

**APPLYING THE *HOLDER* STANDARD TO
SPEECH THAT PROVIDES MATERIAL SUPPORT TO
TERRORISM IN *UNITED STATES V. MEHANNA*, NO.
09-10017-GAO (D. MASS. 2012)**

In April 2012, Tarek Mehanna was convicted and sentenced to seventeen and a half years in federal prison for providing “material support” to al-Qaeda.¹ During his trial, the prosecution alleged that Mehanna traveled to Yemen in an unsuccessful attempt to receive terrorist training,² and that he translated al-Qaeda propaganda materials into English for a jihadist website.³ In the national media storm following the trial, Mehanna’s supporters argued that he was persecuted for exercising his First Amendment rights.⁴ The American Civil Liberties Union (ACLU) warned that if the verdict is not overturned, “ordinary people—including writers and journalists, academic researchers, translators, and even ordinary web surfers—could be prosecuted for researching or translating controversial and unpopular ideas.”⁵ Yet Mehanna’s conviction does not present the grave danger to First Amendment rights that his supporters claim. This issue had already been settled by a previous Supreme Court case. In *Holder v. Humanitarian Law Project*,⁶ the Supreme Court drew a hard line between independent advo-

1. Judgment in a Criminal Case at 1, 3, *United States v. Mehanna*, No. 09-CR-10017-001-GAO (D. Mass. Apr. 13, 2012).

2. Trial Transcript at 40–43, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. Dec. 16, 2001) [hereinafter *Mehanna Trial Tr.*].

3. *Mehanna Trial Tr.* (Dec. 16), *supra* note 2, at 74–75.

4. See David Cole, *39 Ways to Limit Free Speech*, NYRBLOG (Apr. 19, 2012, 3:15 PM), <http://www.nybooks.com/blogs/nyrblog/2012/apr/19/39-ways-limit-free-speech/> (asking, rhetorically, “surely we have not come to the point where we lock people up for nearly two decades for translating a widely available document?”); Glenn Greenwald, *The real criminals in the Tarek Mehanna case*, SALON.COM, Apr. 13, 2012, http://www.salon.com/2012/04/13/the_real_criminals_in_the_tarek_mehanna_case/ (describing Mehanna’s conviction as “one of the most egregious violations of the First Amendment’s guarantee of free speech seen in quite some time”).

5. Press Release, Carol Rose, Exec. Dir., ACLU of Mass., *Mehanna Verdict Compromises First Amendment, Undermines National Security* (Dec. 20, 2011), available at <http://www.aclu.org/free-speech/mehanna-verdict-compromises-first-amendment-undermines-national-security>.

6. 130 S. Ct. 2705 (2010).

cacy, which is protected under the First Amendment, and speech that provides material support “in coordination with” a terrorist organization, which is not protected.⁷ As the evidence at trial made clear, Mehanna’s behavior fell into the latter category. The First Amendment protects those who express unpopular views, but it does not grant Mehanna the right to serve as an agent in al-Qaeda’s criminal enterprise.

Tarek Mehanna, an American-born Muslim, grew up in Sudbury, Massachusetts.⁸ Following the U.S.-led invasion of Iraq in 2003, Mehanna became increasingly opposed to the American presence in the Middle East and began to advocate for the violent expulsion of American forces from Iraq.⁹ At first, Mehanna limited his activities to posting on jihadist websites.¹⁰ In early 2004, however, Mehanna traveled to Yemen with Ahmad Abousamra and another American Muslim whom he had met online.¹¹ They spent two weeks together in Yemen, crossing the desert in an effort to find *mujahideen* fighters that had settled there after leaving Afghanistan.¹² The government alleged that they were searching for terrorist training camps that would provide them with the training they needed to fight against the American forces in Iraq.¹³ Ultimately, however, their trip ended in disappointment. They found no terrorist training camps.¹⁴ When they finally did manage to meet one of the *mujahideen* fighters from Afghanistan, he told them all of the camps had been closed down after the September 11th attacks.¹⁵

After their trip to Yemen, Abousamra continued on to Iraq to join the fight against American forces there.¹⁶ Mehanna returned home to Massachusetts, but he was detained upon arrival for questioning by Border Patrol and Immigration and Cus-

7. See *id.* at 2722.

8. Daniel Lovering, *Massachusetts man convicted of aiding al Qaeda to be sentenced*, REUTERS, Apr. 12, 2012, <http://www.reuters.com/article/2012/04/12/us-usa-security-mehanna-idUSBRE83B0RE20120412>.

