THE PENNSYLVANIA STATE UNIVERSITY
SCHREYER HONORS COLLEGE

DEPARTMENT OF HISTORY

FREE SPEECH IN THE POST-9/11 UNDECLARED WAR ERA

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SPRING 2016

A thesis
submitted in partial fulfillment
of the requirements
for baccalaureate degrees
in History and Political Science
with honors in History

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ABSTRACT

This thesis examines judicial rulings on free speech in the post-9/11 undeclared war era through the lens of two Supreme Court cases, *Holder v*. *Humanitarian Law Project* (2010) and *Snyder v*. *Phelps* (2011). *Holder* involved a self-identified humanitarian group that wished to provide various forms of aid to groups overseas that had been designated as foreign terrorist organizations. In this case the Supreme Court ruled that these advocacy efforts were not protected under the free speech clause of the First Amendment. Moreover, the material support statute of the Intelligence Reform and Terrorism Prevention Act criminalized this aid. The Court's determination depended in part on the implications for national security of material support connected with verbal expression. *Snyder* began as a lawsuit filed in response to a Westboro Baptist Church protest at a fallen Marine's funeral. The Supreme Court ruled that the speech of the protestors was protected under the First Amendment, despite the pain it may have inflicted on the family. The majority ruling identified the protest as public speech and hence constitutional. My question revolves around why the outcomes in these contemporaneous cases were different, and whether the national security concerns of this era of undeclared war played a role in these decisions. Two variables were instrumental: first, whether the speech was simply expression, or instead overlapped with teaching, advice, or material aid, and second, whether the speech directly assisted international organizations, or aimed primarily to stir domestic discussion.

I examine the facts of each case, as well as how they align with precedents and what played a role in the Justices' jurisprudence. While the interest of national security was certainly present in both cases, it only visibly influenced the Justices' decision-making in the *Holder* case. Here, speech had the potential to impact foreign relations and national security, especially

because speech was understood to include material aid. Both rulings, however, were part of a larger history of reviewing First Amendment free speech protection in times of both declared and undeclared war. The cases indicate both the Justices' enduring commitment to protect free speech, as well as their recognition that government may have a compelling interest to regulate speech at times of international conflict.

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ACKNOWLEDGEMENTS

This thesis would not have come to fruition without the support of a great number of friends, family, and my supervisor and advisor. I would first like to thank my supervisor Annie Rose for her patience and close reading of every part of this thesis. She challenged me to be better with each carefully thought out comment and piece of advice. I would also like to thank my advisor Michael Milligan for initially encouraging me to meet Annie when I was in search of a supervisor, and for sticking with us every step of the way.

Thank you to my parents, who offered endless love and support and listened to many panicked phone calls when I did not think I was going to finish this. Thank you to my roommates who offered comedic relief and words of encouragement. Thank you to my former roommate and best friend who did this all a year before me and served as my own personal cheerleader. Thank you to my little and sorority sisters for providing snacks and distractions when I needed them. Thanks to the rest of my Penn State family throughout various organizations and offices, especially the Office of Fraternity and Sorority Life and the Center for Women Students, that constantly checked in to see how this project was going and offered support for this and all my other endeavors.

Finally, thank you to the Paterno Fellows Program, the College of the Liberal Arts, and the Schreyer Honors College for providing me with not only this opportunity, but countless others over the past four years to enrich my learning experience and give me the best Penn State experience possible.

Chapter 1: Examination of Terminology and Current State

The attacks on the Twin Towers of the World Trade Center in New York City on September 11, 2001, shook the United States and changed a nation. But did the event change the opinions of the nine Justices of the Supreme Court? In this time of undeclared war post-9/11, are these Justices issuing judicial rulings with a changed frame of mind that is more inclined to protect national security, or to protect civil liberties? These questions have been raised in the public sphere and require exploration. In order to find answers to these questions, it is imperative to understand the current state of affairs in the United States following 9/11, beginning with the effects of the Patriot Act.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act—the formal title of the USA Patriot Act—is pertinent to the analysis of post-9/11 jurisprudence. Congress passed this piece of legislation, and President Bush subsequently signed it into law on October 26, 2001, as a direct response to the attack on the World Trade Center on September 11, 2001. The bill expanded the legal boundaries of law enforcement agencies to conduct all types of surveillance without notice, increased federal authority over financial assets, strengthened immigration laws to enhance border security and the ability of the federal government to detain suspected terrorists, and immensely broadened the definition of what constitutes a terroristic offense. Although the Patriot Act passed through both chambers of Congress with overwhelming majorities, it still faced harsh criticism when it went into effect. The media jumped on it for overstepping legislative boundaries and greatly restricting civil liberties. Commentators claimed the rights to free speech and privacy were severely reduced

by the legislation because it gave government agencies virtual free reign to do as they pleased in regards to surveillance and detainment.

Claims such as these are what this thesis sets out to explore. The two Supreme Court cases to be examined have been chosen to elucidate whether there is any merit to the claims that the post-9/11 era is one of restricted rights. These cases are: *Holder v. Humanitarian Law Project* (2010), which prohibited the Humanitarian Law Project from providing advice and aid to groups that had been labeled terrorist organizations under the Patriot Act; and *Snyder v. Phelps* (2011), which upheld the Westboro Baptist Church members' speech rights in protesting in proximity to a Marine funeral even though some may consider it outrageous. After examining these cases, it is quite apparent that despite many arguments claiming that rights are restricted in the post-9/11 era, civil liberties are still highly protected. The Supreme Court is careful to ensure that free speech rights are upheld and that speech that does not cause a direct harm is uncensored.

