the high level of Internet use, any effort to address funding and personnel to terrorist organizations must necessarily include efforts to restrict the use of it. The threat posed by use of the Internet by terrorists or their indirect supporters creates substantial national security dangers that outweigh any potentially offsetting social value associated with this type of expression.

To proclaim that “September 11th changed everything” is both a cliché and a truism. What remains unsettled is how best to prevent the occurrence of a similar terrorist-initiated cataclysm in the near future. The events of September 11th cannot be ignored if security is to be maintained. A policy that seeks to deny the painful reality that the United States has entered a “time of war” after these events is dangerous. This new perspective, informed by these horrible attacks, must recognize and come to terms with the potential and power of the Internet as a key weapon to be used by terrorists. However tricky and sensitive the issues, policy-makers must endeavor to accomplish two monumental tasks——protecting the freedom of speech that is vital to democratic discourse while simultaneously limiting the use of the Internet as a terrorist weapon. These are difficult challenges but ones that are both possible to achieve and critical to the survival of America and democracy around the world.

The proposed statute honors the constitutional protections provided by the First Amendment by explicitly protecting political discourse. What it seeks to proscribe are those patently harmful and

destructive communications over the Internet that have no legitimate political value and which are essentially criminal acts. The proposed statute, while not a complete solution, is a solid first step toward accomplishing these goals.

*C. The Proposed Statute is a Constitutional and Practical
Alternative to the Material Support Statutes for
Addressing Terrorist Website Activity*

The proposed statute provides an effective means of addressing the failings of the material support statutes in prosecuting this type of Internet activity. Unlike the material support statutes, it is specifically addressed toward the use of the Internet, a unique and pervasive feature of modern life that warrants particularized legislation. The proposed statute also provides greater precision than the material support statutes concerning the specific conduct that is prohibited (§ 2339E(a)),¹⁹² establishes specific intent requirements to ensure that it will pass constitutional muster (§ 2339E(b)), and contains a provision designed to ameliorate any chilling effect on speech that it might otherwise have (§ 2339E(c)).¹⁹³

By incorporating these protections, the statute serves to eliminate doubt about the point at which website design and maintenance may cross the line and become criminal conduct. This is achieved by requiring the government to establish for a conviction under subparagraph (a) that the defendant had the specific intent to encourage, request, aid, abet, or facilitate the violent acts, as well as prove that the defendant actually knew that the organization was a terrorist organization or that the organization has engaged in, or intended to engage in, acts of terrorism.¹⁹⁴

Perhaps even more importantly, the preceding section described a constitutional framework within which to evaluate efforts by the government to regulate what will loosely be called “terrorist speech.” Such a framework must consider that terrorist use of the Internet in the current wartime context poses a significant and unprecedented threat to national security.¹⁹⁵ The proposed statute falls within the constitutional framework described and offers a potential solution to the weaknesses of the material support statutes in addressing the threat of

192. This conduct specifically includes establishing and maintaining websites or posts that recruit, encourage, or fund violate terrorist acts. See *infra* Part II.C.

193. This provision excludes advocacy of peaceful change and criticism of U.S. officials or policy.

194. See *supra* Part II.C (proposed 18 U.S.C. § 2339E(b)).

195. See *supra* notes 164–167 and accompanying text.

terrorist use of the Internet. The statute's specific intent and specificity requirements meet the first and second prongs of the constitutional framework by proscribing only those website activities that are specifically intended to cause or enable acts of terrorist violence (to include the fundraising and recruiting activities so essential to continuing terrorist operations).¹⁹⁶ The statute is also tailored to address only concrete and detailed communication.¹⁹⁷ These features ensure that the statute does not sweep within its scope those who are unwittingly relaying information that might otherwise qualify as criminal conduct under the statute. In particular, by incorporating relatively stringent mens rea requirements, the proposed statute will ensure that future prosecutions are in harmony with an American jurisprudence that places great importance on the idea that proving criminal intent is a condition precedent to conviction and punishment in our criminal justice system.¹⁹⁸

Finally, one must always be concerned about the chilling effect that restrictions on speech may create. The proposed statute explicitly states that mere advocacy of peaceful change or criticism of officials of the United States or U.S. policy is not prohibited by the statute.¹⁹⁹ The express language in the statute will reassure members of the public that they will not be prosecuted for purely political speech, which is absolutely protected by the First Amendment.

CONCLUSION

The legislation advocated here is not designed to chill free speech, lessen peaceful dissent, or erode our precious liberties. The proposed legislation is reasonable in light of the Supreme Court's First Amendment jurisprudence and the recognition that during a time of war, there should be deference extended to legislative attempts to narrowly circumscribe speech that creates substantial risks for the public. The speech of individuals and groups directly and concretely advancing the cause of those whose goal is violence and destruction should not be protected by our First Amendment.

In *Speech, Crime, and the Uses of Language*, Kent Greenawalt makes the astute observation that a "[s]ensible interpretation of the

196. *See supra* Part II.C (proposed 18 U.S.C. § 2339E(a)).

197. *See id.* (proposed 18 U.S.C. § 2339E(a)) (prohibiting only "detailed information" on Internet websites or posts).

198. *See id.* (proposed 18 U.S.C. § 2339E(a)) (prohibiting only acts committed with the "specific intent" of recruiting, encouraging, or funding terrorist acts); WAYNE R. LAFAYE, *CRIMINAL LAW* § 1.2(b) (4th ed. 2003).

199. *See supra* Part II.C (proposed 18 U.S.C. § 2339E(c)).

First Amendment requires evaluation of the value of liberty of speech and the dangers of particular kinds of communications.”²⁰⁰ Failing to recognize and prohibit the clear threat posed by unimpeded terrorist use of the Internet is not a sensible interpretation of the First Amendment. If faced with this issue today, the *Chaplinsky* Court perhaps would decide that websites and Internet activities seeking to recruit, fund, and encourage violence are “no essential part of any exposition of ideas, and are of such slight social value” as to be “clearly outweighed by the social interest in order and morality.”²⁰¹

Justice Jackson perhaps said it best in his famous dissent in *Terminiello v. City of Chicago*: “The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”²⁰²

200. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 339 (1989).

201. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

202. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