9. See Mehanna Trial Tr. (Oct. 27), *supra* note 2, at 56; Mehanna Trial Tr. (Nov. 1), *supra* note 2, at 117–18.

10. See Mehanna Trial Tr. (Oct. 27), *supra* note 2, at 73.

11. See Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 42–43.

12. See *id.* at 47–48.

13. See Mehanna Trial Tr. (Oct. 27), *supra* note 2, at 29.

14. See Mehanna Trial Tr. (Nov. 17), *supra* note 2, at 134.

15. Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 49–50.

16. See Mehanna Trial Tr. (Nov. 3), *supra* note 2, at 95–96.

toms Enforcement (ICE) agents.¹⁷ Mehanna told them that he and Abousamra had gone to Yemen to visit Islamic schools, and that Abousamra had decided to stay behind in Yemen.¹⁸ The government alleged at trial that Mehanna knew Abousamra had gone to Iraq to fight against American forces.¹⁹

Following his trip to Yemen, Mehanna continued to post on jihadist websites.²⁰ He also began translating videos and written materials from Arabic into English for a website called “Tibyan Publications.”²¹ At trial, two expert witnesses disagreed about the relationship between al-Qaeda and Tibyan Publications. One of the experts, Evan Kohlmann, testified that al-Qaeda’s media wing directly coordinated with Tibyan.²² Kohlmann testified that al-Qaeda would provide propaganda materials to Tibyan before al-Qaeda released the materials on other sites, so that Tibyan would be able to translate the materials into different languages before they were released to the public.²³ Dr. Marc Sageman, the other expert, testified that al-Qaeda “piggybacked” on sites like Tibyan by posting propaganda materials in Arabic on multiple jihadist websites, but he disagreed that al-Qaeda used Tibyan as a recruiting tool.²⁴ Although he acknowledged that al-Qaeda uses the internet to distribute its message,²⁵ Dr. Sageman denied that jihadist websites are necessary to help al-Qaeda find recruits or receive financial support.²⁶

One of the materials that Mehanna translated for Tibyan was “Expedition of Umar Hadeed,” a film created by al-Qaeda in Iraq to glorify their mission there.²⁷ The government alleged that Mehanna and Muraabit Mu’ndhir, one of the website administrators at Tibyan, edited the original Arabic version of the film and added English subtitles, before releasing it as a pro-

17. Mehanna Trial Tr. (Nov. 8), *supra* note 2, at 80–81.

18. *Id.* at 81–82.

19. *See* Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 55–56.

20. *See* Mehanna Trial Tr. (Oct. 27), *supra* note 2, at 72–73.

21. *See* Mehanna Trial Tr. (Nov. 1), *supra* note 2, at 91–93.

22. *See* Mehanna Trial Tr. (Dec. 5), *supra* note 2, at 4, 31.

23. *See id.* at 31–33, 37–38.

24. *See* Mehanna Trial Tr. (Dec. 14), *supra* note 2, at 82–83.

25. *Id.* at 90.

26. *Id.* at 89.