What do the common terms of recent American political discussion mean?

First and foremost, it is imperative to define the terms that are often used when discussing these topics. For the purpose of this thesis, undeclared war will be defined as a period of conflict or invasion of another country or territory for longer than sixty days without a formal Congressional declaration of war. Article 1 Section 8 of the United States Constitution specifically grants the power to declare war to Congress, while the President solely has the power to wage war as Commander in Chief of the U.S. Armed Forces (U.S. Constitution). Additionally, the War Powers Resolution of 1973 allows Presidents to send Armed Forces into action abroad in the case of a national emergency resulting from an attack on the U.S., its

territories or possessions, or its Armed Forces; however, Presidents must notify Congress within 48 hours of committing Armed Forces to action and these forces may not remain for longer than sixty days without an authorization of military force or formal declaration of war from Congress[1]. Thus this definition takes into account what a declared war is and the various ways in which that can be formalized.

The United States has not experienced an officially declared war since World War II. Every "war" since then has been entered into unofficially without the specific approval of Congress. The declared wars in which the United States has engaged in are the War of 1812, the Mexican-American War, the Civil War, the Spanish-American War, World War I, and World War II. Following these official entrances into war, the U.S. has been involved in a number of conflicts including the Korean War, the Vietnam War, the 1982 Peacekeeping Mission in Lebanon, the Persian Gulf War, the War in Afghanistan, and the Iraq War.

The term civil liberties also needs to be defined, as it is often used but not given a universal meaning. Civil liberties shall be defined as fundamental rights and freedoms that cannot be violated by a government entity or individual person. These rights and freedoms are either plainly stated in the Constitution or have come about through American laws and judicial interpretations over time. Among these civil liberties is the right to free speech, articulated in the First Amendment. This right protects citizens from censorship by the government. Although freedom of speech is not absolute, and speech may be regulated when government establishes a compelling interest for doing so, much speech is protected regardless of its message. The protection or restriction of free speech will be a main theme in the two Supreme Court cases to be examined. It is also important to note that although free speech is cited in the First

[1] "War Powers." Library of Congress. Accessed 15 November 2015.

Amendment, this right was not recognized on the state level until incorporation occurred. In the 1920s, there were a series of Supreme Court cases that interpreted the Fourteenth Amendment to apply to both the federal government and state governments. Gradually, the rest of the amendments were also recognized as applicable to both levels of government. Specifically, free speech was incorporated in *Gitlow v. New York* (1926).

Finally, terrorism and national security must be defined. According to a report from the US Department of State in 2003, "No one definition of terrorism has gained universal acceptance"[2]. This is because there is great disagreement about what actually constitutes terrorism, and many government agencies adhere to different definitions. While people in the U.S. may see certain actions as acts of terror, those committing them may not believe these acts represent terrorism. A popularly cited argument when attempting to define terrorism is that one man's terrorist is another man's freedom fighter. Often terrorist actors believe their actions are justified because of a specific set of beliefs that they adhere to.

Despite these gray areas and conflicting views, it is still imperative to have a definition for this term. The Patriot Act redefined what constitutes an act of terrorism. This definition recognized domestic terrorism as well as international terrorism: any act dangerous to human life that is a violation of a state or federal law and which is intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping[3]. However, this is not the only possible definition of terrorism. For the purpose of this thesis, terrorism shall mean politically motivated acts of intimidation or violence carried out by subnational groups.

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[2] "Patterns of Global Terrorism 2002." United States Department of State. Released April 2003. Accessed 10 April 2016.

[3] American Civil Liberties Union. "How the USA Patriot Act Redefines 'Domestic Terrorism.'" Accessed 13 November 2015.

Essentially, terrorism is any act, domestic or international, that threatens the government or civilian population through intimidation, threat, or violence. Terrorism is seen as a threat to national security. National security shall be defined in turn as the government's interest in preserving the safety of the country and its people through various projections of power, including diplomacy, economic superiority, military might, and political prowess among others.

Undeclared War, a new normal?

Since World War II, undeclared war has become the new norm in the United States. However, the U.S. has been involved in various "conflicts," "military actions," or "armed responses" since that time. This habit of entering into undeclared wars or conflicts can be traced back to the Truman Doctrine in 1947. This doctrine was the work of President Harry Truman, and stated that the United State would assist any nation threatened by communism as a part of the American containment policy. This declaration was then put to the test when North Korea invaded South Korea in 1950. In accordance with the Truman Doctrine, President Truman sent troops to South Korea to defend against the communist invasion of North Korea. This was in conjunction with a United Nations force consisting of a conglomeration of troops from various nations. Although this military deployment could be seen as actions of war by some, Truman instead chose to label it as police action as he did not formally request a declaration of war from Congress[4]. The involvement in Korea opened the door for future undeclared wars, and set a precedent that has not yet been overturned.

[4] "Nixon and the War Powers Resolution." Bill of Rights Institute. 2015.

