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**#TWEETING FOR TERRORISM:
FIRST AMENDMENT IMPLICATIONS IN USING
PROTERRORIST TWEETS TO CONVICT UNDER THE
MATERIAL SUPPORT STATUTE**

Abigail M. Pierce*

INTRODUCTION

“Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America. These acts shatter steel, but they cannot dent the steel of American resolve.”¹ Although inspirational, these words carry little truth today. September 11, 2001, stole two landmark buildings, the security of the American people, and many innocent lives. Most importantly, however, September 11, 2001, threatened the very foundation America was built on: freedom. As the War on Terror began, the First Amendment came under attack, and Americans began to lose the very freedoms that the Founders fought so hard to preserve.² The War on Terror paralleled another unimaginable phenomenon: the rise of the internet. The rise of the internet introduced social media, including Twitter,³ allowing people around the world to connect and share information at the click of a button. As the War on Terror and the rise of the internet continued to evolve and turn the world on its head, both began to add new challenges to constitutional interpretations of the First Amendment. This Note will discuss these challenges, arguing that proterrorist tweets can be used to convict an individual under the Material Support Statute without violating the First Amendment, so long as the government has evidence that the defendant acted in coordination with a foreign terrorist organization.⁴

This Note is split into three parts. Part I will introduce Professor Steven Salaita, a University of Illinois professor who lost his job because of his anti-Israel tweets.⁵

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¹ President George W. Bush, President’s Address to the Nation (Sept. 11, 2001), <http://abcnews.go.com/US/story?id=92530> [<http://perma.cc/9WVM-HQLY>].

² See, e.g., *infra* Part II.B.2.

³ Twitter is a social media website that allows people to share their thoughts with the world in 140 characters or less. Posting on Twitter is referred to as “tweeting.” See Alisa Brownlee, *Social Media—Making Connections Through Technology*, ALS ASS’N (Feb. 13, 2014), <http://www.als-ny.org/blog/category/twitter/> [<http://perma.cc/5X2U-CU4Q>].

⁴ See *infra* Part III.A.

⁵ See *infra* Part I.A.; see also *Professor Salaita Speaks for First Time About Losing University of Illinois Tenured Position over Gaza Tweets*, CTR. FOR CONST. RTS. (Sept. 9, 2014), <http://ccrjustice.org/home/press-center/press-releases/professor-salaita-speaks-first-time-about-losing-university> [<http://perma.cc/A9FW-HASD>].

Professor Salaita's situation is merely illustrative as it is one of increasing importance as many are finding themselves in similar circumstances.⁶ Part II will give a history of the First Amendment, addressing the general background,⁷ the limitations that have been placed on the First Amendment for national security concerns,⁸ and its relation to social media, which will include a discussion of *United States v. Mehanna*.⁹ After discussing the First Amendment in depth, Part III will heavily analyze and critique First Amendment implications in using proterrorist speech online, particularly social media, to convict under the Material Support Statute. Part III will also come back to Professor Salaita and look at the criminal liability that he could face for his tweets.¹⁰ This Note will then evaluate the potential ramifications of this outcome¹¹ and offer three unsatisfying solutions to these ramifications.¹² Part III will end with a discussion of policy considerations: the importance of preserving the First Amendment, the necessity of protecting national security, and how to resolve this tension.¹³

I. THE STORY OF STEVEN SALAITA AND OTHERS CAUGHT TWEETING FOR TERRORISM

A. Professor Steven Salaita

"Let's cut to the chase: If you're defending #Israel right now you're an awful human being."¹⁴ This is just one of hundreds of Steven Salaita's anti-Israel tweets from the summer of 2014.¹⁵ Salaita, a Palestinian American,¹⁶ began his academic

⁶ See *infra* Part I.B; see also Ellie Hall, *Inside the Chilling Online World of the Women of ISIS*, BUZZFEED, <http://www.buzzfeed.com/ellievhall/inside-the-online-world-of-the-women-of-isis#b5bhtj> [<http://perma.cc/4JCQ-EFSY>].

⁷ See *infra* Part II.A.

⁸ See *infra* Part II.B.

⁹ 735 F.3d 32, 44 (1st Cir. 2013), *cert. denied*, 135 S. Ct. 49 (2014) (involving a plaintiff who provided material support to a terrorist organization via his online activity, but First Amendment challenges were made); see also *infra* Part II.C.

¹⁰ See *infra* Part III.A.

¹¹ See *infra* Part III.B.

¹² See *infra* Part III.C.

¹³ See *infra* Part III.D.

¹⁴ Robert Mackey, *Professor's Angry Tweets on Gaza Cost Him a Job*, N.Y. TIMES (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/world/middleeast/professors-angry-tweets-on-gaza-cost-him-a-job.html> [<http://perma.cc/D9PB-TMX7>]. See generally Steven Salaita (@SteveSalaita), TWITTER, <https://www.twitter.com/stevesalaita> [<http://perma.cc/KPP3-QHGX>] (containing Steven Salaita's personal Twitter account where all of his tweets can be found).

¹⁵ Among these tweets include "Zionists: transforming 'antisemitism' from something horrible into something honorable since 1948." Mackey, *supra* note 14. Additionally, a tweet surfaced that indicated an American reporter should be "met on the point of a shiv." *Reports: University of Illinois Rescinds Job Offer to Professor over Israel Comments*, CBS CHI. (Aug. 7, 2014, 7:07 AM), <http://chicago.cbslocal.com/2014/08/07/reports-university-of-illinois-rescinds-job-offer-to-professor-over-israel-comments/> [<http://perma.cc/DEG4-A6RV>]. Salaita retweeted this, potentially indicating that he approved of this comment. *Id.*

¹⁶ Mackey, *supra* note 14.

career in 2006 at Virginia Tech where he was a faculty member in the English Department.¹⁷ Salaita earned lifetime tenure at Virginia Tech.¹⁸ In October 2013, Salaita accepted a professorship with lifetime tenure at the University of Illinois at Urbana-Champaign.¹⁹ After moving from Virginia to Illinois, Salaita was fired two weeks before his start date and without any warning.²⁰

The University of Illinois voted in August 2014 to block Salaita's appointment because his tweets supported Palestine and disparaged Israel.²¹ However, this vote came after a campaign by pro-Israel students, faculty members, and donors who argued that Salaita's tweets were anti-Semitic.²² Salaita's termination gained national attention.²³ Despite the many individuals who fought for his termination, many more began fighting for Salaita's reinstatement.²⁴ This fight was not centered around fairness or compassion, but around freedom.²⁵ Those fighting for Salaita's reinstatement used the First Amendment to argue that Salaita's termination violates his right to free speech.²⁶

However, this Note explores a more chilling proposition. Although Salaita's termination raises red flags, it may raise a larger problem: Can the government criminally prosecute Salaita for his tweets? Given that Salaita's tweets may arguably be pro-Hamas, a designated foreign terrorist organization,²⁷ the government could bring criminal charges against Salaita under the Material Support Statute.²⁸ There is, however, one constant concern: the First Amendment. Thus, for the government to do this requires proof that the pro-Hamas tweets actually provided material support to Hamas.

¹⁷ Steven Salaita, *Statement of Steven Salaita*, CCRJUSTICE.ORG (Sept. 9, 2014), http://www.ccrjustice.org/files/Salaita%20Statement_Press%20Conf_09%2008%2014.pdf [<http://perma.cc/P2NU-Q6S8>].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Mackey, *supra* note 14.

²² *Id.*

²³ *See, e.g.*, Joseph Erbenraut, *Professor Who Lost Job over Anti-Israel Tweets: University Setting a 'Perilous Standard'*, HUFFINGTON POST (Sept. 9, 2014, 7:09 PM), http://www.huffingtonpost.com/2014/09/09/steven-salaita-university-of-illinois_n_5793370.html [<http://perma.cc/K8SQ-AZ6S>].

²⁴ Eighteen thousand people signed a petition to reinstate Salaita, while many more stood in the rain in Champaign, Illinois, with tape over their mouths reading "reinstate Salaita." *Id.*

²⁵ *See id.*

²⁶ An attorney at the Center for Constitutional Rights commented: "The University has violated the Constitution by terminating Professor Salaita's appointment based on the content of his speech It has also sent a chilling message to faculty and students everywhere that the First Amendment and basic principles of academic freedom will be ignored when it comes to speech that is controversial or critical of the Israeli government." *Id.*

²⁷ *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> [<http://perma.cc/HS29-9SYM>].

²⁸ *See generally* 18 U.S.C. § 2339B (2000) (codifying the Material Support Statute).