27. *See* Mehanna Trial Tr. (Nov. 3), *supra* note 2, at 75; Mehanna Trial Tr. (Oct. 27), *supra* note 2, at 47–48.

duction of the media department of al-Qaeda in Iraq.²⁸ The government also alleged that al-Qaeda did not release the film to the general public until after Mehanna and Mu'ndhir edited it.²⁹ One week later, Mu'ndhir wrote a private message to Mehanna with another translation request, telling him, "The *ikhwaan* ['brotherhood'] from the cloud people are asking us if we can translate this msg from the al doctoor regarding curryland."³⁰ An expert witness for the government testified that "cloud people" referred to al-Qaeda's propaganda arm, Al Sahab, and that "al doctoor" referred to the prominent al-Qaeda leader Dr. Ayman al-Zawahiri.³¹ The government also alleged that "curryland" was a code word for Pakistan.³² Though Mehanna received the request, the evidence presented at trial did not show that Mehanna actually translated any message from al-Zawahiri concerning Pakistan.³³

Mehanna did, however, translate *39 Ways to Serve and Participate in Jihad*,³⁴ a book by the al-Qaeda leader Mohammad Bin Ahmad Al-Salem. The book is widely available in Arabic, and there are also full-text English translations of the book available on several websites.³⁵ Mehanna released his own translation on the website as a production of Tibyan Publications.³⁶ Some of the ways one can participate in jihad, according to the book, are to "Truthfully Ask Allah for Martyrdom" and "Go For Jihad Yourself"; other ways to participate, however, include "Learn[ing] to Swim and Ride Horses" and "Get[ting] Physically Fit."³⁷ At trial, the government described the book as a terrorist "training manual."³⁸

28. See Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 74–75.

29. See *id.*

30. See Mehanna Trial Tr. (Nov. 1), *supra* note 2, at 80 (emphasis and translation added).

31. See Mehanna Trial Tr. (Nov. 10), *supra* note 2, at 23.

32. See Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 75.

33. See Mehanna Trial Tr. (Nov. 1), *supra* note 2, at 76.

34. See *id.* at 73 (referring to the book as "39 Ways to Serve and Participate").

35. See Cole, *supra* note 4.

36. See Mehanna Trial Tr. (Nov. 1), *supra* note 2, at 14–15 (establishing that user "Abu Saabayaa" was Mehanna); *id.* at 61–62 (establishing that Abu Saabayaa posted the "39 Ways" for Tibyan).

37. See Cole, *supra* note 4.

38. See Mehanna Trial Tr. (Oct. 27), *supra* note 2, at 32 ("This is essentially a training manual on how somebody can get ready to personally get into the fight.").

Mehanna was arrested in 2009.³⁹ He was charged before Judge George O’Toole in the Federal District Court for the District of Massachusetts with the crimes of providing and attempting to provide material support to a foreign terrorist organization,⁴⁰ conspiracy to provide material support to terrorists,⁴¹ conspiracy to kill, kidnap, maim or injure persons in a foreign country,⁴² and making false or fraudulent statements to the United States in the course of the business of the executive branch.⁴³ After a thirty-five day trial, the jury convicted Mehanna on all seven counts.⁴⁴

At trial, Judge O’Toole instructed the jury on the *Holder* standard⁴⁵ over defense counsel’s objections.⁴⁶ Under the *Holder* standard, providing material support to foreign terrorist organizations is not protected by the First Amendment.⁴⁷ *Holder*, decided by the Supreme Court a year before Mehanna’s trial, involved a group called the Humanitarian Law Project that wanted to provide support for the humanitarian and political activities of the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).⁴⁸ Both the PKK and the LTTE were designated by the State Department as foreign terrorist organizations.⁴⁹ Under Section 2339B of Title 18 of the U.S. Code, *Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, providing material support to any group designated by the State Department as a foreign terrorist organization is a felony. The Humanitarian Law Project (the Project) did not, apparently, intend to support the terrorist activity of either the PKK or the LTTE. Instead, it planned to train members of the PKK on how to “use humanitarian and international law to peacefully resolve disputes,” teach PKK

39. Abby Goodnough & Liz Robbins, *Massachusetts Man Is Held on Charges of Plotting Attacks, Including One at a Mall*, N.Y. TIMES, Oct. 22, 2009, at A21.

40. 18 U.S.C. § 2339B.

41. 18 U.S.C. § 2339A.

42. 18 U.S.C. § 956.

43. 18 U.S.C. § 1001.