Undeclared war again took place in 1961 when President John F. Kennedy carried out the promises made in the Truman Doctrine. He authorized supplies and military advisors to be sent to South Vietnam in order to combat communist North Vietnam. This seemed to be enough at the time, and the military advisors were simply providing guidance to and training South-Vietnamese soldiers, not participating in combat. Consequently, Kennedy did not request the approval of Congress. However, Kennedy eventually scaled up these forces by adding more military advisors as well as sending in helicopters which practically engaged the U.S. in combat. Throughout their involvement, the number of troops and extent of their engagement gradually escalated and the U.S. became more and more involved in the war without ever formally entering it. When Lyndon B. Johnson took office after the assassination of Kennedy in November 1963, he increased the number of troops in Vietnam dramatically and continued to do so throughout his term. He took Congress's passage of the Gulf of Tonkin Resolution as an affirmation that he could continue to escalate the U.S. involvement. He saw this as approval from Congress of the war, but it was still not a formally declared war.

What began as military advising in Vietnam eventually grew into a full-scale war in which the United States was heavily involved. By the time President Nixon inherited the war in 1969, there were not only hundreds of thousands of troops on the ground, but bombings and naval actions as well. Nixon decided to go even further and secretly bomb Cambodia in order to target North Vietnamese supplies located there. Unfortunately for the administration, this did not stay a secret from the American public, many of whom were already vigorously protesting the war. Knowledge of the bombings as well as the release of the Pentagon Papers, which made clear that the administration had lied to the public about the success of the war, sparked a national debate about war powers and undeclared war. Many were upset that the U.S. seemed to have

entered a conflict with ill-considered political objectives and undefined rules of engagement, two characteristics of undeclared war. In response to this debate, Congress deemed it necessary to settle the issue through the passage of the War Powers Resolution of 1973.

The War Powers Resolution of 1973 is perhaps the most important piece of legislation pertaining to undeclared war, with the exception of the powers laid out in the Constitution itself. As discussed when defining undeclared war, this resolution clearly defined what roles Congress and the President have in formally entering into wars. When first passed through Congress, President Nixon vetoed the resolution claiming that it abridged presidential power as Commander in Chief of the military. This raised the question of how far presidential power as Commander extends and reinforced the need to define the balance between the Executive and Legislative branches in this regard. Congress garnered the two-thirds vote necessary to override the veto and the resolution became law anyway. Although there has not been a formally declared war since this piece of legislation was passed, many of the conflicts the U.S. has entered into did follow the guidelines set forth in the resolution.

The next instance of undeclared war following the War Powers Resolution was President Ronald Reagan's commitment of U.S. troops to Beirut in 1982. This was part of a peacekeeping mission to deal with the consequences of the Israeli invasion of Lebanon. The guidelines of the mission were somewhat loose and unclear, as it seems to be with most undeclared wars. The troops were mandated to restore order, support the weak Lebanese government, and work for the withdrawal of foreign forces from Beirut[5]. Due to their lack of clear directives, the troops soon found themselves entangled in the Lebanese civil war, which was a result of some Lebanese people being sympathetic to the Israeli cause. Eventually, the American troops, rather than the

[5] "A Chronology of U.S. Military Interventions: From Vietnam to the Balkans." PBS: Frontline. Accessed 5 December 2015.

Lebanese, conducted attacks. This culminated in an attack on the Marine base in Beirut; a truck bomb killed 241 Marines. Following this attack, the Secretary of State at the time, George Shultz, called for an investigation into the attacks and the security of diplomatic agencies overseas. The report the investigation produced was titled the Inman Report. This report created the State Department's Bureau of Diplomatic Security and Diplomatic Security Service, both of which serve as the security and law enforcement arms of the Department of State. In this instance of terror and undeclared war, the government did not restrict the rights of the American people and were still able to accomplish its goal of protecting national security moving forward. This concept will continue to be tested for each instance of undeclared war.

The United States again found itself entrenched in conflict in the Persian Gulf War in 1990. Saddam Hussein surprised much of the world in the summer of 1990 by accusing Kuwait of siphoning oil from a field on a border the countries share. Many were under the impression that the peace talks between Iraq and Iran were going well and that this area would soon resolve all its conflicts. However, this accusation made it clear that was not the case. Hussein demanded that Kuwait and Saudi Arabia cancel $30 billion of Iraq's foreign debt as he claimed they were conspiring to pander to Western nations that import their oil. Despite attempts at peace negotiations between Iraq and Kuwait, on August 2, 1990, Hussein ordered his troops to invade Kuwait. A few days later, after discussions with the UN Security Council and other international organizations, the U.S. commenced Operation Desert Shield. This operation sent U.S. Air Force planes to Saudi Arabia to protect against a potential attack there. Iraq continued to increase its forces in Kuwait and garner support from other nations, so the United Nations authorized the use of all necessary means of force against the Iraqi army. In accordance with this authorization, the U.S. devised Operation Desert Storm to be launched on January 17, 1991. This operation

consisted of an air offensive to hit Iraq's air forces and then move onto its communications networks, weapons plants, oil refineries, and many other important assets to the Iraqis. The mission was deemed a great success and was used to counter arguments claiming undeclared war was unorganized and without clear directives or goals. The war continued on the ground and the coalition forces were eventually to virtually cripple the Iraqi forces. President George H.W. Bush declared a ceasefire in February and peace terms were negotiated. The Persian Gulf War became the model for undeclared wars due to its great success, so many did not question this involvement as much as past conflicts.

