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McGraw, David, SA, United States Department of State

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14. ABSTRACT

In the early twentieth century, the United States Supreme Court made its first modern-era rulings determining what speech was protected by constitutional gaurantee under the first amendment. The decisions in Schenck vs. United States, Minersville School District v. Gobitis, West Virginia State Board of Education v. Barnette, Chaplinsky vs. New Hampshire, The United States Supreme Court dictated a narrow set of terms defining proscribed or restricted speech and expression. Toward the mid twentieth century in Brandenburg vs. Ohio, a further narrowing of proscribed speech occurred although no consensus or clear decision was reached on religious speech protections. The result of no clear rulings on religious speech became apparent in the outcomes of two early twenty-first century cases: Holder vs. Humanitarian Law Project and United States vs. Mehanna. The United States government was able to deny American citizens fundamental first amendment rights and prosecute them for their religious interpretations using a loose thread linking their thoughts and words to terrorist activities.

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United States Marine Corps
Command and Staff College
Marine Corps University
2076 South Street
Marine Corps Combat Development Command
Quantico, Virginia 22134-5068

MASTER OF MILITARY STUDIES

TITLE: First Amendment Protections in the Age of Terrorism

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AUTHOR: David McGraw, United States Department of State, Bureau of Diplomatic Security

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Mentor and Oral Defense Committee Member: Paul D. Gruff
Approved: _____
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Oral Defense Committee Member: Bradford Wineman
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Executive Summary

Title: First Amendment Protections in the Age Terrorism

Author: David McGraw, United States Department of State, Bureau of Diplomatic Security

Thesis: In the United States, the freedom of speech and expression means different things to different individuals and groups. With the onset of terrorist attacks by radical Muslims on the United States homeland, freedom of speech becomes even more important. When does political expression or political speech enter into sedition or substantive support to terrorism? When does religious expression or religious interpretation enter into incitement to violence or hate speech? Where does the bright line or rigid boundary lay when determining if an individual's words or expressions fall outside of first amendment protections? The truth is there was never a historical bright line or fixed boundary and this leaves citizens open to government infringement upon first amendment rights.

Discussion: In the early twentieth century, the United States Supreme Court made its first modern-era rulings determining what speech was protected under the first amendment. The decisions in *Schenck vs. United States, Minersville School District v. Gobitis, West Virginia State Board of Education v. Barnette, Chaplinsky vs. New Hampshire,* whereby ruling on a narrow set of terms defining proscribed or restricted speech. Toward the mid twentieth century in *Brandenburg vs. Ohio,* a further narrowing of proscribed speech occurred although no consensus was reached on religious speech protections. The result of no clear rulings on religious speech became apparent in the outcomes of two early twenty-first century cases: *Holder vs. Humanitarian Law Project* and *United States vs. Mehanna*. The United States government was able to prosecute citizens for their religious interpretations by a loose thread linking their thoughts and words to terrorist activities.

Conclusion: After more than ninety years of United States Supreme Court decisions ranging from defining 'clear and present danger' to what constitutes 'material support and assistance to terrorists', the United States Supreme Court and the nation are no closer to an answer. The ambiguity and lack of clarity the United States Supreme Court has shown allow the United States government and law enforcement to prosecute citizens under the Patriot Act of 2001/2002 and the Intelligence Reform and Terrorism Prevention Act of 2004 for what are essentially thought crimes. Without a clear definition of what constitutes religiously accepted and protected speech, the first amendment will be weakened and an indispensable liberty eventually curtailed.

DISCLAIMER

THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MARINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

Introduction:

As the United States government endeavors to protect its sovereignty and prevent attacks by Islamic militants on its soil, a serious dilemma is occurring: when does political expression or political speech enter into sedition or substantive support to terrorism? Furthermore, when does religious expression or sacred text interpretation enter into incitement to violence or hate speech? Where does the bright line or rigid boundary lay when determining if an individual's words or expressions fall outside of first amendment protections? The truth is there was never a historical bright line or fixed boundary and this leaves citizens open to government infringement upon first amendment rights.

Many judges, lawyers and legal scholars believe the United States constitution is a living document, able to be interpreted time and again as necessary to clarify a particular point of law at a particular time in history. Historically the most indeterminate amendment contained in the Bill of Rights is the first amendment: encompassing the dominant right to free speech, freedom of assembly and freedom of religion. The first amendment protections guaranteeing free speech and expression are a battle ground today perhaps more so than in the preceding thirty years. Whether examining the merits of non-secular practices or political, religious or artistic expression, there are boundaries set by case law which limit what form each of these examples may take under constitutional protection.