44. Mehanna Trial Tr. (Dec. 20), *supra* note 2, at 4–6.

45. Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 24–25.

46. Transcript of Charging Conference at 26, United States v. Mehanna, No. 09-10017-GAO (D. Mass. Dec. 15, 2011).

47. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010).

48. *Id.* at 2713–14.

49. *Id.* at 2713.

members how to “petition various representative bodies such as the United Nations for relief,” train members of the LTTE to “present claims for tsunami-related aid to mediators and international bodies,” and help negotiate “peace agreements between the LTTE and the Sri Lankan government.”⁵⁰ The Project sued the federal government on the basis that the material support statute violated the freedom of speech and freedom of association guarantees in the First Amendment because the statute “criminalized [the Project’s] provision of material support to the PKK and the LTTE, without requiring the Government to prove that [the Project] had a specific intent to further the unlawful ends of those organizations.”⁵¹

Rejecting the Project’s arguments that the material support statute would ban purely political speech, the Court noted that “the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”⁵² Furthermore, the Court noted, even “[m]aterial support meant to ‘promot[e] peaceable, lawful conduct’” may further terrorism by “free[ing] up other resources within the organization that may be put to violent ends”⁵³ or “lend[ing] legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.”⁵⁴ Addressing the Project’s plan to train members of the PKK on how to use humanitarian and international law to peacefully resolve disputes, the Court noted that it is “foreseeable that the PKK could use the ‘specific skill[s]’ that plaintiffs propose to impart, § 2339A(b)(2), as part of a broader strategy to promote terrorism.”⁵⁵

The Court made an exception for “independent advocacy” on behalf of a foreign terrorist organization, which the Court held does not constitute providing material support under the statute.⁵⁶ As the Court clarified, “we in no way suggest that a regulation of independent speech would pass constitutional muster,

50. *Id.* at 2716.

51. *Id.* at 2714.

52. *Id.* at 2723.

53. *Id.* at 2725 (second alteration in original).

54. *Id.*

55. *Id.* at 2729 (alteration in original).

56. *Id.* at 2721–22.

even if the Government were to show that such speech benefits foreign terrorist organizations.”⁵⁷ Individuals are free to advocate for the political or military goals of a terrorist organization, so long as their advocacy is not “performed in coordination with, or at the direction of, a foreign terrorist organization.”⁵⁸

Moreover, the Court held that the statute does not violate the freedom of association guaranteed by the First Amendment. The Court noted that “[t]he statute does not prohibit being a member of one of the designated [foreign terrorist] groups or vigorously promoting and supporting the political goals of the group.”⁵⁹ What the statute prohibits, the Court held, is providing material support “to,” meaning “in coordination with,” a foreign terrorist organization.⁶⁰

Judge O’Toole summarized the *Holder* decision as the basis for his instructions to the jury. On the charge that Mehanna had provided material support to al-Qaeda, Judge O’Toole told the jury:

Persons who act independently of a foreign terrorist organization to advance its goals or objectives are not considered to be working under the organization’s direction or control. A person cannot be convicted under this statute when he’s acting entirely independently of a foreign terrorist organization. That is true even if the person is advancing the organization’s goals or objectives. Rather, for a person to be guilty under this count, a person must be acting in coordination with or at the direction of a designated foreign terrorist organization, here, as alleged in Count 1, al Qa’ida.⁶¹

The Judge also instructed the jury that the First Amendment does not protect speech that provides material support to foreign terrorist organizations. He told the jurors:

You need not worry about the scope or effect of the guarantee of free speech contained in the First Amendment to our Constitution. According to the Supreme Court, this statute already accommodates that guarantee by punishing only

57. *Id.* at 2730.

58. *Id.* at 2722.

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

60. *Id.* at 2722.