B. Other Examples

Unfortunately, terrorist organizations continue to haunt America's security and freedom. Because of this, Steven Salaita is just one of many whose tweets may be used against him. With the growing movement of ISIS,²⁹ many have shown support for this dangerous, anti-American organization through Twitter.³⁰ In fact, one Twitter user is finding that it is frightfully easy to become a poster child for a terrorist organization.³¹ Jennifer Williams is a young, blonde American woman who became a star to ISIS supporters in less than 140 characters.³² Like Salaita, Williams took to Twitter to express her feelings about Islam.³³ She tweeted: "Sorry I read the Quran to learn abt terrorist beliefs but ended up converting to Islam b/c of what it said. #MuslimApologies #sorrynotsorry."³⁴ ISIS supporters began retweeting this, and Williams continued to show her support, most notably by tweeting a picture of pro-ISIS graffiti she found in Washington, D.C.³⁵ ISIS supporters are now using Williams's tweets as a means to show that a blonde American woman supports ISIS's ideals.³⁶ While Williams denounces her support for ISIS, she is one example of how tweets can be used by a foreign terrorist organization to show support.³⁷

Unlike Williams, other Americans have fallen victim to these online recruiting efforts and have actually attempted to join, and fight with, terrorist groups. One very recent and particularly troubling case involves a young boy, just seventeen years old when he converted to Islam after searching for education about religion online.³⁸ Shelton Thomas Bell, the defendant, found radical preaching online from Anwar

²⁹ ISIS stands for Islamic State in Iraq and Syria. It is a terrorist organization that has threatened many, including Great Britain, if it continues its "evil alliance with America." *ISIS Fast Facts*, CNN, <http://www.cnn.com/2014/08/08/world/isis-fast-facts/> [<http://perma.cc/5RZE-ME4R>] (last updated Sept. 17, 2015, 9:35 PM).

³⁰ See Hall, *supra* note 6 (describing a tweet from a young woman stating "[o]nly after becoming the wife of a[n] ISIS fighter] do you realise why there is so much reward in this action").

³¹ Jennifer Williams, *How a Blonde Tattooed Texas Girl Became an ISIS Twitter Star*, LAWFARE (Oct. 2, 2014, 4:49 PM), <http://www.lawfareblog.com/2014/10/how-a-blonde-tattooed-texas-girl-became-an-isis-twitter-star/> [<http://perma.cc/R7CG-WPVP>] ("Last Monday, I had 60 followers on Twitter. Today, I have more than 4,300 But here's the problem: A healthy number of them are Islamic extremists, including no small number of supporters of the Islamic State of Iraq and Syria (ISIS) And some of them want to marry me.").

³² *Id.* ("It's also interesting that [ISIS members] chose to make [my face] blurry rather than to black it out entirely—I suppose they did that so you could still tell that I was a blonde, white American girl. The holy grail of Muslim converts—so to speak.").

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* ("A friend of mine . . . emailed me to let me know that my conversion-story tweet was being used as propaganda by [Islamic radicals] in Arabic-language social media circles.").

³⁸ *United States v. Bell*, No. 3:13-cr-141-J-32JRK, 2015 U.S. Dist. LEXIS 4447, at *7 (M.D. Fla. Jan. 14, 2015).

al-Awlaki,³⁹ a significant spokesman and recruiter for al-Qa'ida.⁴⁰ Bell hung on al-Awlaki's every word, listening to hundreds of hours of terrorist propaganda online.⁴¹ It was only after viewing this material online that Bell decided to join al-Awlaki's terrorist efforts.⁴² Bell gathered a group of friends, who joined the "cause" with him, and the small group began training to fight the United States in Florida.⁴³ In fact, these online efforts were so effective that Bell and his group began to fashion explosives to practice for war.⁴⁴ After a failed attempt to travel to Yemen, Bell and a juvenile friend were eventually arrested in Florida and charged with conspiracy to provide material support to terrorists.⁴⁵ In March 2014, Bell pleaded guilty.⁴⁶

Bell's story, although very different from Jennifer Williams's story,⁴⁷ shows that terrorists' efforts to recruit members online can be successful. His story outlines what can happen if the government fails to take action. However, Bell's story focuses on his actions of betrayal against the United States, rather than his words. While the internet provided him with the terrorist propaganda, his actions ultimately led to his demise.⁴⁸

However, those who turn to Twitter, Facebook, and other social media websites to shout their support for terrorist organizations to the world and in turn help such terrorist organizations recruit individuals like Shelton Bell may face prosecution if it is deemed that these tweets constitute providing material support.⁴⁹ In this uncertain time, American security is not the only thing under attack, the First Amendment is also facing destruction in this never-ending battle.

II. WHAT DOES THE FIRST AMENDMENT REALLY PROTECT? A LOOK BACK INTO THE HISTORY OF THE FIRST AMENDMENT

A. General Background

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

³⁹ Anwar al-Awlaki was a dual citizen of Yemen and the United States. *Id.* at *9.

⁴⁰ *Id.* at *7-9.

⁴¹ *Id.* at *10.

⁴² *Id.*

⁴³ *Id.* at *10-11 ("To prepare themselves mentally and physically, Bell and his group began to train with firearms that Bell supplied, to continue consuming extremist media, and to record their own videos that Bell . . . directed another member of the group to post online.").

⁴⁴ Bell said to one of the juveniles in his group, regarding the explosives, "It may stink, but how [sic] you think the battlefield is gonna smell?" *Id.* at *13.

⁴⁵ *Id.* at *15-17.

⁴⁶ *Id.* at *3-4.

⁴⁷ See Williams, *supra* note 31 and accompanying text.

⁴⁸ See Bell, 2015 U.S. Dist. LEXIS 4447, at *62 ("Bell stands convicted of his actions, not his beliefs.").

⁴⁹ See *infra* Part III (discussing implications of using the Material Support Statute to convict proterrorist speech online).

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁵⁰ In 1791, “[i]n that turbulent mix of repressive law and an audacious press,” the Bill of Rights, including the First Amendment, was added to the Constitution.⁵¹ While fights broke out among states about the Constitution, the promise of incorporating a Bill of Rights solidified ratification.⁵² The drafters of the Bill of Rights created the First Amendment, which was added to the Constitution on December 15, 1791.⁵³ However, “[t]he birth of the First Amendment threw no light on how its scope should be understood,” and since its creation, the First Amendment has been under fire.⁵⁴

In 1798, just seven years after the First Amendment was adopted, Congress adopted the Sedition Act, which prohibited “the publication of false, scandalous, and malicious writing against the [g]overnment . . . with intent to defame [it]; . . . or to excite against [it] the hatred of the good people of the United States”⁵⁵ The Sedition Act was enacted mainly to suppress Republican and Jeffersonian support due to the impending presidential election of 1800.⁵⁶ Nonetheless, the Act was marketed as a tool to protect Americans from the French after the French suffered a bloody revolution.⁵⁷ Even though the Sedition Act never made it to the Supreme Court, it was upheld by lower federal courts.⁵⁸ Fourteen men were prosecuted under this act.⁵⁹ Although the Sedition Act disappeared and allowed Americans to appreciate the freedom that the First Amendment brought, “political use of fear to justify repression” did not disappear.⁶⁰ In fact, that is one aspect of the Sedition Act that is very much alive today.⁶¹

Nearly 120 years later, the Espionage Act was passed in the wake of World War I, making it a crime to “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces.”⁶² Much like the Sedition Act of

⁵⁰ U.S. CONST. amend. I.

⁵¹ ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* 6, 10 (2007). Additionally, by this time, “nine of the original thirteen states had such provisions in their constitutions or other basic documents.” *Id.* at 6.

⁵² *Id.* at 7–8.

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 10.

⁵⁵ Earl Pollock, *Freedom of Speech*, in 1 *FIRST AMENDMENT RIGHTS: AN ENCYCLOPEDIA: TRADITIONAL ISSUES ON THE FIRST AMENDMENT* 153 (Nancy S. Lind & Erik T. Rankin eds., 2013); *see also* LEWIS, *supra* note 51, at 11 (“Violators were subject to imprisonment for up to two years and a fine of up to \$2,000.”).

⁵⁶ LEWIS, *supra* note 51, at 12.

⁵⁷ *Id.*

⁵⁸ Pollock, *supra* note 55, at 153.

⁵⁹ LEWIS, *supra* note 51, at 12; *see also* Pollock, *supra* note 55, at 153 (“The act expired by its own terms in 1801, and all those convicted under it were pardoned by Jefferson upon his taking office as president.”).

⁶⁰ LEWIS, *supra* note 51, at 21.

⁶¹ *Id.*

⁶² *Id.* at 25 (quoting Espionage Act of 1917, ch. 30, 40 Stat. 217 (current version at 18 U.S.C. § 2388 (2012))).