During the Persian Gulf War there were claims of the government restricting rights and exercising censorship. The one reporter who was allowed in Iraq was extremely restricted in what he could publish and what interviews and access he was granted. However, this was not the result of an initiative of the U.S. government, these were restrictions put in place by the Iraqi government. The claims of censorship persisted anyway, and were given even more fuel when the reporters in Saudi Arabia were given strict guidelines. This was due in large part to the actions of the press during the Vietnam War. Many supporters of the Vietnam War blamed the press for losing this war for America due to their negative and critical reporting of the war efforts. Rather than complying with what the administration would have liked these reporters to print, they roamed the battlefields individually and interviewed soldiers on the frontlines. This gave them a very different perspective than the one presented by the government at home. These negative news stories further incited the already inflamed American opposition to the war and made it very difficult for the administration to win the war. After examining these effects, many U.S. government officials decided it was necessary to restrict the press in times of war. Thus, during the Persian Gulf War the U.S. government initiated a policy stating that journalists could

only travel outside of the Kuwaiti and Saudi Arabian capitals in a pool of reporters escorted by a military officer. In these pools they were permitted to interview military personnel, but the escort was required to be present. Additionally, before printing any of their stories they had to be reviewed by the United States military security review system. This system had the authority to delete or change any information in the story under the guise of "military sensitive information." Some news outlets began filing a lawsuit claiming that their First Amendment right to freedom of the press was being violated. Unfortunately for those involved, the lawsuit was not heard by a judge before the war ended. The fact that this lawsuit came about shows that many believed their rights were being violated in the interest of national security. This thesis will examine if this same outcome holds true for future instances of undeclared war.

The next instance of undeclared war is what this thesis focuses on most heavily, the wars in Afghanistan and Iraq. In order to decide whether rights were restricted or not, we must first examine the conditions that existed at the time. The War in Afghanistan was a result of the terrorist attacks on the Twin Towers of the World Trade Center in New York on September 11, 2001. Following these attacks, President George W. Bush demanded that Osama bin Laden be handed over to the United States and that al-Qaeda be expelled from Afghanistan. The Taliban did not comply with the request, so the U.S. launched Operation Enduring Freedom on October 7, 2001 and sent troops into Afghanistan. Along with the United Kingdom, the U.S. was able to drive the Taliban from power and build military bases around the country. However, this was not the end of the conflict and the Taliban reorganized and launched an insurgency to counter the efforts of the U.S. and NATO in rebuilding Afghanistan. This opposition continued until May 2011 when Navy SEALs completed a mission to kill Osama bin Laden. After this, NATO began

forming exit strategies and initiated peace talks. There are still residual forces there so the U.S. did not withdraw abruptly, but they are planned to withdraw completely by the end of 2016.

While this is technically an undeclared war, there is some debate that Congress gave an informal authority for the President to engage in this conflict. Congress passed the Authorization for Use of Military Force (AUMF) on September 14, 2001, and granted the President authority to use all necessary and appropriate force against those whom he determined planned, authorized, committed or aided the September 11 attacks, or who harbored said persons or groups.[6] Although this resolution was clearly not a formal declaration of war, it does seem to grant the president authority to use whatever means he deems necessary to deal with the situation at hand. Some may argue that these means include engaging in military combat. Despite this authorization, this will still be viewed as an undeclared war for the purposes of this thesis as there was no congressional action entering the United States into a war.

During the War in Afghanistan, the U.S. also entered into another conflict: the Iraq War. This undeclared war was in response to the terms set out in the peace negotiations following the Persian Gulf War. Iraq was required to halt production of weapons of mass destruction and to allow U.N. weapons inspectors access to suspected weapons production sites. The country had not complied with these terms, so in 2002 President Bush threatened military action if they did not begin allowing inspections. Despite numerous reports and inspections stating that Iraq was beginning to comply, the Bush administration chose to present information claiming that Iraq possessed materials to create weapons of mass destruction. There were a number of instances where this rhetoric appeared and many researchers and investigators attempted to counter it but were quickly quieted. According to the Downing Street Memo from a meeting of the British

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[6] 107th Congress. Public Law 107-40: Authorization for the Use of Military Force.

Parliament, "George Bush wanted to remove Saddam Hussein, through military action, justified by the conjunction of terrorism and WMD [weapons of mass destruction]. But the intelligence and facts were being fixed around the policy."[7] Essentially, it seemed as though the administration would put forth any information necessary to get authorization for military action against Iraq. These efforts culminated in the Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq in October of 2002. It is important to note that this was not a formal declaration of war, but merely an authorization for the president to send in troops. The invasion was successful in taking down the regime of Saddam Hussein, but spent many years following fighting off insurgencies. The undeclared war dragged on for many years and became a point of contention among the American people.

The Judiciary Branch: final protector of civil liberties?

It has been made quite apparent that the Legislative and Executive branches play a large role not only in entering into these conflicts, but also in determining how these conflicts affect the rights of the American people. The third branch of the U.S. government, the Judiciary, also plays a large role in resolving these conflicts. It is up to the Courts to decide the constitutionality of the actions that Congress and the President are taking, and whether or not these infringe upon the civil liberties granted to American citizens by the Constitution. Although the Judiciary is not the only branch that determines civil liberties, oftentimes it is the stage of final appeal.