61. *Mehanna Trial Tr.* (Dec. 16), *supra* note 2, at 24.

conduct that is done in coordination with or at the direction of a foreign terrorist organization.⁶²

Mehanna's defense counsel objected to the jury instructions. He proposed his own set of instructions, based on the Supreme Court's holding in *Brandenburg v. Ohio*,⁶³ that the First Amendment protects speech unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁶⁴ Judge O'Toole correctly rejected the proposed instructions from Mehanna's counsel, noting that the *Holder* decision limits the scope of *Brandenburg* with respect to speech that provides material support to terrorism. As Judge O'Toole pointed out, "[T]he [material support] statute itself, by not punishing independent advocacy, accommodates the First Amendment already. . . . So I don't think there's any need to involve the jury in the consideration of the First Amendment."⁶⁵

At trial, the prosecution effectively demonstrated that Mehanna violated the "material support" statute as interpreted by *Holder*. The prosecution's case proved all three elements required for a conclusion that the defendant knowingly gave material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B. First, they showed that Mehanna knew either that the organization was "designated as a [foreign] terrorist organization," or that it "engages in terrorist activity."⁶⁶ The State Department has designated al-Qaeda as a foreign terrorist organization since 1999.⁶⁷ Even if Mehanna did not know that it was designated as such by the State Department, he almost certainly knew that al-Qaeda engaged in terrorist acts. Even before he went to Yemen in 2004, Mehanna was active on jihadist websites and online message boards.⁶⁸ Prosecutors also showed that he posed for pictures in front of the World Trade Center

62. *Id.*

63. 395 U.S. 444 (1969).

64. *Id.* at 447; Defendant's Motion for Preliminary Instruction to the Jury at 3, *United States v. Mehanna*, No. 09-CR-10017-GAO (D. Mass. Oct. 26, 2011).

65. Transcript of Charging Conference, *supra* note 46, at 26.

66. See 18 U.S.C. § 2339B(a)(1).

67. See Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112, 55,112 (Oct. 8, 1999).

68. See Mehanna Trial Tr. (Nov. 3), *supra* note 2, at 55-57.

site several times,⁶⁹ and sent his friends links to a video tribute to the September 11th hijackers.⁷⁰

Second, the prosecution proved that Mehanna provided “material support or resources”⁷¹ to al-Qaeda. The statute defines “material support or resources” to mean a “service,” which may include, *inter alia*, “expert advice or assistance” and “personnel.”⁷² “Expert advice or assistance” means “advice or assistance derived from scientific, technical or other specialized knowledge.”⁷³ Providing “personnel” means the defendant provided “[one] or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.”⁷⁴ An individual need not be an employee or even a member of the terrorist organization to qualify as “personnel”;⁷⁵ rather, it is sufficient that the person has engaged in some form of “coordination, joint action, or understanding” with the terrorist organization.⁷⁶

At trial, the prosecution advanced two theories explaining how Mehanna provided material support to al-Qaeda. Prosecutors first alleged that Mehanna attempted to provide himself as “personnel” when he went to Yemen in 2004 to seek terrorist training.⁷⁷ They alleged that Mehanna planned to use the terrorist training he received there to fight American forces in Iraq.⁷⁸ Multiple witnesses testified that Mehanna and Ahmad Abousamra, his co-traveler, had stated that their goal in going to Yemen was to seek terrorist training.⁷⁹ Although neither man directly mentioned that he was seeking to join al-Qaeda, Abousamra stated that his goal was to seek out *mujahideen* fighters from Afghanistan who resettled in Yemen.⁸⁰ Mehanna also described Yemen as a “wild land” full of *mujahideen* and

69. Mehanna Trial Tr. (Oct. 27), *supra* note 2, at 39.

70. Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 67.

71. 18 U.S.C. § 2339B.

72. 18 U.S.C. § 2339A(b)(1).

73. 18 U.S.C. § 2339A(b)(3).

74. 18 U.S.C. § 2339B(h).

75. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722 (2010).

76. *United States v. Hassan Abu-Jihaad*, 600 F. Supp. 2d 362, 400 (D. Conn. 2009).

77. Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 40–41.

78. *See id.* at 42–43.

79. *Id.* at 43, 46, 48, 53–55.

80. *Id.* at 43–44.