1798, the Espionage Act of 1917 criminalized speech.⁶³ The Supreme Court upheld some of these convictions, with Justice Holmes uttering his famous phrase: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”⁶⁴ In *Schenck*, Justice Holmes also introduced the clear and present danger test in which a court must look to whether the words are used to create “a clear and present danger.”⁶⁵ Despite the Founders’s attempt to implement protections for Americans during war and peace,⁶⁶ the Supreme Court recognized in *Schenck* that the protections offered by the First Amendment are altered during times of war.⁶⁷

World War I brought with it new fears that again affected the First Amendment. Not only did states begin adopting sedition acts,⁶⁸ but the federal government, for the first time since 1798, passed the Espionage Act of 1917.⁶⁹ After World War I, fears of communism whispered through the nation and prosecutions began.⁷⁰ Despite these fears, many still opposed the notion that the First Amendment should be sacrificed in wartime.⁷¹ Justice Brandeis spoke out about the protections afforded by the First Amendment, allowing a full-scale debate between security and freedom to ensue. Justice Brandeis argued:

Those who won our independence . . . valued liberty both as an end
and as a means. They believed liberty to be the secret of happiness

⁶³ *Id.* (“[J]udges told juries to convict if they found a defendant’s words disloyal.”).

⁶⁴ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (upholding defendants’ conviction for violating the Espionage Act where they gave leaflets to men urging them to refuse to submit to the draft into military service).

⁶⁵ *Id.* (“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.”); *see also* *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) (arguing that speech producing or intending “to produce a clear and *imminent* danger that it will bring about *forthwith* certain substantive evils” may be punished) (emphasis added).

⁶⁶ The Bill of Rights does not signify, in any way, that its protections only apply in times of peace. In fact, the Founders wanted to protect against the very oppression they suffered from in Great Britain and create a nation founded upon the one principle that no war could take away: freedom. *See* LEWIS, *supra* note 51, at 8.

⁶⁷ *Schenck*, 249 U.S. at 52 (“When 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.”).

⁶⁸ *See* LEWIS, *supra* note 51, at 101 (describing that Montana adopted a state sedition law that made it a crime to speak poorly about the government during wartime—seventy-nine individuals from Montana were convicted of violating the state sedition law).

⁶⁹ *Id.* at 103.

⁷⁰ *See, e.g., id.* at 35 (discussing Anita Whitney, a founding member of the Communist Labor Party of California, who was convicted of membership advocating “criminal syndicalism”).

⁷¹ *See, e.g., Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (explaining the importance of the First Amendment even during times of war).

and courage to be the secret of liberty But they knew that order cannot be secured merely through fear of punishment for its infraction; . . . that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. . . . [T]hey amended the Constitution so that free speech and assembly should be guaranteed.⁷²

Brandeis's words had a significant impact on the First Amendment during times of fear and war.⁷³ Additionally, the Supreme Court began striking down laws that adversely affected the First Amendment.⁷⁴ In one case, *Herndon v. Lowry*,⁷⁵ the Supreme Court addressed an issue that has surfaced today: participation in an unpopular, and potentially dangerous, group.⁷⁶ Herndon was a member of the Communist party.⁷⁷ The Supreme Court determined that "to make membership in the [Communist] party and solicitation of members for that party a criminal offense, punishable by death, in the discretion of a jury, is an unwarranted invasion of the right of freedom of speech."⁷⁸ This marked a new time period for the Court and gave new strength to the First Amendment.

Nonetheless, times of war still continued to strain the country and the Court. Although the Supreme Court made great strides in favor of the First Amendment post-World War I, World War II set back progress.⁷⁹ This set back, however, happened differently and is perhaps far worse than the set backs of World War I. During World War II, Japanese Americans were relocated because of their heritage.⁸⁰ In *Korematsu v. United States*, an infamous decision, the Supreme Court upheld the conviction of a Japanese American for refusing to relocate.⁸¹

⁷² *Id.*

⁷³ *See, e.g.*, LEWIS, *supra* note 51, at 36–37 (explaining that Anita Whitney was pardoned by the Governor of California who quoted Brandeis's passage at length).

⁷⁴ *See id.* at 39; *see also* *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (stressing the importance of freedom of speech and assembly); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (holding, for the first time, that a California law forbidding the display of a red flag was unconstitutional because it violated the First Amendment).

⁷⁵ 301 U.S. 242 (1937).

⁷⁶ *Id.* at 245.

⁷⁷ *Id.*

⁷⁸ *Id.* at 261.

⁷⁹ *See generally* *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the constitutionality of Japanese American internment camps).

⁸⁰ LEWIS, *supra* note 51, at 112.

⁸¹ 323 U.S. at 246 ("A military order, however unconstitutional, is not apt to last longer than the military emergency."). It is important to note that this decision has been widely criticized. *See, e.g.*, *Farag v. United States*, 587 F. Supp. 2d 436, 467 (E.D.N.Y. 2008) ("[*Korematsu*] is now widely regarded as a black mark on our constitutional jurisprudence.").

Despite this decision, the Supreme Court continued to progress during World War II, giving significant credence to the First Amendment.⁸² The Supreme Court struggled throughout the twentieth century to determine the scope of the First Amendment.⁸³ The United States was plagued with war, hostility, and fear during the first half of the twentieth century. Unfortunately, the United States would continue to struggle with uncertainty, hatred, and paralyzing fear as technology developed and weapons advanced.

B. Limitations Placed on the First Amendment for National Security

Security is like liberty in that many are the crimes committed in its name.⁸⁴

Despite the ending of World War II, hatred and fear still plagued the country and threatened national security. While many kinds of speech are not protected by the First Amendment,⁸⁵ some of the most important limitations have been in the name of national security.⁸⁶ The constant fear of danger caused the Supreme Court and Congress to take action limiting the First Amendment in an attempt to protect national security.

1. *Brandenburg*: Inciting Violence

In 1969, the Supreme Court opened another category of unprotected speech. In *Brandenburg v. Ohio*,⁸⁷ a Ku Klux Klan leader invited press to a rally and made derogatory comments about African Americans and Jewish Americans.⁸⁸ An important test arose from this case: speech is not protected by the First Amendment if it is “directed to incit[e] or produc[e] imminent lawless action and is likely to incite or produce such action.”⁸⁹ This test is still in effect today.⁹⁰

⁸² See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that compelling a flag salute violated the First Amendment); see also LEWIS, *supra* note 51, at 115 (“At the end of World War II the First Amendment seemed to be in a strong position in the courts and in the country.”).

⁸³ See, e.g., LEWIS, *supra* note 51, at 115–17.

⁸⁴ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting).

⁸⁵ See Pollock, *supra* note 55, at 154 (stating that perjury, bribery, and obscenity are not protected by First Amendment).

⁸⁶ See Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 958 (2011)

⁸⁷ 395 U.S. 444 (1969).

⁸⁸ *Id.* at 445–46.

⁸⁹ *Id.* at 447.

⁹⁰ See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 43–44 (2010) (Breyer, J., dissenting).

Brandenburg furthered an important idea: the notion that the government “cannot regulate speech based on its *content*—its subject matter, its message, its ideas, its viewpoint.”⁹¹ Content-based restrictions are tested under a strict scrutiny standard.⁹² Although there are arguments for and against this test, it is a test that balances the interests of freedom and security.⁹³

Although this test arose from hate speech following the Civil Rights Movement, the United States now faces a more turbulent and explosive threat: terrorism. Terrorism has deeply threatened America’s security, but it has also created a terrible threat to the First Amendment.

But perhaps judges, and the rest of us, will be more on guard now for the rare act of expression—not the burning of a flag or the racist slang of an undergraduate—that is genuinely dangerous. I think we should be able to punish speech that urges terrorist violence to an audience some of whose members are ready to act on the urging. *That is imminence enough.*⁹⁴

In an age of technology where much speech is communicated online, the very hint of support to a terrorist organization can be said to “urge[] terrorist violence” to an audience that is ready to act.⁹⁵ If this is imminent, then is online speech really protected by the First Amendment? In an age of terrorism, the question of imminence becomes particularly important, and the United States must carefully protect national security. But, this question simultaneously becomes exceptionally dangerous to the freedom of speech that the Founders established in 1791.⁹⁶

2. Material Support Statute

In response to the attacks on September 11, 2001, the United States entered the War on Terror, and a new era of the First Amendment was born. The First Amendment survived the most gruesome of wars, but it now faces two substantial changes

⁹¹ Pollock, *supra* note 55, at 155.

⁹² These restrictions are “presumptively unconstitutional, and can be sustained only by a demonstration of a ‘compelling’ governmental interest.” *Id.* An example of a content-based law can be found in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding a statute invalid where it prohibited messages addressed to race, color, creed, religion, or gender). On the other hand, content-neutral speech regulations are much more forgiving. These can be “justified by a showing that [the law] serves a ‘substantial’ or ‘significant’ governmental interest.” Pollock, *supra* note 55, at 155. An example of a content-neutral statute can be found in *Virginia v. Black*, 538 U.S. 343, 362–63 (2003) (holding a statute was content-neutral where its purpose and effect were focused on cross burning rather than the nature of the message).