Over the past one hundred years, the United States Supreme Court (hereafter 'the Court') decided numerous cases involving what is constitutionally protected speech and what is considered proscribed, or un-protected speech outside of first amendment guarantees. Throughout this hundred year period the evolution of prohibited speech interpretation became highly dependent upon the context in which the speech or expression is uttered and where the

speech appears in textual form.[1] Nowhere is that debate more challenging than in determining what type of religious speech is protected and what is not, particularly in separating radical Islam from widely-accepted or mainstream Islam. How does the Koranic call to *jihad*- generally translated as holy striving or war in the path of God- and the duty to inflict forcible submission on those outside Islam get interpreted? There is no clear answer.

Today, United States law enforcement and the judiciary alike find themselves at the forefront of this important debate about protected speech specifically when determining criminality in speech that may be considered protected, non-secular expression. Securing the United States from domestic and overseas terror plots and attacks is the top priority in nearly all federal law enforcement agencies and large metropolitan police departments.[2] Locating and arresting Islamic terrorists and their facilitators' leads law enforcement into ever increasing means to intrude into privacy and potentially infringe upon constitutional rights.

In 2010, the Court's ruling in the case *Holder vs. Humanitarian Law Project* set a troubling precedent in how much latitude federal law enforcement and the judiciary are afforded in prosecuting free speech determined to be outside constitutional protection. Similarly the problematic 2012 United States federal court case *United States vs. Mehanna* allowed the abrogation of the defendant's right to freedom of expression and freedom of religion through the absence of specific Court precedence protecting freedom of religion.

Balancing the need to secure the United States and prevent terror attacks by radical Islamists with the first amendment guarantees in freedom of speech and religious association and

[1] Rhonda Ferro, ed. *Laws and legislation: The First Amendment: Selected Issues* (New York, NY: Nova Science Publishers, 2010), 4.
[2] United States Federal Bureau of Investigation (FBI), Terrorism Investigations website, http://www.fbi.gov/about-us/investigate/terrorism.

expression has not been adequately addressed in order to secure religious freedom. This is a continuing problem that if left unresolved, will lead the United States back into darker times in the nation's history where free speech and religious expression was unreasonably censored and limited.

Part I: Freedom of Expression

The First Amendment: Freedom of Speech and Expression

Generally speaking, the United States Government may not prohibit citizens from engaging in speech, however, this does not mean exercising that constitutional guarantee is not subject to legally recognized parameters or regulation.[3] The same is true for speech considered a category of religious expression. Codifying specific religious practices into law has proven a highly problematic issue leading to vague and ambiguous interpretations on legally recognized, acceptable religious speech and practice. This is particularly so in precedent decisions made by the Court when dealing with religious expression interpretation.

A seminal decision on religious practice arose in 1940 when the Court upheld a Pennsylvania state flag-salute law in *Minersville School District v. Gobitis*. A Jehovah's Witness family that had two children in the public schools challenged their expulsion on first amendment grounds.[4] "National unity is the basis of national security," Justice Felix Frankfurter wrote for the majority.[5] Only Chief Justice Harlan F. Stone dissented from the Court's ruling [8 to 1 majority], which would be overruled three years later in another groundbreaking case, *West Virginia State Board of Education v. Barnette*.[6] The Court steered away from distinguishing

[3] Ferro, ed. Laws and legislation, 6.
[4] Vanderbilt University, First Amendment Center, http://www.firstamendmentcenter.org/first-amendment-timeline.
[5] Vanderbilt University, First Amendment Center, http://www.firstamendmentcenter.org/first-amendment-timeline.
[6] Vanderbilt University, First Amendment Center, http://www.firstamendmentcenter.org/first-amendment-timeline.

what type of religious speech was protected or guaranteed, and confined the argument exclusively to actions and speech with an adverse impact upon national unity.

In 1940s America, national unity meant something far different than today. Non-secular based Islamic militancy did not pose the threat to United States sovereignty it undoubtedly does now. Consequently, the national security concerns of the United States government regarding Islamic militancy and United States-based Islamic terrorists play a significant part in the Tarek Mehanna terror plot case and will be critically analyzed later in this paper.

Freedom of Speech and Religion: the Patriot Act and Conspiracy

In the influential 1943 case *West Virginia State Board of Education v. Barnette*, the Court ruled that a West Virginia state requirement to salute the flag violates the free-speech clause of the first amendment and due process clause of the fourteenth amendment.[7] In remaining inside the scope of this paper the focus here is exclusively on the ruling as it pertains to the first amendment.