“al-Qaida.”⁸¹ Given both men’s statements, and the fact that Abousamra did continue to Iraq to fight American forces there,⁸² a rational trier of fact could have concluded that Mehanna and Abousamra attempted and conspired to provide themselves as personnel for al-Qaeda.

Under the second theory, Mehanna provided “material support” when he provided expert advice or assistance by translating propaganda material into English on the Tibyan Publications website.⁸³ Mehanna acknowledged that he translated “Expedition of Umar Hadeed,”⁸⁴ a film created by al-Qaeda in Iraq to glorify their mission there. Mehanna also worked on translating *39 Ways to Serve and Participate in Jihad*,⁸⁵ a book by the al-Qaeda leader Mohammad Bin Ahmad Al-Salem. Parts of *39 Ways* specifically instruct readers to ask Allah for martyrdom, and to “[g]o for [j]ihad [y]ourself.”⁸⁶ On the Tibyan website, Mehanna used his video editing skills, as well as his knowledge of Arabic and English, to enhance the al-Qaeda propaganda and translate it into English.⁸⁷ The prosecution alleged that Mehanna’s translations helped to spread al-Qaeda’s message and aid recruitment.⁸⁸ A rational trier of fact could easily conclude that Mehanna’s translation work constituted material support for al-Qaeda.

Finally, the prosecution proved the third element by showing that Mehanna knowingly coordinated or attempted to coordinate with al-Qaeda.⁸⁹ The government produced no evidence that Mehanna contacted or attempted to contact al-Qaeda prior to traveling to Yemen in 2004; however, a jury might rationally infer from Mehanna and Abousamra’s stated intention to seek terrorism training, as well as Mehanna’s de-

81. *Id.* at 47.

82. See Mehanna Trial Tr. (Nov. 3), *supra* note 2, at 95–96.

83. Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 68.

84. Mehanna Trial Tr. (Nov. 3), *supra* note 2, at 74–75.

85. Mehanna Trial Tr. (Nov. 1), *supra* note 2, at 73.

86. Cole, *supra* note 4.

87. See Mehanna Trial Tr. (Nov. 1), *supra* note 2, at 91–92.

88. See Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 65–66.

89. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722 (2010) (explaining that “material support” for terrorist organizations covers “advocacy performed in coordination with, or at the direction of, a foreign terrorist organization”); Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 24 (explaining the elements necessary to commit the crime).

scription of the land as “full of . . . al Qa’ida,”⁹⁰ that Mehanna attempted to coordinate with al-Qaeda during his trip. The prosecution also produced compelling evidence that Mehanna coordinated his translation work at Tibyan Publications with al-Qaeda. Evan Kohlmann, an expert witness for the government, testified that al-Qaeda’s media wing, known as Al Sahab, would work directly with Tibyan to release al-Qaeda’s propaganda materials.⁹¹ Kohlmann testified that Al Sahab would provide al-Qaeda propaganda materials to Tibyan to translate before the materials were released to the general public.⁹² Although Dr. Marc Sageman, an expert witness for the defense, disputed Kohlmann’s claim that al-Qaeda directly coordinated with Tibyan,⁹³ the government provided evidence that al-Qaeda did not release one of its propaganda films, “Expedition of Umar Hadeed,” until after Mehanna had helped to add English subtitles to it.⁹⁴ The film was released as a production of the media department of al-Qaeda in Iraq.⁹⁵

The best evidence that Mehanna directly coordinated with al-Qaeda is the e-mail message he received from Muraabit Mu’ndhir, another member of Tibyan Publications. As previously described, Mu’ndhir wrote that “[t]he *ikhwaan* [‘brotherhood’] from the cloud people are asking us if we can translate this msg from the al doctoor regarding curryland.”⁹⁶ An expert witness for the government testified that “cloud people” referred to al-Qaeda’s media department, Al Sahab, and that “al doctoor” referred to the prominent al-Qaeda leader Dr. Ayman al-Zawahiri.⁹⁷ The e-mail from Mu’ndhir indicates that Mehanna knew Tibyan Publications was directly coordinating with al-Qaeda. It also indicates that Mehanna was knowingly translating propaganda materials at the request of al-Qaeda’s media department. After he received the e-mail from Mu’ndhir, Mehanna continued to translate al-Qaeda propaganda materials, including chapters from al-Qaeda leader

90. *Id.* at 47.