⁹³ *But see* Pollock, *supra* note 55, at 160–61.

⁹⁴ LEWIS, *supra* note 51, at 167 (emphasis added).

⁹⁵ *Id.*

⁹⁶ *See id.* at 9.

to the world: terrorism and technology. In the face of these attacks, President George W. Bush authorized a series of programs, including enhanced interrogation techniques on suspected terrorists, wiretapping of international phone calls, and detention of American citizens suspected of terrorist ties without trial or access to counsel.⁹⁷ These programs were created because of fear, much like those created during World Wars I and II.⁹⁸ However, there is something much different about these programs: it is hard to envision an end in sight.⁹⁹

Nonetheless, even before the attacks on September 11, 2001, Congress enacted a statute that addressed concerns regarding terrorism. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act after a bombing at a federal building in Oklahoma City.¹⁰⁰ This created criminal liability for anyone who provided “‘material support’ to foreign groups designated as ‘terrorists’ by the Secretary of State.”¹⁰¹ This became known as the “Material Support Statute.”¹⁰²

After the War on Terror began, Congress began amending many provisions of the Material Support Statute.¹⁰³ These amendments included defining terrorist activity as any foreign group that engages in “unlawful use of, or threat to use, a weapon against person or property, unless for mere personal monetary gain.”¹⁰⁴ Currently, there are fifty-nine foreign organizations that the Secretary of State has designated as “terrorist organizations.”¹⁰⁵ After a group has been designated as a foreign terrorist

⁹⁷ *Id.* at 127.

⁹⁸ *Id.*

⁹⁹ *Id.* at 127–28.

¹⁰⁰ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); *see also* David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL’Y REV. 147, 151 (2012).

¹⁰¹ Cole, *supra* note 100, at 151.

¹⁰² *Id.* at 158.

¹⁰³ The statute, in relevant part, now reads:

(a) Prohibited activities. (1) Unlawful conduct. Whoever 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. 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, . . . or that the organization has engaged or engages in terrorism.

18 U.S.C. § 2339B (2000).

¹⁰⁴ Cole, *supra* note 100, at 151 n.13 (citing 8 U.S.C. § 1189(a) (2006); *id.* § 1182(a)(3)(B)(iii)(V)–(VI) (2006)).

¹⁰⁵ *See Foreign Terrorist Organizations*, *supra* note 27. The Federal Government announced in May 2014 that it will be adding six more terrorist organizations to this list. *Terrorist Designations of Groups Operating in Syria*, U.S. DEP’T OF STATE (May 14, 2014), <http://www.state.gov/t/pa/prs/ps/2014/05/226067.htm> [<http://perma.cc/8YDB-CZD4>].

organization, “it is a crime to knowingly provide ‘material support’ to it.”¹⁰⁶ Although vague, “material support” includes funds, tangible goods, “service,” “expert advice or assistance,” “training,” and “personnel,” defined as “acting under an organization’s ‘direction or control.’”¹⁰⁷ With this statute, the federal government is attempting to protect the American people from another attack.¹⁰⁸ Nonetheless, serious First Amendment concerns arise with the application of this statute.

3. *Humanitarian Law Project* and the Coordination Test

*Holder v. Humanitarian Law Project*¹⁰⁹ attempted to challenge the constitutionality of the Material Support Statute. In this case, the plaintiffs, six organizations and two individuals, wanted to provide material support to the Kurdistan Workers’ Party (PKK) and the Liberation Tigers of Tamil Ealam (LTTE).¹¹⁰ Both organizations were designated as foreign terrorist organizations in 1997.¹¹¹ In conjunction with the plaintiffs, the organizations advocated peaceful, nonviolent resolutions to obtain political freedoms and human rights.¹¹² The Humanitarian Law Project challenged the Material Support Statute, arguing that its intended activities were constitutionally permissible.¹¹³ One plaintiff, Dr. Nagalingam Jeyualingam, “made cash donations to organizations that provided assistance to Tamil refugees in Sri Lanka and encouraged others to make such donations.”¹¹⁴ In large part, this case became so controversial because the plaintiffs were attempting to provide humanitarian aid.¹¹⁵

In a landmark decision, the Supreme Court upheld the Material Support Statute as applied to the plaintiffs’ desired activities.¹¹⁶ In particular, plaintiffs sought to train members of the PKK on humanitarian and international law, teach PKK members “how to petition various representative bodies such as the United Nations for relief,” and “engag[e] in political advocacy on behalf of Kurds who live in Turkey” and Tamils living in Sri Lanka.¹¹⁷

Humanitarian Law Project introduced a new test: the coordination test.¹¹⁸ The Supreme Court stated that “any *independent* advocacy in which plaintiffs wish to

¹⁰⁶ Cole, *supra* note 100, at 151.

¹⁰⁷ *Id.*; *see also* 18 U.S.C. § 2339B(h) (2012).

¹⁰⁸ *See, e.g.*, Cole, *supra* note 100, at 151 (highlighting that the statute criminalizes support to foreign groups that may harm persons or property).

¹⁰⁹ 561 U.S. 1 (2010).

¹¹⁰ *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998), *aff’d in part and rev’d in part*, 561 U.S. 1 (2010).

¹¹¹ *Id.*

¹¹² *Id.* at 1181.

¹¹³ *See* Cole, *supra* note 100, at 151.

¹¹⁴ *Humanitarian Law Project*, 9 F. Supp. 2d at 1183.

¹¹⁵ *See* Zick, *supra* note 86, at 968.

¹¹⁶ *Humanitarian Law Project*, 561 U.S. at 40; Cole, *supra* note 100, at 152.

¹¹⁷ *Humanitarian Law Project*, 561 U.S. at 14–15 (citations omitted).

¹¹⁸ *Id.* at 24.

engage is not prohibited by § 2339B.”¹¹⁹ However, the term “service” covers “advocacy performed *in coordination with, or at the direction of,* a foreign terrorist organization.”¹²⁰ This leaves courts, or more specifically juries who are likely nonsympathetic to a criminal charge of providing material support to a foreign terrorist organization, to determine if an individual has acted independently or in coordination with the terrorist organization. Nonetheless, Chief Justice Roberts was careful in his majority opinion, stating:

All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. . . . We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.¹²¹

This case has been criticized harshly. David Cole, a famous First Amendment scholar, argues, “If any speech deserves presumptive protection under the First Amendment, it is speech advocating lawful, peaceful activity. Until 2010, that was indeed a core First Amendment principle.”¹²² Additionally, another scholar, Andrew Moshirnia, stated, “By manipulating established standards to elevate security over liberty, the Court served neither principle. It is unclear how speech associated with foreign terrorist groups deserves less First Amendment protections when that speech does not advocate imminent lawless conduct.”¹²³ Moshirnia also criticized the Court’s coordination test, arguing that this “nebulous” test “will likely chill otherwise constitutionally protected speech.”¹²⁴ The decision’s full impact remains unknown because it came out just five years ago. Courts, however, are beginning to use this decision to convict individuals under the Material Support Statute.¹²⁵

C. *The Phenomenon of Social Media*

As national security concerns deepened, social media quickly developed as an avenue for people to communicate and share ideas across the world at the click of a button. Social media continues to grow rapidly with over 241 million users on

¹¹⁹ *Id.* (emphasis added).

¹²⁰ *Id.* (emphasis added).

¹²¹ *Id.* at 39. The Material Support Statute, as applied in this case, limits content of speech, and therefore requires the Supreme Court to hold it to a strict scrutiny standard. *Id.* at 27–28.

¹²² Cole, *supra* note 100, at 176.

¹²³ Andrew V. Moshirnia, *Valuing Speech and Open Source Intelligence in the Face of Judicial Deference*, 4 HARV. NAT’L SEC. J. 385, 387 (2013).

¹²⁴ *Id.*

¹²⁵ *See, e.g.,* United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013), *cert. denied*, 135 S. Ct. 49 (2014).

Twitter at the end of 2013.¹²⁶ The growth of social media websites like Twitter has brought an entirely new set of problems to the First Amendment.