There are a number of historical rulings by the Supreme Court that dealt with civil liberties in times of conflict. First, *Schenck v*. *United States* (1919) addressed the enforcement of

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[7] Matthew Rycroft. "The Secret Downing Street Memo." *The Downing Street Memo(s).* 23 July 2002. Accessed 3 December 2015.

the Espionage Act of 1917 during World War I. While this case occurred during an officially declared war, it is still important to explore the precedents set for free speech cases in the future. This case developed when Charles Schenck, a member of the Executive Committee of the Socialist Party in Philadelphia, oversaw the mailing of leaflets urging men not to obey the draft. These leaflets were sent to men who were subject to compulsory conscription. They compared the draft to involuntary servitude and claimed that it was a "monstrous wrong motivated by the capitalist system".[8] These pamphlets suggested peaceful actions such as petitioning to have conscription repealed. Schenck was tried and convicted under the stipulations in the Espionage Act of 1917, which prohibited, among other offenses, interference with military operations or recruitment. He was charged with conspiracy to violate the Espionage Act by attempting to cause insubordination in the military and to obstruct recruitment.[8] Schenck appealed the conviction claiming that his First Amendment rights were being violated.

Justice Oliver Wendell Holmes Jr. delivered the unanimous opinion of the Court. The Justices upheld the conviction claiming that the Free Speech clause of the First Amendment does not protect speech that is deemed unlawful by the Espionage Act, because the circumstances in wartime are different than peacetime. Holmes made it clear in his opinion that because Schenck distributed the pamphlet, it must have intended to cause some kind of effect. Holmes claimed that this effect must have been to influence draftees to obstruct the draft even though the pamphlet only implicitly encouraged protesting.[9] Intent, even if inferred rather than explicitly stated, was key to this decision. Perhaps the most important aspect of Holmes' opinion was the

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[8] "*Schenck v. United States*." Oyez. Accessed 1 December 2015.

[9] Melvin I. Urofsky and Paul Finkelman. *Documents of American Constitutional and Legal History*, 3rd ed. "*Schenck v. United States*" (New York: Oxford University Press, 2008). 424-425.

emphasis he placed on the circumstances surrounding the speech in deciding whether it is protected or not. He stated that in other places or times, the ideas expressed in the pamphlet might have been protected. However, because the nation was at war this speech was seen as a hindrance to the war effort and could not be tolerated. This decision also set forth the "clear and present danger" standard that became precedent for many free speech cases in the future.

> 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.[10]

Schenck v. United States (1919) not only left the legacy of the "clear and present danger standard," but also made clear that rights in times of peace are different from rights in wartime. This was upheld in a number of cases following this one, and is a main theme to be explored in this thesis.

Schenck v. United States (1919) was quickly followed by *Abrams v. United States* (1919) which was similar in nature, but dealt more closely with the 1918 amendment to the Espionage Act, more commonly referred to as the Sedition Act of 1918. The Sedition Act added to the offenses that were illegal under the Espionage Act. These additions included speech that criticized or expressed negativity about the government or war effort. The *Abrams* case began with a number of Russian immigrants living in New York who printed flyers protesting the United States involvement in Russia (the Wilson administration had sent troops to Russia in order to reinforce the Eastern Front). These flyers were then distributed at an anarchist meeting in New York City, and the next day one of the defendants was arrested for throwing the flyers out of a fourth floor window of a hat factory in Manhattan. Both the printers and distributors of these flyers were arrested and when tried, they were convicted of inciting resistance to the war

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[10] Urofsky and Finkelman. *Documents: Schenck v. United States* (2008): 424-425.

effort and of urging curtailment of production of essential war material.[11] The defendants appealed the decision to the Supreme Court, which upheld the conviction in a 7-2 vote.

Justice John Hessin Clarke delivered the majority opinion, citing the clear and present danger standard that Holmes had created in the *Schenck* decision. He claimed that the leaflets called for strikes and revolution, and thereby aimed to curtail the production of munitions.[12] He claimed that these created a danger to the Allied war effort and thus the men's conviction passed the clear and present danger test. The Court upheld the constitutionality of the Espionage Act once again, as well as the amendments presented in the Sedition Act.

Justice Holmes crafted the dissent, joined by Justice Louis Brandeis, and claimed that the "clear and present danger" test was not satisfied. Holmes argued that in order to consider the actions of the defendants criminal, the Sedition Act required that there must be an intent "to cripple or hinder the United States in the prosecution of war" via curtailment.[13] He did not find this intent in the pamphlets the defendants distributed. In fact, Holmes saw no real threat in the pamphlets as he believed they were ridiculous rantings. He did not believe that any person could be persuaded to take action by the rhetoric in the pamphlets. Holmes arguably moved away from the opinion he wrote in *Schenck*, because he thought it necessary to protect free speech unless it truly caused damage to the government or the U.S. war effort. Just as Holmes did in the *Schenck* case, he reiterated that the U.S. government has more power to prevent speech that poses a clear and imminent danger in times of war than in times of peace. However, in this instance he qualified this statement by adding, "But as against dangers peculiar to war, as against others, the

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[11] "*Abrams v. United States.*" Oyez. Accessed 1 December 2015.
[12] Urofsky and Finkelman. *Documents: Schenck v. United States* (2008): 424-425.
[13] Urofsky and Finkelman. *Documents: Schenck v. United States* (2008): 424-425.

principle of the right to free speech is always the same."[14] He clarified by stating that only the presence of immediate evil (or intent of immediate evil) warrants the limitation of free speech and expression. Holmes staunchly supported free speech because he believed a competitive marketplace for ideas was the only way to find the ultimate truth in society.