91. See Mehanna Trial Tr. (Dec. 5), *supra* note 2, at 31.

92. *Id.* at 31–32, 37–38.

93. Mehanna Trial Tr. (Dec. 14), *supra* note 2, at 82–83.

94. See Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 74–75.

95. *Id.*

96. Mehanna Trial Tr. (Nov. 1), *supra* note 2, at 80 (emphasis and translation added).

97. Mehanna Trial Tr. (Nov. 10), *supra* note 2, at 23.

Mohammad Bin Ahmad Al-Salem's book, *39 Ways to Serve and Participate in Jihad*.⁹⁸ Given the testimony by Kohlmann, the evidence that al-Qaeda did not release a video until Mehanna had helped add subtitles to it, and the e-mail from Mu'ndhir to Mehanna, a rational trier of fact could easily conclude Mehanna acted in coordination with al-Qaeda.

Critics of the *Mehanna* verdict point to the "chilling" effect that the decision could have on political discourse and academic study. The ACLU, in its December 20, 2011, press release, warned that "ordinary people" like journalists, academic researchers, and translators could be prosecuted for "researching or translating controversial and unpopular ideas."⁹⁹ David Cole, a contributor to the *New York Review of Books* blog, warned readers that they should not "try to make [their] own translation" of *39 Ways to Serve and Participate in Jihad* lest they be "sentenced to seventeen and a half years in prison."¹⁰⁰ Yet, such hysterical warnings about a supposed threat to free speech miss the central element of the Mehanna case. Mehanna was not a mere "ordinary person" translating al-Qaeda materials for academic or political discourse. The government presented significant, credible evidence that he coordinated his translations with al-Qaeda. If Mehanna had advocated independently on behalf of al-Qaeda, his actions would have been protected under the First Amendment unless his actions met the *Brandenburg* standard of being "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action."¹⁰¹ By knowingly coordinating with al-Qaeda, however, Mehanna enlisted himself as one of al-Qaeda's "personnel" in the service of al-Qaeda's criminal enterprise.¹⁰²

The Supreme Court carefully considered the material support statute's First Amendment implications in its *Holder* decision. Noting that the statute was directed at conduct but, as applied, constituted a "content-based regulation of speech,"¹⁰³ the Court applied a "more demanding" standard than intermediate scrutiny¹⁰⁴ consistent with the Court's past holdings

98. See Mehanna Trial Tr. (Nov. 1), *supra* note 2, at 73.

99. ACLU, *supra* note 5.

100. Cole, *supra* note 4.

101. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

102. See 18 U.S.C. § 2339A(b)(1).

103. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2710 (2010).

104. *Id.* at 2724 (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)).

that “[w]hen content-based speech regulation is in question . . . exacting scrutiny is required.”¹⁰⁵ Under exacting scrutiny, restrictions on the content of speech are unconstitutional unless they are narrowly tailored to serve a compelling state interest.¹⁰⁶ In *Holder*, the Court held that the material support statute met the “more demanding”¹⁰⁷ standard required by the First Amendment.¹⁰⁸ As the Court noted, “the Government’s interest in combating terrorism is an urgent objective of the highest order.”¹⁰⁹ The material support statute is necessary to further the government’s interest because “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization facilitates that conduct.*”¹¹⁰ Moreover, the statute is narrowly tailored to serve the government’s interest because it “reaches only material support coordinated with or under the direction of a designated foreign terrorist organization.”¹¹¹

It is reasonable to conclude that Mehanna’s translation of propaganda materials helped al-Qaeda commit terrorism. al-Qaeda uses propaganda to raise money, gain legitimacy in the eyes of the public, and find new recruits. As the prosecution pointed out in closing arguments:

In every organization or corporation—take, for example, a car manufacturer—there’s [sic] those who work on the assembly line making the product: there are those who work in the front office or human resources doing the hiring, or in advertising seeking new employees and advertising their product. Al Qaeda is no different. They have those who fight on the front lines, those who run the organization, those who work in the media department, and those who make the media available to a wider audience.¹¹²

Mehanna essentially served as a publicist for al-Qaeda. Although he was not on the front lines with a gun, his actions helped advance terrorism in other ways. Translating al-Qaeda’s

105. *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012); *see also* *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 642 (1994).