Because technology is new and rapidly expanding, the Court has not had much time to address First Amendment concerns with social media. Nonetheless, the Supreme Court has addressed a number of First Amendment cases concerning the internet.¹²⁷ Many of these cases, however, have dealt with liability for computer service providers rather than the actual speech.¹²⁸

One important case, *United States v. Mehanna*,¹²⁹ addressed online activity and the Material Support Statute. *Mehanna* is a case that addresses all three issues discussed in this Note: online activity, First Amendment issues, and national security concerns.¹³⁰ *Mehanna* was charged with four terrorism-related counts, including “conspiracy to provide material support to al-Qa’ida,” “conspiracy to provide material support to terrorists,” “providing and attempting to provide material support to terrorists,” and “conspiracy to kill persons in a foreign country.”¹³¹ The material support charges were based on two separate activities: *Mehanna*’s travel to Yemen and his online translations.¹³² While some of the most damaging evidence was *Mehanna*’s travel to Yemen,¹³³ the government also relied on his online translation

¹²⁶ Rachel King, *Twitter’s First Earnings Report: Active User Count Up 30 Percent to 241 Million*, ZDNET (Feb. 5, 2014, 9:07 PM), <http://www.zdnet.com/twitters-first-earnings-report-active-user-count-up-30-percent-to-241-million-7000026007/> [<http://perma.cc/XFQ6-DRKD>].

¹²⁷ See, e.g., *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (addressing the constitutionality of statutes meant to protect minors from material on the internet); *Elonis v. United States*, 135 S. Ct. 2001 (2015) (addressing whether threats on Facebook were covered by the First Amendment).

¹²⁸ See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413, 416, 422 (5th Cir. 2008) (holding that MySpace, a social media website, was not liable when the defendant’s daughter was able to create a profile on MySpace, despite being too young, and met a man who sexually assaulted her); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (holding that Metrosplash was not liable where a user created a fake dating profile that encouraged sexually explicit communication with the defendant); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328–29 (4th Cir. 1997) (holding that Zeran, a victim of a prank after the Oklahoma City bombing in which a poster advertised offensive shirts for sale with a message that included Zeran’s phone number, could not hold America Online, Inc. liable for defamatory speech initiated by a third party).

¹²⁹ 735 F.3d at 32.

¹³⁰ See *id.* at 40 (“Terrorism is the modern-day equivalent of the bubonic plague: it is an existential threat. Predictably, then, the government’s efforts to combat terrorism through the enforcement of the criminal laws will be fierce. Sometimes, those efforts require a court to patrol the fine line between vital national security concerns and forbidden encroachments on constitutionally protected freedoms of speech and association. This is such a case.”).

¹³¹ *Id.* at 41.

¹³² *Id.*

¹³³ *Mehanna* traveled to Yemen in search of a terrorist training camp. *Id.* He remained there for a week, but was unable to locate such a camp. *Id.*

of Arab-language materials.¹³⁴ In 2005, Mehanna began translating Arab-language materials into English, posting these translations on a website “that comprised an on-line community for those sympathetic to al-Qa’ida and Salafi-Jihadi perspectives.”¹³⁵ This website was used “to share[] opinions, videos, texts, and kindred materials” online.¹³⁶ Mehanna translated al-Qa’ida propaganda and materials that supported al-Qa’ida.¹³⁷ He was convicted on all counts.¹³⁸ Mehanna’s online activity became the focus of a First Amendment claim.¹³⁹ The First Circuit barely addressed Mehanna’s claim that the evidence procured came from his online activity was protected speech.¹⁴⁰ The First Circuit concluded that the translations used as material support were premised on the translations being a “service.”¹⁴¹ The court, using the decision in *Humanitarian Law Project*,¹⁴² determined that “otherwise-protected speech rises to the level of criminal material support only if it is ‘in coordination with foreign groups that the speaker knows to be terrorist organizations.’”¹⁴³ The First Circuit concluded that the district court appropriately left the question to determine whether enough coordination existed to criminalize the defendant’s translations to the jury.¹⁴⁴

While the Supreme Court denied certiorari,¹⁴⁵ *Mehanna* opened many questions and set potentially chilling precedent.¹⁴⁶ This case, however, gives little guidance for lower courts. Because Mehanna’s trip to Yemen was so damaging to his case, it is unknown if mere online translations would have been enough to convict him.

Placing the decision of whether online activity was coordinated with a foreign terrorist organization on jurors may create a substantial prejudice. Although it has been over fourteen years since September 11, 2001, many Americans still feel the pain and hatred from that day and fear anyone who may be involved in any kind of terrorist organization. This begs the question of how social media fits. The Court has yet to address a case in which activity on Twitter is considered material support, but both *Humanitarian Law Project* and *Mehanna* suggest that, so long as a jury can find

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 42.

¹³⁹ *Id.* at 47.

¹⁴⁰ *Id.* (“The Court of Appeals is not a sorting hat, divining which criminal defendants’ stories fall into constitutionally protected and unprotected stacks.”).

¹⁴¹ *Id.* at 49.

¹⁴² 561 U.S. 1 (2010).

¹⁴³ *Mehanna*, 735 F.3d at 49 (citing *Humanitarian Law Project*, 561 U.S. at 26).

¹⁴⁴ *Id.*

¹⁴⁵ See *Mehanna v. United States*, 135 S. Ct. 49 (2014).

¹⁴⁶ Reply to Brief in Opposition at 8, *Mehanna v. United States*, 135 S. Ct. 49 (2014) (No. 13-1125) (“The First Circuit’s holding sets disturbing precedent for future government attacks on speech, with the extreme sanction of criminal conviction.”).

coordination, the First Amendment does not protect these tweets, potentially making the tweets enough to convict an individual under the Material Support Statute.¹⁴⁷

III. DOES THE FIRST AMENDMENT PROTECT TWEETING IN SUPPORT OF TERRORISM?

A. Returning to Professor Salaita: An Analysis of His Potentially Criminal Behavior

While social media continues to strengthen as a platform for sharing personal opinions and views, many forget that the First Amendment does not protect all speech.¹⁴⁸ Professor Salaita, like many others, has found himself in a compromising position. Not only did he lose his job because of his anti-Israel tweets, but the Material Support Statute allows the government to seek a more serious remedy.¹⁴⁹ For the government to press charges under the Material Support Statute, it would need to prove that: (1) the tweet(s) evidenced support for a foreign terrorist organization; (2) the person who tweeted the support knew that the organization was a foreign terrorist organization; and (3) the tweet(s) were formed in coordination with that foreign terrorist organization.¹⁵⁰

In many cases, the first two elements are not difficult to prove. On its face, a tweet can be seen as showing support simply by looking at its plain language. Furthermore, if the organization is a well-known terrorist organization, like ISIS or Hamas, and the individual tweeting is more educated, it will likely not be difficult for the government to show that the person tweeting knew that the organization was classified as a foreign terrorist organization. In Professor Salaita's case, his tweets seem to be pro-Hamas. In fact, he states on his twitter, "Will you condemn Hamas? No. Why not? Because Hamas isn't the one incinerating children, you disingenuous prick. #Gaza #GazaUnderAttack."¹⁵¹ Although Professor Salaita could, and likely would, argue that this tweet merely expresses an opinion, at the very least, this tweet suggests that his allegiance lies with Hamas, not with Israel.¹⁵² Additionally, Professor Salaita is a professor, and an activist, in this area. While more facts are certainly needed, it is likely that he knew Hamas was a foreign terrorist organization.¹⁵³

¹⁴⁷ See *supra* Part II.B.3.

¹⁴⁸ See Pollock, *supra* note 55, at 154.

¹⁴⁹ See *supra* Part II.B.2-3.

¹⁵⁰ Cf. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010).

¹⁵¹ Steven Salaita (@SteveSalaita), TWITTER (July 14, 2014, 10:32 AM), <https://www.twitter.com/stevesalaita/status/488737738666287104> [<http://perma.cc/DL4E-SJQ4>].

¹⁵² See Mackey, *supra* note 14 (explaining that not all of Professor Salaita's tweets were anti-Semitic polemics, but that many arguably endorsed the one-sided pro-Hamas, anti-Israel politic). The University of Illinois Board of Trustees based their rejection of Professor Salaita on his polarizing actions. *Id.*

¹⁵³ On October 8, 1997, the United States Department of State added Hamas to the list of foreign terrorist organizations. See *Foreign Terrorist Organizations*, *supra* note 27.

As in most, if not all, cases that involve this type of speech, the government would face its biggest challenge in proving that a person's tweets were either "in coordination with" or "at the direction of" a foreign terrorist organization.¹⁵⁴ Courts have yet to weigh in on difficult cases in which coordination is debated.¹⁵⁵ Since *Humanitarian Law Project*, most cases have included other extremely damaging evidence, specifically traveling overseas to train with a terrorist organization.¹⁵⁶ It is, therefore, difficult to say what a court, or more specifically a jury, would do if confronted with only tweets that support a foreign terrorist organization. In Professor Salaita's case, if the only evidence presented were his tweets, the jury would likely find it difficult to find that Professor Salaita acted in coordination with Hamas. Tweets alone fit neatly into "wholly independent" speech that is not prohibited by 18 U.S.C. § 2339B.¹⁵⁷

Nonetheless, any remote connection to a foreign terrorist organization may be enough under 18 U.S.C. § 2339B.¹⁵⁸ For Professor Salaita, that could mean that if any relative or friend of his is a member of Hamas, with whom he has been in contact, could be enough to show that his tweets were "in coordination with" Hamas. This type of communication could show that Professor Salaita tweeted at a specific Hamas member; however, it would be difficult to prove. Additionally, because Twitter is a platform where millions of people can see one's tweets instantaneously, if Professor Salaita was in contact with members of Hamas about their efforts against Israel, it could be argued that he tweeted for the purpose of gaining support or even recruiting new members for Hamas, thus providing a service to the group. Even if Professor Salaita's tweets

¹⁵⁴ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010).