Two important points are made in *West Virginia State Board of Education v. Barnette* related to where the United States is now in law enforcement and prosecution of terror conspiracies and related crimes. First, in 1943 the Court held that individuals who refused compliance in saluting the United States flag acted on religious, non-secular grounds did not control the decision of this question, and it is unnecessary to inquire into the sincerity of their

[7] Vanderbilt University, First Amendment Center, http://www.firstamendmentcenter.org/first-amendment-timeline.

views.[8] Secondly, the Court found that under the Federal Constitution, compulsion as here employed is not a permissible means of achieving "national unity."[9]

Contained within the USA Patriot Act of 2001/2002 (hereafter Patriot Act), the primary tool both federal law enforcement and the judiciary have to combat domestic terror crimes, are codified processes that circumvent the ruling in *West Virginia State Board of Education v. Barnette*. The Patriot Act contains language specifying that it "enhanced a number of conspiracy penalties…" including "…material support to terrorists" because "…under previous law, many terrorism statutes did not specifically prohibit engaging in conspiracies to commit the underlying offenses [material support and conspiracy]."[10] In these particular cases, the United States government could only prosecute under the general federal conspiracy statute.[11]

Essentially, the elements of conspiracy occur through a solicitation and an agreement by two or more individuals or through specific, overt and furthering acts by one or more individuals, beyond mere planning but to actually carry out a crime.[12] Law enforcement and the judiciary can now prosecute individuals under providing 'material support' through conspiracy if an individual is espousing radical Islamic ideas such as death to those who don't adhere to the faith and these ideas are seconded by another individual or individuals. Again, there is no legally enforceable definition of what constitutes radical Islam or widely-accepted Islam as the

[8] Cornell University School of Law, Legal Learning Institute/LLI, https://www.law.cornell.edu/supremecourt/text/319/624.
[9] Cornell University School of Law, Legal Learning Institute/LLI, https://www.law.cornell.edu/supremecourt/text/319/624.
[10] United States Department of Justice website, USA Patriot Act, http://www.justice.gov/archive/ll/highlights.html.
[11] United States Department of Justice website, USA Patriot Act, http://www.justice.gov/archive/ll/highlights.html.
[12] Charles Doyle. *Federal Conspiracy Law: A Brief Overview*, CRS Report for Congress R41223, (Washington DC: Congressional Research Service, April 30, 2010), 4-6, https://www.fas.org/sgp/crs/misc/R41223.pdf.

establishment clause of the first amendment prohibits Congress from passing laws regarding the establishment of religion.[13]

The Court's decision in *West Virginia State Board of Education v. Barnette* was not based upon non-secular speech or even sincerity in the particular faith. Rather, the Court held that compulsion, by a state or the federal government, against the wishes of the individual due to a particular faith could not be used against them. The Patriot Act annuls the spirit of *West Virginia State Board of Education v. Barnette* by interpreting an individual's national allegiance through their faith and extending that into 'material support'. Furthermore, questioning an individual's allegiance or 'national unity' when the individual is expressing a non-secular view is far easier to use today as evidence in prosecution particularly for 'material support' to terrorism than when the pre 9/11 standard in *West Virginia State Board of Education v. Barnette* was held.

Free Speech vs. Hate Speech

When legally determining religious, non-secular speech or expression and its intent for purposes of first amendment protection or compelling proscription, there is another profoundly gray area in law commonly referred to in lay terminology as 'hate speech'. Codification of hate speech and the broader category of hate crimes falls under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249, enacted in 2010. Of particular interest here is subsection (a) (2) of 18 U.S.C. § 249 providing for protections against violent acts motivated by animus against those religions and national origins which were not considered to be "races" at the time the thirteenth amendment was passed.[14] Subsection (a) (2) of 18 U.S.C. § 249

[13] Alliance Defending Freedom. *The Truth about Separation of Church and State*. (Scottsdale, AZ). https://www.alliancedefendingfreedom.org/content/docs/resources/Signature-Brochure-Insert-Church-State.pdf.
[14] United States Department of Justice, Civil Rights Division website, http://www.justice.gov/crt/about/crm/matthewshepard.php.

makes clear that violent acts motivated and carried out to satisfy animus or hate for a particular religious group carries strong penalty.

Another area of significant concern is subsection (a) (2) of 18 U.S.C. § 249 which criminalizes only violent acts resulting in bodily injury or an attempt to inflict bodily injury through the use of fire [which is also punishable as arson], firearms, explosive and incendiary devices, or unspecified other weapons.[15] The preceding statute does not criminalize threats of violence. Threats of violence or threats to inflict physical injury, which are a type of assault without the appurtenant infliction of any injury, may be prosecutable under other hate crimes statutes, such as 42 U.S.C. § 3631 or 18 U.S.C. § 245.[16] Threats may also be prosecutable under federal laws preventing interstate communication of threats, specifically 18 U.S.C § 875 Interstate Communications.[17]

Under the provisions contained within 18 U.S.C § 875 (c) it is a crime to transmit in interstate or foreign commerce any communication containing… any threat to injure the person of another.[18] The current laws are unclear in how to interpret an interstate threat, specifically internet or email transmitted, that falls under how the law codifies religious speech especially in separating radical Islam from widely-accepted Islam.