106. *See, e.g., Boos v. Barry*, 485 U.S. 312, 321 (1988).

107. 130 S. Ct. at 2724 (quoting *Johnson*, 491 U.S. at 403).

108. *See id.* at 2728.

109. *Id.* at 2724.

110. *Id.* (citation omitted).

111. *Id.* at 2726.

112. Mehanna Trial Tr. (Dec. 16), *supra* note 2, at 65.

materials into English allowed its message to reach a larger audience, helping it to establish terrorist cells in new locations. Al-Qaeda understands the importance of translating its propaganda in order to reach a non-Arabic speaking audience. In fact, the prosecution even showed that al-Qaeda in Iraq reached out to Tibyan Publications to translate its official online e-book.¹¹³ By knowingly coordinating with al-Qaeda to translate propaganda materials, Mehanna was helping al-Qaeda spread its message worldwide and find new recruits for terrorism.

Mehanna's supporters allege that his case is a symbol of the government's failure to respect the First Amendment while prosecuting the war on terror.¹¹⁴ Yet, the First Amendment does not provide a cover for individuals who are working in coordination with and under the direction of terrorist organizations. As national security expert and law professor Peter Margulies points out on the *Lawfare* blog,

Mehanna's case is analogous to a simple hypo based on everyone's favorite TV show, "The Sopranos." Suppose Tony told an associate, "I think it's a good idea if 'Johnny Boots' gets whacked." The associate then acted on Tony [sic] instructions. At a subsequent trial, Tony might claim that he was merely "expressing his opinion." Tony's First Amendment argument wouldn't get far, and neither should Mehanna's.¹¹⁵

Tarek Mehanna was not convicted for "expressing his opinion." He was convicted for coordinating the provision of material support to al-Qaeda. As Margulies suggests, Mehanna's actions are more analogous to speech that effects a crime or constitutes a conspiracy. The Supreme Court noted in *Giboney v. Empire Storage & Ice Co.* that "[i]t rarely has been suggested that

113. Mehanna Trial Tr. (Nov. 10), *supra* note 2, at 21–22.

114. See, e.g., Cole, *supra* note 4 ("History shows that free speech is fundamental to a robust democracy, and that if the government can punish expression because of its political content, it will use that power to go after its enemies. Today's enemy may be anyone who shows sympathy with jihadism, but who knows who tomorrow's enemy will be."); Adam Serwer, *Does Posting Jihadist Material Make Tarek Mehanna a Terrorist?*, MOTHER JONES, Dec. 16, 2011, available at <http://www.motherjones.com/politics/2011/12/tarek-mehanna-terrorist> ("[I]n the view of some civil libertarians, the case could narrow the right to free speech by allowing the government to successfully prosecute the expression of radical or unpopular views as a crime.").

115. Benjamin Wittes, *David Cole and Peter Margulies: An Exchange on Tarek Mehanna*, LAWFARE (Apr. 22, 2012, 3:45 PM), available at <http://www.lawfareblog.com/2012/04/david-cole-and-peter-margulies-an-exchange-on-tarek-mehanna/>.

the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”¹¹⁶ Mehanna’s translations were an integral part of conduct intended to provide material support to a terrorist group. He knew that al-Qaeda was a terrorist organization, and he agreed to work under the direction of al-Qaeda affiliates to spread the group’s message. The First Amendment rightly offers no protection for his translations.

Christopher Pochon

116. 336 U.S. 490, 498 (1949).