¹⁵⁵ This may be because federal prosecutors are careful to bring cases where the main argument comes down to freedom of speech versus security. In a case where coordination is not clear by other means, the government faces the burden of proving that the speech was "in coordination with, or at the direction of, a foreign terrorist organization," and not wholly independent. *Id.* This is a high hurdle for the government, and may be a question that the Court never has to face.

¹⁵⁶ See *United States v. Hassan*, 742 F.3d 104, 113–14, 117 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 157 (2014) (holding that the First Amendment rights of the defendants, who were convicted of terrorism related charges, were not violated despite the government using the defendants' violent speech that they posted on Facebook to prove intent because other evidence revealed that defendants had traveled to Jordan to engage in violent Jihad and served as enough proof of providing material support); see also *Mehanna*, 735 F.3d at 41.

¹⁵⁷ The government would have a much more difficult time prosecuting Professor Salaita under 18 U.S.C. § 2339A. 18 U.S.C. § 2339A requires that the defendant knows that, or intends for, the material support provided to be used in preparation for, in carrying out, in preparation for concealment of an escape from, or in carrying out the concealment of an escape from a crime of terrorism. See CHARLES DOYLE, CONG. RESEARCH SERV., R41334, TERRORIST MATERIAL SUPPORT: A SKETCH OF 18 U.S.C. 2339A AND 2339B, (July 19, 2010), <https://www.fas.org/sgp/crs/natsec/R41334.pdf> [<http://perma.cc/Q7M2-G2HA>]. Therefore, because 18 U.S.C. § 2339A is much more difficult for the government to prove than 18 U.S.C. § 2339B, and thus faces less criticism, this Note focuses on 18 U.S.C. § 2339B.

¹⁵⁸ See *id.*

were arguably to *stop* the war between Israelis and Palestinians, peaceful support, when done in coordination with a foreign terrorist organization, is still prohibited.¹⁵⁹ Furthermore, Professor Salaita's tweets have been interpreted as advocating anti-Semitism and violence against Israel.¹⁶⁰ Although Professor Salaita is entitled to his own thoughts and opinions, if presented with evidence of these tweets *and* evidence of direct communication with a foreign terrorist organization, a jury would likely not hesitate to convict. Based on the standard announced in *Humanitarian Law Project*, and supported in *Mehanna*, Professor Salaita's tweets could land him in a federal prison if the government found any additional link between him and Hamas.¹⁶¹

Professor Salaita is only one of many taking to Twitter. In his case, the government would be unlikely to find a connection with Hamas. There is no evidence that he had any direct contact with anyone in Hamas, nor is there any evidence to suggest that his tweets were not merely his opinion. However, more chilling cases are surfacing. Terrorist organizations are now using Twitter and other social media platforms to recruit new members.¹⁶² ISIS, in particular, is succeeding in recruiting Western women through online efforts.¹⁶³ A nineteen-year-old American nursing student, Shannon Conley, fell victim to these online efforts.¹⁶⁴ She met an ISIS terrorist online, and from there, she began the process of joining ISIS.¹⁶⁵ She was apprehended by police while trying to board a flight to Turkey.¹⁶⁶ Conley admitted that she "wanted to use her American military training to wage jihad on the U.S."¹⁶⁷ Although Conley pleaded guilty to conspiracy to provide material support to a foreign terrorist organization,¹⁶⁸ she is not the only one being lured into terrorist organizations through social media.¹⁶⁹ Using social media to recruit Americans has become a problem that the Material

¹⁵⁹ See *Humanitarian Law Project*, 561 U.S. at 8–9.

¹⁶⁰ See Mackey, *supra* note 14 (explaining Professor Salaita's tweets and describing them as anti-Semitic).

¹⁶¹ In *Mehanna*, the defendant's online speech was coupled with his attempts to train with a terrorist organization. *Mehanna*, 735 F.3d at 41. In this case, a potential connection between Professor Salaita and Hamas is more tenuous.

¹⁶² See Katie Zavadski, *Meet the Female Recruiters of ISIS*, N.Y. MAG. (Sept. 4, 2014, 10:10 AM), <http://nymag.com/daily/intelligencer/2014/09/meet-the-female-recruiters-of-isis.html> [<http://perma.cc/V5S7-X2PC>].

¹⁶³ *Id.*

¹⁶⁴ Snejana Farberov & Daniel Bates, *Denver Woman Charged Plotting to Join ISIS Militants*, DAILY MAIL (July 2, 2014, 6:18 PM), <http://www.dailymail.co.uk/news/article-2678662/Denver-woman-19-charged-plotting-join-ISIS-militants-wage-jihad-U-S.html> [<http://perma.cc/T936-VZ4A>].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Colorado Teen Shannon Conley's Support of ISIS Raises Alarm About American Jihadists*, CBS NEWS (Sept. 10, 2014, 10:02 AM), <http://www.cbsnews.com/news/colorado-teen-shannon-conleys-support-of-isis-raises-alarm-about-american-jihadists/> [<http://perma.cc/82KZ-7NG2>] [hereinafter *Colorado Teen Shannon Conley*].

¹⁶⁹ See Zavadski, *supra* note 164.

Support Statute may address. As young Americans are lured in through foreign terrorist organizations' online efforts, tweets and other social media activity indicate that these young Americans may trade in their lives of freedom to fight against the United States. In fact, Shannon Conley changed her Facebook to say that she worked as a "slave for Allah."¹⁷⁰ If she had not pleaded guilty, her activity on social media certainly would have been used against her in a trial. While Professor Salaita and Shannon Conley are two very different individuals with very different stories, both reveal how tweeting for terrorism has become a dangerous game to play.

B. Potential Ramifications in Situations like Professor Salaita's

While the Material Support Statute is designed to offer protection against terrorism, it also limits a piece of freedom. Professor Salaita will not likely be charged under the Material Support Statute because he has no clear connection to Hamas. If he did have a connection, though, his personal beliefs would be put on trial. Similarly, Shannon Conley's beliefs would have been put on trial if she had not pleaded guilty.¹⁷¹ Twelve Americans would be tasked with deciding the fate of Shannon Conley, an admitted traitor.¹⁷² If she had not pleaded guilty, a jury would have been left to decide whether she conspired to provide material support to a foreign terrorist organization. Shannon Conley's case is simple; her online activity only corroborates the other evidence against her. She admitted to both her desires to join ISIS and fight against the United States.¹⁷³ Shannon Conley admitted to betrayal, and a jury would almost certainly convict her.

Professor Salaita's situation is much more difficult. The Supreme Court has given little guidance on an issue like this.¹⁷⁴ Because the only evidence of Professor Salaita's allegiance with Hamas is his tweets, a jury would likely be torn between protecting what appears to be only speech and ensuring that a potential threat to the country is not let free.

If a jury ever convicted Professor Salaita of providing material support to Hamas, the First Amendment would be significantly compromised. Social media would provide a platform for a witch-hunt, and the freedom that the Founders fought for would be diminished.¹⁷⁵ On the other hand, if he were not convicted, it could solidify terrorist organizations' recruitment process through social media, but only if his tweets were actually in support of a terrorist organization. Communication across borders is increasingly common. In fact, "[t]he speech of U.S. citizens now routinely crosses borders, and the speech of foreigners easily reaches our shores."¹⁷⁶ Online speech is a

¹⁷⁰ Farberov & Bates, *supra* note 166.

¹⁷¹ See *Colorado Teen Shannon Conley*, *supra* note 170.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 7–8 (2010).

¹⁷⁵ This would be much like the speech condemned during earlier times of war, as seen in World War I, World War II, and the Cold War. See LEWIS, *supra* note 51, at 101, 104.

¹⁷⁶ Zick, *supra* note 86, at 946.

dangerous weapon, and foreign terrorist organizations are taking advantage and using online speech as a weapon against the United States by recruiting its own citizens.¹⁷⁷ Both outcomes in a case like Professor Salaita's pose significant risks and problems. It highlights, however, the need for guidance on the issue and the flaws inherent in the *Humanitarian Law Project* decision.