Are there certain Koranic passages, if expressed by an individual in written or spoken form that could be prosecuted as an interstate threat or hate speech? No definitive answer exists today, although, there is abundant writing and critical review on the subject. From a purely constitutional law perspective the overwhelming consensus suggests that unless or until Islamic

[15] United States Department of Justice, Civil Rights Division website, http://www.justice.gov/crt/about/crm/matthewshepard.php.
[16] United States Department of Justice, Civil Rights Division website, http://www.justice.gov/crt/about/crm/matthewshepard.php.
[17] Cornell University School of Law, Legal Learning Institute/LLI, https://www.law.cornell.edu/uscode/text/18/875.
[18] Cornell University School of Law, Legal Learning Institute/LLI, https://www.law.cornell.edu/uscode/text/18/875.

scholars separate radicalism from the accepted practice of Islam there will not be a constitutional law ruling in favor of moving radical interpretations under proscribed or unprotected speech.

Part II: Challenges for Law Enforcement Agencies in Balancing Civil Liberties

Extreme Religious Motivations: Real Dangers Posed by Violent Religious Expression

The repeated appearance of provocative cartoons depicting the Prophet Mohammad published in the satirical French publication Charlie Hebdo were not looked upon favorably by radical Islamic adherents although these images are protected as free speech in the United States, France, Belgium and other European nations. The cartoons prompted radical Islamic elements to act upon what they believed was a religiously based calling to kill anyone who insults the Prophet Mohammad or Islam. Consequently on January 7, 2015 two gunmen entered the Charlie Hebdo magazine offices in central Paris and executed nine employees including the magazine's editor, Stéphane Charbonnier. As evidenced by reactions, the overwhelming majority of the world's population did not believe the two Muslim gunmen that killed chief editor Stéphane Charbonnier and the others were heroes nor were the gunmen expressing a religious truism by avenging a perceived slight against the Prophet Mohammad and the Islamic faith.

Public outcry condemning the murders came from many quarters. In a Huffington Post article published within hours of the attacks "Hassen Chalghoumi, imam of the Drancy mosque in Paris's Seine-Saint-Denis suburb… condemned the attackers, saying, 'Their barbarism has nothing to do with Islam… I am extremely angry… these are criminals, barbarians… they have

sold their soul to hell. This is not freedom. This is not Islam."[19] Even Saudi Arabia, an extremely conservative Muslim state, Saudi Arabia published a surprisingly public and stern commendation of the killings saying the incident was "… a cowardly terrorist attack that was rejected by the true Islamic religion"[20] This statement by the Saudi government may provide a small window by which dialogue can be made in furtherance of separating radical Islam from mainstream Islamic interpretation.

The attacks on February 14, 2015 at a Copenhagen café where an event promoting free speech was taking place and outside a synagogue are another example of radical Islamic interpretations. A Muslim male in his early twenties shot and killed a prominent European cartoonist at a café and later the same day shot and killed a security guard protecting a Bar Mitzvah celebration at a Copenhagen synagogue. Although the attacks were entirely confined to only to France and Denmark, the immediate, visceral reaction in Europe was widespread. The overwhelming public reaction was the same: shock, indignation and outrage. The Danish Prime Minister, Ms. Helle Thorning-Schmidt told reporters "…the Danish democracy is strong, the Danish nation is strong, and we will not accept any attempt to threaten or intimidate our liberties and our rights." Jewish leaders in Copenhagen agreed, saying "…We fight together with them (Muslims) for religious rights. We are moderates. We fight together against extremism and radicalism…"[21]

Outside of the April 15, 2014 Boston Marathon bombing the United States government, primarily through law enforcement activity, has prevented a major attack from occurring on

[19] Carol Kuruvilla and Antonia Blumberg, "Muslims around the World Condemn Charlie Hebdo attack," *HuffingtonPost.com*, January 7, 2015, http://www.huffingtonpost.com/2015/01/07/muslims-respond-charlie-hebdo_n_6429710.html.
[20] Ian Black, "Charlie Hebdo Killings Condemned by Arab States- but Hailed online by Extremists," *TheGuardian.com*, January 7, 2015, http://www.theguardian.com/world/2015/jan/07/charlie-hebdo-killings-arab-states-jihadi-extremist-sympathisers-isis.
[21] Ole Mikkelsen and Sabina Zawadzki, "Defiant Danes March after Gunman Attacks Copenhagen," *Reuters.com*, February 16, 2015, http://www.reuters.com/article/2015/02/16/us-denmark-shooting-idUSKBN0LI0N720150216.

American soil since those of September 11, 2001. Nonetheless, extreme violence related to radical Islamic religious interpretations is a constant threat to the United States homeland. Again, preventing terror plots from culmination and execution on United States soil is the top priority for federal law enforcement agencies throughout the nation and police departments in major cities and urban areas. The question remains: when does religious expression, outside of any actual violence, become proscribed speech and consequently a crime punishable by United States law?