Abrams v. United States (1919) leaves behind its own legacy in regards to the "clear and present danger" standard. After the *Schenck* and *Abrams* decisions, the clear and present danger standard was used up until the *Brandenburg v. Ohio* (1968) case, which created a new standard that stated speech could only be prosecuted if its intent was to produce imminent lawless action. This standard is similar, but encompassed a bit more than clear and present danger. The "imminent lawless action" standard required the actor to intend to incite crime as a result of his speech. The "imminent lawless action" standard has been used widely in free speech cases since. However, one of the cases to be studied in this thesis, *Holder v. Humanitarian Law Project* (2010) revived the arguments used in Holmes' dissent to the *Abrams* decision. The three dissenting Justices in *Holder* argued that the defendants did not have the specific intent to aid in terrorist acts and thus could not be prosecuted for attempting to support terrorist acts. *Holder* and *Citizens United v. FEC* (2010) are the only recent cases that have referenced Holmes' arguments in *Abrams*, as the *Brandenburg v. Ohio* standard is now used more often in dealing with free speech challenges.

The Supreme Court has also handed down decisions regarding the freedom of the press in wartime, which go hand in hand with freedom of speech. *New York Times v. United States* (1971), or as it was nicknamed the Pentagon Papers Case, dealt with the publication of documents from the Department of Defense detailing a study of the United States involvement in

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[14] Urofsky and Finkelman. *Documents: Schenck v. United States* (2008): 424-425.

Vietnam. These documents revealed intimate details of all actions taken in Vietnam, much of which had not been shared with the public prior to its publication. This leak caused a litany of legal issues, as Daniel Ellsberg, the employee that leaked the documents, was charged with espionage, conspiracy, and theft of government documents. Ellsberg provided copies of the documents to the press and the *New York Times* published the first article about the Pentagon Papers on June 13, 1971, followed quickly by the *Washington Post* on June 18, 1971.[15] The papers received orders to cease further publication of the Pentagon Papers on the grounds that these articles would cause harm to the defense interests of the United States. The administration intended to restrain publication to prevent further printings of information found in the study of the U.S. involvement in Vietnam. There ensued a flurry of activity in both the District Court and the Court of Appeals which heard two cases each. One district court issued an injunction against further publication, while the other did not. As a result of this confusion, the case made its way to the Supreme Court. In a 6-3 vote the Court struck down the injunctions, but came to no consensus on the reasoning. Each Justice wrote his own opinion due to the lack of consensus. This demonstrates the varying opinions that exist on how rights should be balanced with national security in times of war, even within the Supreme Court.

Justice Hugo Black, joined by Justice William O. Douglas, argued that the injunctions never should have been issued, because they were a gross violation of the First Amendment. He added, "Only a free and unrestrained press can effectively expose deception in government."[16] Justice Douglas, joined by Justice Black, argued that any power the government possesses must come from its inherent power. The inherent war power must stem from a declaration of war, only

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[15] Urofsky and Finkelman. *Documents: "New York Times Company v. United States, United States v. Washington Post Company"* (2008): 636-638.

[16] Urofsky and Finkelman. *Documents: "New York Times Company v. United States, United States v. Washington Post Company"* (2008): 636-638.

issuable by Congress and not the President. Thus the Court cannot decide what weight wartime carries in the abridging of freedom of the press in this case. There had been no official declaration of war. Justice William Brennan wrote another concurring opinion, arguing that prior restraint cannot be granted based on conjecture that nuclear consequences may or may not arise. He saw no proof that the publication of the information in the Pentagon Papers would cause drastic events. Justice Potter Stewart, joined by Justice Byron White, concurred with the reasoning that it is the President's responsibility to protect internal security and the dissemination of information. Stewart claimed that it was not within the jurisdiction of the Court to expose and scrutinize government secrets. Stewart also agreed that there is not enough evidence to convince him that the publication of this information would cause irreparable damage to the nation. Justice White, joined by Justice Stewart, provided a concurrence as well. He was of the opinion that these documents would have a damaging effect, but he did not agree that the government had sufficiently satisfied the great burden that must be met to allow prior restraint.

The sole dissent written by Justice John Marshall Harlan, joined by Chief Justice Warren Burger and Justice Harry Blackmun, first critiqued the rushed timeline of this case. Harlan did not believe that the Justices had adequate time to review the case and make truly thoughtful and informed decisions. However, he accepted this fact as the reality he must deal with and continued with his dissent. He believed the determination of the probable fallout of the publication of these documents was the duty of the president, not the Court. Thus, Harlan did not believe the Court could re-determine for itself what the impact on national security would be and it had to trust the president's judgment to allow the injunction. As was made quite apparent in *New York Times v. United States* (1971), the issue of when and how rights should be balanced

with national security interests in times of war has produced many varying opinions. Even the nine Justices of the Supreme Court could not come to one determination in 1971!

The combination of both the undeclared War in Afghanistan, which began in October 2001, and the undeclared Iraq War, which began in March 2003, with the effects of the Patriot Act, drove much attention to civil liberties. This led to claims of restricted rights and gross expansion of executive power in the media which created conversation among the public. Through analyzing this time period via the Supreme Court cases *Holder v. Humanitarian Law Project* (2010) and *Snyder v. Phelps* (2011), this thesis will attempt to determine the extent to which these claims hold true.