The Material Support Statute condemns Shannon Conley from leaving the United States to go fight on behalf of ISIS. It also condemns Professor Salaita from providing any type of support, including nonviolent, peaceful support, to Hamas.¹⁷⁸ Both situations are vastly different, but both are controlled by the coordination test in *Humanitarian Law Project*.¹⁷⁹ Despite their differences, Shannon Conley and Professor Salaita are both restricted from providing any type of support to any designated foreign terrorist organization. But is this right?

Scholars argue that the coordination test is fundamentally flawed and unnecessarily restricts freedom of speech. Among them, David Cole argues that the limitations taken by the Supreme Court are not enough.¹⁸⁰ In *Humanitarian Law Project*, the Supreme Court determined that the Material Support Statute would not prohibit support from domestic terrorist organizations; only those who provide support to *foreign* terrorist groups could be punished.¹⁸¹ Cole argues that “[i]f the government could not constitutionally prohibit training a disfavored domestic organization how to advocate for its rights, it should not be permitted to prohibit the same training simply because it is directed to a disfavored foreign organization.”¹⁸² If Professor Salaita and Shannon Conley provided material support to a domestic terrorist organization, their behavior would be considered protected speech, not criminal.¹⁸³

There are inherent dangers any time the Court limits speech. The consequences of *Humanitarian Law Project* are far reaching. Nonviolent, peaceful support is no longer tolerated among foreign terrorist organizations.¹⁸⁴ At first glance, this rule may appear necessary: cutting all ties with terrorist organizations makes it clear that the United States will not support *any* behavior from these groups. This means that the only way to gain support from Americans, and its organizations, is to stop fighting against the United States and its allies, therefore removing itself from the list of

¹⁷⁷ See, e.g., *Colorado Teen Shannon Conley*, *supra* note 170; see also Zavadski, *supra* note 164.

¹⁷⁸ *Humanitarian Law Project*, 561 U.S. at 36 (“[T]he political branches have adequately substantiated their determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups’ nonviolent ends.”).

¹⁷⁹ *Id.* at 35–36.

¹⁸⁰ Cole, *supra* note 100, at 169–70.

¹⁸¹ See generally 561 U.S. at 16–18.

¹⁸² Cole, *supra* note 100, 170–71.

¹⁸³ *Id.*

¹⁸⁴ *Humanitarian Law Project*, 561 U.S. at 33.

foreign terrorist organizations. Nonetheless, this “with us or against us” attitude may cause more harm than good. Many terrorist organizations do not have the same fundamental values as the United States. Some organizations turn to violence, but when an organization seeks assistance to help ensure that it is provided basic human rights protections in nonviolent, peaceful means, an uneasy message is sent—terrorist organizations are not worthy of basic human rights. They must back down from America and its allies in order to receive the most basic human rights. This troubling message only adds further animosity. It penalizes those who advocate nonviolent, peaceful means, leaving terrorist organizations with no resources to help them obtain the basic rights they deserve without violence. As social media platforms grow increasingly more popular, and as terrorist organizations grow stronger, there is a need for clarity and resolve. “Independent advocacy” is vague and difficult to define.¹⁸⁵ The *Humanitarian Law Project* decision changed the First Amendment, placing more restrictions on it for speech involving foreign terrorist organizations.¹⁸⁶ It ended the choice for Shannon Conley to move overseas and join ISIS, but it may have also ended Professor Salaita’s ability to tweet his support for Hamas.

C. Possible Solutions

There are serious consequences of *Humanitarian Law Project* and the reach of the Material Support Statute, and the few possible solutions prove unsettling. First, the United States could abandon the standard in *Humanitarian Law Project*. Instead, the Court or the legislature could enact a standard that requires a showing of coordination and support of *violent* behavior. *Humanitarian Law Project* punishes organizations that seek to help terrorist organizations solve their problems by going to the United Nations and seeking their aims in nonviolent means.¹⁸⁷ This sends a chilling message to foreign terrorist organizations, and only encourages violence. A different standard that allows for individuals and organizations to help terrorist organizations in a peaceful manner would solve that problem. It may nonetheless pose a greater threat. This type of standard would blur lines, making it easier for those who want to help terrorist organizations, even in violent ways, get away with furthering terrorist violence and hatred against the United States. Therefore, this solution would cause too much confusion and leave too many loopholes open for Americans to begin helping terrorists.

A second solution is to read *Humanitarian Law Project* narrowly and only apply it for purposes of national security. Cole suggests that the decision is “best harmonized with precedent if read narrowly to rest on all three features—regulation of speech *coordinated with foreign* groups for *national security* purposes.”¹⁸⁸ However,

¹⁸⁵ Cole, *supra* note 100, at 171.

¹⁸⁶ 561 U.S. at 8.

¹⁸⁷ *Id.* at 21–22.

¹⁸⁸ Cole, *supra* note 100, at 174.

applying the standard only for national security purposes hardly changes anything. The United States has entered a global war against terrorism that has only gotten worse throughout the years, and its national security is constantly threatened. With the rise of technology, terrorist organizations are now using social media to speak directly to both Americans who wish to join them and Americans who want to defy them. When a terrorist organization is involved, whether an individual wants to provide nonviolent support or not, America's national security is threatened. The government will easily satisfy the first element in material support cases. Therefore, this solution offers little help as well.

Finally, Cole suggests that the rule in *Humanitarian Law Project* only applies to foreign terrorist organizations.¹⁸⁹ This is another solution that has already been implemented. *Humanitarian Law Project* can, and has, been interpreted narrowly.¹⁹⁰ In fact, the Ninth Circuit held in *Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury (AHIF)*¹⁹¹ that the government cannot ban support of domestic terrorist organizations.¹⁹² In *AHIF*, the plaintiff was a non-profit organization incorporated in Oregon.¹⁹³ It described itself as a “charitable organization that seeks to promote greater understanding of the Islamic religion through operating prayer houses, distributing religious publications, and engaging in other charitable activities.”¹⁹⁴ The group, however, was suspected by the United States government of supporting terrorism. The Office of Foreign Assets Control froze AHIF–Oregon’s assets and designated it a “specially designated global terrorist.”¹⁹⁵ AHIF also had a Saudi Arabia branch, and the two shared some leaders.¹⁹⁶ The Ninth Circuit ruled in favor of the plaintiff, distinguishing this case from *Humanitarian Law Project* by stating that the entities were wholly foreign, whereas AHIF–Oregon was at least partly domestic.¹⁹⁷ This standard protects domestic organizations, and does little harm to the Material Support Statute. If terrorist organizations seek to take advantage of this, they will need to open a branch within the United States, incorporate, and follow the laws of the United States. It is difficult to see organizations like ISIS taking this path, especially when it is easy for terrorists to gain support through online activity.

However, while this standard helps lessen the fear that the First Amendment is slowly being shaved away, it does little to resolve the issue of online speech. This solution defines *who* can receive material support, but not *what* material support is or what it takes to constitute “in coordination with” a terrorist organization. Nonetheless,

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 660 F.3d 1019 (9th Cir. 2011).

¹⁹² *Id.* at 1023.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1024.

¹⁹⁵ *Id.* at 1023.

¹⁹⁶ *Id.* at 1024.

¹⁹⁷ *Id.* at 1051.

guidance on these two points will not come until a case is brought that involves mainly online activity. Only then will courts be forced to confront this issue.

D. Policy Considerations for Why Humanitarian Law Project Is the Best Compromise

America has struggled between freedom and security since its founding. With each war that has passed, a balance has been struck between the two. This balance is a give and take, where one is inevitably sacrificed more than the other. The government and the Supreme Court have taken great pains to equalize this balance. However, when a new threat arises the First Amendment often becomes compromised.¹⁹⁸ Because of this, it is not surprising that the government, and the Court, have leaned in favor of preserving antiterrorism efforts.¹⁹⁹ It is *even more* understandable when terrorism is compared with other threats the United States has faced. The United States has been attacked only a few times on its own soil. The first occurred on December 7, 1941, when the Japanese attacked a naval base at Pearl Harbor, Hawaii, forcing the United States to enter World War II.²⁰⁰ The most recent attack was much different. During a time of supposed peace, terrorists attacked civilians on September 11, 2001. As the United States faced a new threat, specifically in the middle of incredible technological advances, the Court was forced to deal with a novel obstacle to the First Amendment.

The standard set in *Humanitarian Law Project* offers the best safeguard to national security while still maintaining much of the protections afforded by the First Amendment. By implementing the coordination test,²⁰¹ the government is required

¹⁹⁸ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring) (“The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace.”); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (upholding a conviction under the Espionage Act in 1919 in which the Court stated 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.”). *But see* *Stromberg v. California*, 283 U.S. 359, 369 (1931) (holding, for the first time, a California law forbidding the display of a red flag unconstitutional because it violated the First Amendment).