Part II of this paper further examines freedom of expression issues raised in *United States vs. Mehanna*, the federal case against Muslim American Tarek Mehanna, convicted in April 2012 of 'providing material support to terrorism'. The Tarek Mehanna case clearly exposes the flaws in current law enforcement practices, coupled with ambiguous constitutional interpretation abridging essential first amendment freedom of speech, religion and religious expression protections.

Civil Liberties and Time of War: *Schenck vs. United States*

The benchmark Court decision in the 1919 case *Schenck vs. United States* provides a historical grounding for the basis of United States government imposed restrictions during times of war. During the First World War, the United States was concerned with, amongst other things, internal threats to sovereignty from socialist and anarchist movements and maintaining the draft for the war effort in Europe. Mr. Schenck by his own admission claimed to be the General Secretary of the Socialist Party in the United States.[22] The United States government arrested Schenk for producing pamphlets and papers deemed subversive and counter to the war

[22] Cornell University School of Law, Legal Learning Institute/LLI, https://www.law.cornell.edu/supremecourt/text/249/47.

effort. Schenk was charged with conspiracy to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219 which under the provisions of the Act amounted to causing or creating an environment for the potential for insubordination in the military and damage to recruitment.[23]

The Court held that during a time of war there was a heightened need to secure the nations interests and utterances tolerable in peacetime can be punished.[24] Justice Oliver Wendell Holmes, speaking for a unanimous Court [9-0 conviction upheld] concluded that Mr. Schenck was not protected in this specific situation.[25] Justice Holmes delivered the now well-known opinion that defined the 'clear and present danger test'. The character of every act depends on the circumstances and '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.'[26]

This particular ruling left undefined whether restrictions or proscription on civil liberties such as free speech are valid when there is no legally-declared war. There is also the issue of whether or not private speech between acquaintances is considered proscribed or unprotected by the first amendment when the speech could be considered a 'clear and present danger'. It would not be until the 1969 case *Brandenburg vs. Ohio* and the Court establishing the Brandenburg Test requirements that a narrowing of the broad 'clear and present danger' doctrine occurred. The Brandenburg Test became an essential corner stone for the basis of law enforcement latitude to bring charges against individuals under the Patriot Act provisions.

Civil Liberties and National Security: The Post 9/11 War on Terror

[23] Oyez Project at IIT Chicago-Kent College of Law. *Schenck vs. United States*. http://www.oyez.org/cases/1901-1939/1918/1918_437.
[24] Oyez Project at IIT Chicago-Kent College of Law. *Schenck vs. United States*.
[25] Oyez Project at IIT Chicago-Kent College of Law. *Schenck vs. United States*.
[26] Oyez Project at IIT Chicago-Kent College of Law. *Schenck vs. United States*.

Federal Law enforcement and the judiciary continue to struggle with how to enforce laws against terror and appropriately prosecute crimes ranging from seditious acts, to incitement to violence to material support to terrorism. In Part I, many issues were raised concerning constitutional protection regarding how and when free speech or freedom of religion becomes prohibited whether it is prosecuted under conspiracy, material support to terrorism or hate speech. Again, the question is: when does freedom of religion, as viewed through the lens of first amendment constitutional law, become a terrorism related crime? Potential answers to this lay within several historical cases where the Court ruled on matters specifically dealing with categories of speech "…that are unprotected by the first amendment and may be prohibited entirely… obscenity, child pornography and speech that constitutes so-called 'fighting words' or 'true threats'".[27]

In remaining within the scope of this paper the focus here is on what is currently accepted as 'fighting words' and 'true threats'. The terms 'fighting words' and 'true threats' primarily originate from the following two Court cases and the subsequent Court rulings narrowing the scope of proscription. In the 1942 case *Chaplinsky vs. New Hampshire* the Court concluded that certain words "… by their very utterance inflict injury or tend to incite an immediate breach of the peace and may be punished consistent with the First Amendment."[28] The Court cited no specific words or phrases as examples, however "… the Court upheld a statute which prohibited

[27] Rhonda Ferro, ed. *Laws and legislation: The First Amendment: Selected Issues* (New York, NY: Nova Science Publishers, 2010), 2. http://site.ebrary.com/lib/usmcu/detail.action?docID=10680867&p00=the+first+amendment%3A+selected+issues+edited+rhonda+ferro.