Holder v. Humanitarian Law Project and *Snyder v. Phelps* each focused on different aspects of speech. *Holder* grappled with whether actions based in beliefs constitute speech and *Snyder* debated the line between public and private speech. Overall, these cases give a comprehensive overview of exactly what speech is in the post-9/11 undeclared war era. The Court in *Holder* did not allow material support to be given free speech protections, which makes defining exactly what speech encompasses in this era a bit unclear. *Snyder* showed that the Court gives more deference to public speech, which the Court defined as speech that is on issues of public concern and contributes to open debate. Although at face value these cases may seem quite different, they fit together to bring a different piece of free speech jurisprudence to light. In examining them side by side, one can get a truly comprehensive view of how free speech is protected, or unprotected, in the post-9/11 undeclared war era.

Chapter 2*: Holder v. Humanitarian Law Project* (2010)

Holder v. *Humanitarian Law Project* (2010) deviated from much of the previous First Amendment jurisprudence of the Supreme Court. Prior to *Holder*, the Court very rarely restricted First Amendment rights so this opinion that very obviously limited freedom of speech and association stood out among its contemporaries. The case involved self-identified humanitarian groups that wished to provide certain aid and services to organizations that were engaged in terrorist activities abroad. Secretary of State Madeleine Albright designated these organizations as foreign terrorist organizations (FTOs), and as such the humanitarian groups could be prosecuted for providing FTOs with aid that constituted "material support." *Holder* examines the definition of material support, the material support statute's implication on freedom of speech, and the material support statute's implication for freedom of association.

The case had a long and complex twelve-year history before being heard by the Supreme Court. *Humanitarian Law Project v*. *Reno* (1998), which would later evolve into *Holder v*. *Humanitarian Law Project* (2010), first began litigation against provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996. These provisions, which limited providing material support to foreign terrorist organizations, evolved over time and the first case presented by plaintiffs was a bit different than the case that was presented to the Supreme Court. While the core issues remained the same, the material support statute had been amended, clarified, and narrowed over time.

Despite the efforts to clarify and improve the laws limiting support of foreign terrorist organizations, the plaintiffs that originally filed *Humanitarian Law Project v*. *Reno* (1998) were still not satisfied. Thus, after a long legal battle, their case (now *Holder v*. *Humanitarian Law Project)* finally came before the Supreme Court. The central issues in this case were whether the

laws limiting "material support" of foreign terrorist organizations were unconstitutionally vague, in violation of the First and Fifth Amendments, and whether these laws violated First Amendment rights to free speech and association. The Court, in a 6-3 ruling, decided that the statute was not unconstitutionally vague and did not violate the rights of freedom of speech and association. Chief Justice John G. Roberts penned the majority opinion, while Justice Stephen Breyer wrote the dissent joined by Justice Ruth Bader Ginsburg and Justice Sonia Sotomayor.

Anti-Terrorism and Effective Death Penalty Act of 1996:

The Anti-Terrorism and Effective Death Penalty Act of 1996 was passed in response to the World Trade Center bombing in 1993 and the Oklahoma City bombing in 1995. On February 26, 1993, a truck bomb exploded in a parking garage below the World Trade Center building, killing six people and injuring more than 1,000.[17] On April 19, 1995 a truck bomb exploded in front of the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people and injuring hundreds more.[18] In response to these attacks, Congress created legislation aimed at preventing future terrorist attacks.

The stated purpose of the AEDPA was "to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes."[19] The legislation did this by means of providing restitution and assistance to victims of terrorism; designating foreign terrorist organizations and placing prohibitions on funding; removing alien terrorists and modifying

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[17] "1993 World Trade Center Bombing Fast Facts." CNN. 13 February 2015. Accessed 10 April 2016.

[18] "Terror Hits Home: The Oklahoma City Bombing." The Federal Bureau of Investigation. Accessed 7 February 2016.

[19] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

asylum procedures; restricting nuclear, biological, or chemical weapons; implementing the plastic explosives convention; changing criminal law involving terrorist offense including increased penalties and criminal procedures; commissioning a study to determine the constitutionality of restrictions on bomb-making materials; and changing funding and clarifying jurisdiction for law enforcement related to terroristic threats. The most important of these provisions for this thesis is the designation of foreign terrorist organizations and prohibitions on funding. Specifically, this legislation states:

> The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that – (A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 212 (a)(3)(B)); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.[20]

Additionally, the prohibition on providing material support to designated foreign terrorist organizations is highly relevant. There is much dispute over what exactly "material support" includes and whether it is constitutional to prohibit it. For example, the plaintiffs in *Holder* argue that material support is vague and they are unsure of what activities are prohibited by this statute, while lawmakers argue that it clearly delineates specific activities that are prohibited such as monetary contributions, advice, providing personnel, and various other activities. The statute itself reads:

> Currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosive, personnel, transportation, and other physical assets, except medicine or religious materials.[21]

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[20] AEDPA, 1996.
[21] AEDPA, 1996.

Legislators in support of the AEDPA claim that this provision is "in the interest of law enforcement and national security, and in furtherance of U.S. foreign relations."[22] As will be discussed later, the balancing of these interests in relation to the interests of the American people becomes a point of contention.