¹⁹⁹ See President George W. Bush, President’s Address in Cincinnati, Ohio (Oct. 2, 2002), <http://www.edition.cnn.com/2002/ALLPOLITICS/10/07/bush.transcript/> [<http://perma.cc/2YDG-ZNBZ>] (“We also must never forget the most vivid events of recent history. On September 11, 2001, America felt its vulnerability—even to threats that gather on the other side of the earth. We resolved then, and we are resolved today, to confront every threat, from any source, that could bring sudden terror and suffering to America.”).

²⁰⁰ See *Pearl Harbor*, HISTORY.COM, <http://www.history.com/topics/world-war-ii/pearl-harbor> [<http://perma.cc/5GYN-4YL8>].

²⁰¹ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24–26 (2010).

to *prove* a link to a foreign terrorist organization.²⁰² This is not necessarily an easy task for prosecutors. Finding a link requires *more* than a tweet, likely more than a “retweet” or “favorite” by a foreign terrorist organization; it will require communication with terrorists.

Although it is unknown exactly what is enough to satisfy the coordination test, it is also unlikely that the government will prosecute everyone who vocalizes support for foreign terrorist organizations.²⁰³ Thus far, the government has only prosecuted cases involving individuals who actively attempted to join a foreign terrorist organization with the intent to fight against the United States.²⁰⁴ There is no indication that the government has attempted, or will attempt to, use the Material Support Statute to criminalize speech for the sake of limiting proterrorist speech. On the contrary, the government’s goal seems to be to stop new threats from arising,²⁰⁵ namely to stop terrorist efforts to recruit Americans through social media and to stop Americans from joining these organizations. The main goal in doing so is to eliminate threats against the United States rather than to limit speech in an attempt to merely stop others from voicing different ideals than that of the United States.²⁰⁶

Because of the importance of preventing another terrorist attack,²⁰⁷ the burden of proving an individual has acted “in coordination with” a foreign terrorist organization

²⁰² *Id.*

²⁰³ *But see* Nicolás Medina Mora, *How a Post-9/11 Law Can Get You Arrested for Your Emoji Choices*, BUZZFEED NEWS (Jan. 29, 2015, 7:52 AM), <http://www.buzzfeed.com/nicolasmedinamora/how-a-post-911-law-can-get-you-arrested-for-your-emoji-choic#.hpG9w0xj0n> [<http://perma.cc/T5ZC-35CW>] (explaining how a Brooklyn teen was arrested on terrorism charges after he tweeted “emojis,” which were cartoon illustrations of a police officer’s head and a gun pointed at it).

²⁰⁴ *See* *United States v. Mehanna*, 735 F.3d 32, 44 (1st Cir. 2013), *cert. denied*, 135 S. Ct. 49 (2014); *United States v. Bell*, No. 3:13-cr-141-J-32JRK, 2015 U.S. Dist. LEXIS 4447, at *1–2 (M.D. Fla. Jan. 14, 2015); Farberov & Bates, *supra* note 166.

²⁰⁵ Online speech often leads the government to find dangerous new threats. *See, e.g.*, Edmund DeMarche, *3 Arrested in New York City for Allegedly Conspiring to Support ISIS*, FOX NEWS (Feb. 25, 2015), <http://www.foxnews.com/us/2015/02/25/3-arrested-in-brooklyn-for-allegedly-conspiring-to-support-isis/> [<http://perma.cc/8PGC-9U7F>] (describing how two men who “came to the attention of law enforcement,” after law enforcement saw they had posted online support for Islamic militants, have been arrested for providing material support to ISIS, and have admitted that if ISIS directed them to, they would bomb Coney Island, shoot American soldiers, and harm President Obama).

²⁰⁶ For example, the Sedition Act of 1798 attempted to limit speech because it wanted to limit support for Jefferson during a presidential election. Pollock, *supra* note 55, at 153 (discussing Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired 1801)). The Sedition Act did not protect the United States from outside threats that have the potential to launch a widespread attack on Americans, but rather was only intended to limit speech for political reasons. *Id.*

²⁰⁷ *See* President’s Address in Cincinnati, Ohio, *supra* note 201 (“America must not ignore the threat gathering against us. Facing clear evidence of peril, we cannot wait for the final proof—the smoking gun—that could come in the form of a mushroom cloud.”).

to be convicted under the Material Support Statute,²⁰⁸ and the government's limited use of this statute in prosecuting those who truly threaten America's security,²⁰⁹ the *Humanitarian Law Project* decision does not jeopardize the First Amendment. Instead, it ensures that the government seeks convictions of individuals who are threats to the United States, while preserving freedom of speech by excluding independent advocacy from the Material Support Statute.²¹⁰

Instead of limiting the First Amendment, *Humanitarian Law Project* actually *strengthens* free speech by emphasizing that the government cannot go on a witch-hunt, using only tweets and other social media posts, to convict individuals under the Material Support Statute. By requiring that these posts be "in coordination with" a foreign terrorist organization, the Supreme Court has made the best compromise between protecting the First Amendment and preserving antiterrorism efforts.

CONCLUSION

On September 11, 2001, the entire country was shaken with fear, resentment, and hatred. Two of America's tallest buildings, symbolizing freedom above all else, fell to ashes because a radical Islamic terrorist group attacked the United States. During this attack, as the Twin Towers fell to ashes, so too did America's sense of security. On September 11, 2001, the United States was forever changed.

As the War on Terror began, technology continued to advance. Social media websites, like Facebook and Twitter, emerged as platforms for communication. People from around the world flocked to these websites to share their stories, thoughts, and beliefs, including terrorists. Terrorists began to take advantage of social media as a way to lure in new members, specifically targeting Americans. These recruiting tactics have been successful, with some Americans turning their backs on the United States in an attempt to fight against it.

These recruiting tactics cause First Amendment concerns. In an age of technology, is a tweet that reaches millions who are ready to act in just seconds, advocating for ISIS or al-Qa'ida, for example, inciting imminent violence, and therefore not protected by the First Amendment? More to the point, is a tweet, used as a recruiting technique, providing material support to a foreign terrorist organization? The Supreme Court has not answered either question, but both leave the government in a difficult position: protect the First Amendment or protect the public from threats of terrorism?

Professor Salaita was placed in a difficult position when he was fired for his anti-Israel tweets.²¹¹ However, his tweets could have a much more devastating impact if

²⁰⁸ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24–26.

²⁰⁹ *See, e.g., Mehanna*, 735 F.3d at 44; *Bell*, 2015 U.S. Dist. LEXIS 4447, at *1–2; *Farberov & Bates*, *supra* note 166.

²¹⁰ *See Humanitarian Law Project*, 561 U.S. at 24 (“[A]ny independent advocacy in which plaintiffs wish to engage is not prohibited by [the Material Support Statute].”).

²¹¹ Mackey, *supra* note 14.

the government were to ever prove that he acted in coordination with Hamas.²¹² Not only could the government then use these tweets to criminally prosecute Professor Salaita under the Material Support Statute, but terrorist organizations might use Professor Salaita's tweets, like ISIS did with Jennifer Williams's tweets, to recruit future terrorists.²¹³ It is people like Shelton Bell and Shannon Conley that highlight the importance of this issue. Both fell victim to terrorist organizations, Conley to ISIS and Bell to al-Qa'ida. Both attempted to leave the United States to wage war against their own country. Both remind us that terrorism is still very much alive, and that these organizations are not going anywhere any time soon.²¹⁴

To protect the First Amendment in an era of constant, instant communication, *Humanitarian Law Project's* coordination test provides the best compromise to allow the government to prosecute individuals who are truly working on behalf of a foreign terrorist organization. This test protects tweets so long as those tweets are merely words, not intended to provide aid to a foreign terrorist organization. This test allows individuals to voice their concerns and beliefs, yet punishes them for recruiting or for joining terrorist organizations. The coordination test does not take away freedom afforded by the First Amendment. Rather, it strengthens the First Amendment by maintaining that independent speech alone is not enough to convict under the Material Support Statute.

Nonetheless, the War on Terror has created new challenges to the First Amendment. The fear from September 11, 2001, is still very much alive. With this seemingly never-ending battle against terrorists, new fears and challenges arise almost daily. In an era of constant war, terrorism has indeed shaken our foundation.

²¹² See *Humanitarian Law Project*, 561 U.S. at 24–26.

²¹³ See Williams, *supra* note 31.

²¹⁴ See Ben Brumfield, Pamela Brown & Dana Ford, *FBI Says Plot to Attack U.S. Capitol Was Ready to Go*, CNN (last updated Jan. 15, 2015, 5:34 PM), <http://www.cnn.com/2015/01/15/us/capitol-attack-plot/> [<http://perma.cc/V2HQ-TXC9>] (explaining that another twenty-year-old man was arrested after meeting an ISIS member online, tweeting about his support for ISIS, and planning to bomb the U.S. Capitol in the name of ISIS).