[28] Ferro, ed. Laws and legislation, 4.

a person from addressing 'any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place…'."[29]

Regarding 'true threats' the Court in 1969 drew a distinction in the now famous *Brandenburg vs. Ohio* case between advocacy, which is a form of protected speech and uttering incitements to 'imminent lawless action' that falls outside of the first amendment protections.[30] The Court's ruling in the Brandenburg case established a determining standard thereafter known as the Brandenburg Test. The Brandenburg Test standard determined that speech advocating or promoting the use of force or the commission of crime could only be proscribed where two conditions existed: first, the encouragement is "directed to inciting or producing imminent lawless action," and second the advocacy is "likely to incite or produce such action."[31]

In the current application of this principle, the Court continues to hold that "advocacy of the use of force or of law violation is protected unless such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Similarly, the Court continues to hold that a statute prohibiting threats against the life of the President [of the United States] could be applied only against speech that constitutes a 'true threat' and not against mere 'political hyperbole'."[32]

In the 1949 case *Terminiello v. Chicago,* the Court considerably limited the scope of the "fighting words" doctrine. Writing for the majority, Justice William O. Douglas exclaimed the "function of free speech … is to invite dispute."[33] The speech or expression may best serve its purpose when it induces a condition of unrest, creates dissatisfaction with conditions, or even

[29] Ferro, ed. Laws and legislation, 4-5.
[30] Ferro, ed. Laws and legislation, 4-5.
[31] Cornell University Law School, Legal Information Institute, s.v. "Brandenburg Test," accessed February 14, 2015, https://www.law.cornell.edu/wex/brandenburg_test.
[32] Ferro, ed. Laws and legislation, 4-5.
[33] Vanderbilt University, First Amendment Center, http://www.firstamendmentcenter.org/first-amendment-timeline.

stirs people to anger.[34] The Court upheld the essence of the first amendment in determining that dispute through open dialogue is a fundament and formative basis of first amendment protections.

These Court rulings set precedents limiting government infringement on the civil liberty of free speech although these specific rulings do not deal directly with religious speech and religious interpretations. Advocacy for religious purpose as uttered in free speech is still unclear. The following case study proves there is a serious civil liberty threat to Americans caused by the absence of any formative Court ruling providing definitive freedom of religion protections.

Holder vs. Humanitarian Law Project (HLP)

In the 2010 case *Holder vs. Humanitarian Law Project* (hereafter HLP) the Court established legal restrictions encroaching upon first amendment protections. First, the Court's decision in HLP makes religious advocacy that could potentially be used to further terrorist activity a crime and second, the decision makes it a crime to provide support, including humanitarian aid, literature distribution and political advocacy, to any foreign entity that the government has designated as a "terrorist" group.[35]

The Court held [in a 6-3 decision] that the Patriot Act of 2001/2002 and the Intelligence Reform and Terrorism Prevention Act of 2004 prohibitions on "expert advice," "training," "service," and "personnel" were not vague, and did not violate free speech or religious

[34] Vanderbilt University, First Amendment Center, http://www.firstamendmentcenter.org/first-amendment-timeline.
[35] The Center for Constitutional Rights, *Holder vs. Humanitarian Law Project*. http://ccrjustice.org/holder-v-humanitarian-law-project.

association rights as applied to plaintiffs' intended activities.[36] Previously, a lower federal court ruled the above statutes were vague and ill-defined in application to religious speech protections. In the HLP decision, Chief Justice Roberts wrote that "'while strict scrutiny apparently applied, even support in the form of intangibles like human rights training freed up resources for other illegal uses, and that combined with the government's interest in denying blacklisted groups legitimacy was sufficient to trump the First Amendment interests of the plaintiffs.'"[37] It should be noted that the conservative portion of the bench leaned toward proscription while the liberal side with the Plaintiff's reasoning.

The dissenting opinion came from Justices' Breyer, Ginsburg and Sotomayor who believed the Plaintiff's had a first amendment right, outside proscription to provide training in human rights advocacy and peacemaking to the Kurdistan Workers' Party in Turkey, a United States government designated terrorist organization.[38] This particular case had a serious impact on the *United States vs. Mehanna* decision, whereby a lower federal court was able to apply the Court's findings to convict an American citizen of material support to terrorist activity on the basis of his written and uttered speech.

United States vs. Mehanna

In April 2012 a particularly telling case pitting civil liberty and Islamic terrorism was decided by a federal court in Boston. It focused on what constitutionally protected free expression is in relation to providing support to terrorists and terrorist activities. Using the Anti-Terrorism and Effective Death Penalty Act of 1996, Patriot Act of 2001/2002 and the Intelligence Reform and Terrorism Prevention Act of 2004, the United States government

[36] The Center for Constitutional Rights, *Holder vs. Humanitarian Law Project*.
[37] The Center for Constitutional Rights, *Holder vs. Humanitarian Law Project*.
[38] The Center for Constitutional Rights, *Holder vs. Humanitarian Law Project*.

prosecuted Tarek Mehanna (hereafter Mehanna) for conspiracy and providing material support to a terrorist organization.

The Court's previous ruling in *Holder vs. Humanitarian Law Project* (HLP) made it possible for the United States government to exploit, through the use of federal law enforcement the gap in first amendment interpretation created by an absence of definitive free expression in religious matters. This particular case absolutely illustrates the vulnerabilities to first amendment rights when pitted against law federal law enforcement and the judiciary in the post 9/11 environment. Expanding the definition of material support for terrorism as this critical threat to national security increased over the past decade and a half the United States government codified support to terrorism as any training and expert advice or assistance that an individual provides to, or participates in with terrorists.[39]

The *United States vs. Mehanna* case was almost exclusively based on evidence obtained through law enforcement wire taps, subject surveillance and internet monitoring. Throughout the investigation, Tarek Mehanna was monitored by federal law enforcement while emailing friends, viewing and downloading internet videos, translating Arabic language documents on the web, and travelling from the United States to Yemen one time.[40] When the case was decided on April 10, 2012, Tarek Mehanna received a sentence of 17 years in prison for what many constitutional law scholars and American journalists believe was the constitutionally protected, first amendment guaranteed exercise of free speech and religious expression.

The United States government's case against Mehanna is almost entirely based upon a government-favorable interpretation of what is legally meant by 'material support'. The first

[39] Michael May, "Keyboard Jihadist?" *The American Prospect* 28.5 (June 2012): 24-33. http://search.proquest.com/.
[40] Andy Worthington, "Tarek Mehanna's Powerful Statement as He Received a 17-Year Sentence Despite Having Harmed No One", April 14, 2012, http://www.andyworthington.co.uk/.

substantive codification of 'material support for terrorism' came shortly after the 1996 Oklahoma City bombing by convicted domestic terrorists Timothy McVeigh and Terry Nichols.[41] After 9/11, Congress expanded the definition of material support', beginning with the Patriot Act and again in the Intelligence Reform and Terrorism Prevention Act of 2004.[42] Material support or resources now includes providing 'training and expert advice or assistance' to any group that one knows is designated by the government as a terrorist organization or that one knows commits terrorist acts.

A tandem case related to *United States vs. Mehanna* that highlights the problem with the broad range of speech that can be considered support to terrorist activities is the 2010 case *Holder vs. Humanitarian Law Project* (HLP) referred to previously. The following insights highlight the constitutional interpretation issues in the Tarek Mehanna and HLP cases. Religious interpretations are problematic even inside each denomination whether Christian or Muslim in orientation. The King James Version Bible (hereafter KJV) is considered a standard by which a wide array of Protestant denominations accept. There is no accepted or tacitly authorized cannon of works inside the Protestant community. Catholicism accepts the KJV as the cannon standard however throughout the world, in differing cultures and regions, interpretations are not exactly the same or congruent with that of the Papal standard. In the Tarek Mehanna case the United States government showed that in the United States government's opinion Tarek Mehanna was translating documents that were ultimately used to further terrorist recruitment and support activities.[43] This ruling did not set any test or concreter precedence in how to determine if a bright line is crossed between religious advocacy and incitement to imminent violence.

[41] Michael May, "Keyboard Jihadist?" *The American Prospect* 28.5 (June 2012).
[42] Michael May, "Keyboard Jihadist?" *The American Prospect* 28.5 (June 2012)
[43] Michael May, "Keyboard Jihadist?" *The American Prospect* 28.5 (June 2012).

The appearance that the United States has deemed Islamic radicalism as outside mainstream Islamic practice is a gray area in the interpretation of the first amendment that goes back to the gaps in the Schenck, Chaplinsky and Brandenburg cases of the early to mid-twentieth century. At the time these cases were upheld or established a new test or precedence the Court only set rules for proscription on free speech to prevent imminent violence or lawlessness. Nowhere did any of these cases venture into how or when to separate accepted religious speech from speech advocating violence. In the post 9/11 atmosphere the United States government in a sincere and determined course has used the gaps in the case law to exploit the Patriot Act and others to stem attacks by Islamic radicals inside the United States.

Religious Interpretation: Radicalism and Government Monitoring

Beyond the Tarek Mehanna and HLP cases there is a further, fundamental problem with the lack of clarity on accepted, and thus protected religious speech. Many steps which various United States government entities take while monitoring individuals in the United States are not necessary to preserve United States sovereignty and protect the nation from terror attacks. Edward Snowden, the now infamous NSA information leaker, claimed that the United States government and its security and law enforcement apparatus listened to private cell phone conversations and read private email traffic of nearly all American citizens, along with the private conversations of world leaders such as the German Chancellor, Angelika Merkel. Without probing into potentially classified information regarding the specifics of what Edward Snowden released, his statements about these intrusions are generally correct and have been acknowledged by the United States government. That being the fact, the United States government should not continue to use these methods as this intrusion into privacy negates both

the first amendment right to speak freely about thoughts and ideas, as well as hampering efforts to identify nefarious individuals or groups that may be forming or planning attacks. Future Court cases dealing with terrorist activity inside the United States- specifically material support issues- will not doubt further test the protections of the first amendment.

There is no compelling requirement for the United States government to codify the religious interpretation of radical Islam as outside protection of the first amendment as there are many laws already in statute that deal with their actions i.e. murder, conspiracy etc. Terrorist groups have and will continue to exploit religion to further their causes, however, the United States government must balance this with protecting first amendment guarantees.

Conclusion

At issue here is the unresolved problems of religious interpretation, protection of sovereignty, law enforcement practices and first amendment protections. An integral part of this overall problem of balance between free speech and religious expression and protecting United States sovereignty lies in the function of the United States judiciary system. Looking back at the example in the *Holder vs. Humanitarian Law Project* case illustrates the point that the United States government is far down the path of further restricting free speech and religious expression.

The United States Supreme Court is a quasi-political body where the tenor of the Court and its decisions moves back and forth across the political spectrum. Republican presidents appoint right leaning justices and Democratic presidents appoint left leaning justices. The affirming decision and the dissenting opinions are more often than not split across this political line. The same is true in Congress where the Court's justices are confirmed. This is inherently

cyclical through United States Presidential and Congressional election cycles, each of which overlaps the other. This problem does nothing to further the Court in making unbiased decisions when ruling on first amendment protections, particularly religious expression issues.

Confusing matters further are the ebb and sway of Court decisions over the previous ninety-plus years. In both *Minersville School District v. Gobitis* and *West Virginia State Board of Education v. Barnette* cases the Court actually set a precedent of avoidance by not proffering a definitive ruling on the validity of religious practices, specifically as those practices relate to freedom of association or speech. Since September 11, 2001, the United States government has been moving towards legalizing potentially unconstitutional restrictions on freedom of speech.

The Patriot Act of 2001 and the Intelligence Reform and Terrorism Prevention Act of 2004 are manifestations of the United States government's reaction to an actual attack and subsequent terror threats but this threat is not a new phenomenon. As far back as *Schenck vs. United States* in the early twentieth century, the United States government has been dealing with threats to sovereignty and internal protection against foreign threat manifestations. Only in recent years has the Court and lower federal courts upheld convictions based on ill-defined religious speech and advocacy. The cases of *Holder vs. Humanitarian Law Project* and *United States vs. Mehanna* highlight where the government encroached upon religion- in these particular cases Islamic faith interpretation- in order to uphold peace and order within the United States.[44] The United States is going back to a time when the Court had yet to rule on free speech parameters, whereby national security interests were left solely for the lower courts and the executive or legislative branches to decide. The following quotes illustrate this serious and unresolved penumbra regarding American freedom of speech protections:

[44] The Center for Constitutional Rights, *Holder vs. Humanitarian Law Project*.

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.— Supreme Court Justice Louis Brandeis, Olmstead v. U.S. (1928).[45]

> Protecting the safety of the American people is a solemn duty of the Congress; we must work tirelessly to prevent more tragedies like the devastating attacks of September 11th. We must prevent more children from losing their mothers, more wives from losing their husbands, and more firefighters from losing their heroic colleagues. But the Congress will fulfill its duty only when it protects both the American people and the freedoms at the foundation of American society. So let us preserve our heritage of basic rights. Let us practice as well as preach that liberty. And let us fight to maintain that freedom that we call America. — U.S. Senator Russ Feingold, from the *Statement of U.S. Senator Russ Feingold on the Anti-Terrorism Bill, 10/25/2001*.[46]

Although these two quotes appear to come to the same conclusion, they are remarkably different in one respect. There is a subtle but discernible contrast between Justice Brandeis' words and those of Senator Feingold in what is meant by 'understanding'. In the early twentieth century, Justice Brandeis recognized that the term 'well-meaning', with respect to good order and the peace of the nation required understanding the threat posed to that 'well-being'. As he states, "…the greatest dangers to liberty lurk in insidious encroachment by men of zeal."[47] Today, as evidenced by Senator Feingold's post 9/11 statement, the zeal in protecting the nation is first and foremost. Nowhere in his statement does he speak of the dangers of over-zealousness and understanding the threat as Justice Brandeis did ninety years before. When will Congress and the Court actually decide on what the threat is? There is no clear indication either have clearly defined the threat Islamic non-secular extremism has as it crosses paths with first amendment rights protecting religious speech and expression.

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[45] American Library Association, Quotes Reference Section, Law and Legal, http://www.ala.org/offices/oif/ifissues/issuesrelatedlinks/quotations.
[46] American Library Association, Quotes Reference Section, Law and Legal.
[47] American Library Association, Quotes Reference Section, Law and Legal.

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