Origins of Case in Humanitarian Law Project v. Reno:

In 1997, then Secretary of State Madeleine Albright designated over thirty organizations as foreign terrorist organizations (FTOs). Secretary Albright designated both the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) as foreign terrorist organizations. In accordance with the parameters for designating a group as an FTO, Secretary Albright found that both the PKK and LTTE were foreign organizations and they engaged in terrorist activity. In her opinion this activity threatened the national security of the United States and qualified the organizations to be classified as FTOs. The PKK was founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey; since then its aims as an organization have shifted and now they are more focused on gaining civil rights and some level of autonomy.[23] The activities that earned the group the designation as an FTO included various military activities directed as both security forces and civilians in southeastern Turkey as well as urban terrorist attacks in southeastern Anatolia.[24] Due to the relationship between the

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[22] *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176 – Dist. Court, CD California 1998.
[23] Greg Bruno. "Inside the Kurdistan Workers' Party." Council on Foreign Relations. 19 October 2007. Accessed 10 April 2016.
[24] Office of the Coordinator for Counterterrorism. "Country Reports on Terrorism 2011." U.S. Department of State. 31 July 2012. Accessed 10 April 2016.

U.S. and Turkey as partners in counterterrorism efforts, the Secretary viewed this as a threat to the national security of the U.S.

The LTTE was founded in 1976 with the aim of creating an independent Tamil state in Sri Lanka, as Tamils claim they are persecuted by the majority group of Sinhalese.[25] The Tamil Tigers engaged in the assassination of both India's Prime Minister and Sri Lanka's President as well as other militaristic activities such as suicide bombings that threatened civilians and government officials alike. Additionally, the group acquired weapons, communications, funding, and other supplies from around the world including North America.[26] The Secretary designated these activities as terroristic in nature and as a threat to the national security of the United States and thus designated the LTTE as an FTO. The LTTE petitioned for review of their designation as an FTO in the D.C. Circuit Court, which the AEDPA allows for:

> Not later than 30 days after publication in the Federal Register of a designation…the designated organization may seek judicial review in the United States Court of Appeals for the District of Columbia Circuit.[27]

The organization claimed that their designation as an FTO violated their procedural due process rights because they had not received pre-designation notice and hearings. However, the Court held that the group did not have the constitutional rights to due process and a hearing as they were a foreign entity. The Justices allowed the plaintiffs to challenge the designation based on the procedures employed by the Secretary in her designation, but then did not find any issues or questionable judgments in her decision. Due to the lack of evidence showing the LTTE is not a terrorist organization, the Court upheld the designation as a foreign terrorist organization. The PKK did not challenge its designation.

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[25] Preeti Bhattacharji. "Liberation Tigers of Tamil Eelam (aka Tamil Tigers)(Sri Lanka, separatists)." Council on Foreign Relations. 20 May 2009. Accessed 10 April 2016.
[26] Office of the Coordinator of Counterterrorism. "Country Reports."
[27] AEDPA, 1996.

Prior to their designations as terrorist organizations, both the LTTE and the PKK had histories of receiving various methods of assistance from the Humanitarian Law Project, a self-described human rights organization based in the United States. The HLP is a non-governmental organization that has consultative status to the UN. This status privileged the organization to receive updates from the UN about issues and opportunities pertinent to their cause. The HLP's website states that the organization is "dedicated to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights laws and humanitarian law."[28] The organization claims its long-term goal is to strengthen the human rights standards around the globe and discuss issues related to these standards with activists and legislators.

This assistance from the Humanitarian Law Project included activities such as soliciting funds for or making contributions to the political branches of the PKK and LTTE, advocating on the organizations' behalf before the UN Commission on Human Rights and the U.S. Congress, training the organizations in how to engage in political advocacy and how to use international law to seek redress for human rights violations, writing and distributing publications supporting the organizations and their causes, advocating for freedom of political prisoners convicted for being members of the organizations, working with members at peace conferences, and providing lodging to members of the PKK and LTTE in connection with these activities.[29] The Humanitarian Law Project grew concerned that its members might be prosecuted for providing assistance to these groups in the form of "monetary contributions, other tangible aid, legal training, and political advocacy" under the Anti-Terrorism and Effective Death Penalty Act of

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[28] Humanitarian Law Project International Educational Development, Inc. "Humanitarian Law Project." Accessed 1 March 2016.
[29] *Humanitarian Law Project v. Reno* (1998).

1996 (AEDPA).[30] The human rights advocacy group claimed that this assistance was only to aid the PKK and LTTE's nonviolent and non-terroristic goals, which included the humanitarian and political arms of the organizations. In an amicus brief filed by the Carter Center et al., filers argue that the activities of these humanitarian groups are "intended to dissuade the (terrorist) group[s] from engaging in unlawful activities."[31] According to the brief, this occasionally got humanitarian groups providing assistance involved in the violent activities of the terrorist groups in order to resolve conflict or provide strategic advice on more peaceful means of resolution. The filers of the amicus brief all had a vested interest in the outcome of this case because they carried out similar activities to the Humanitarian Law Project and feared they could also be in danger of prosecution if this case upheld the material support statute.

The first challenge to the prohibitions on providing aid or assistance to FTOs as detailed in the AEDPA was in the case of *Humanitarian Law Project v. Reno* (1998). The plaintiffs in this case were the Humanitarian Law Project, Ralph Fertig (president of HLP), Nagalingam Jeyalingam (a Tamil physician), and five nonprofit groups dedicated to the interests of persons of Tamil descent (predominantly from India and Northern Sri Lanka).[32] This case came before the District Court of California and determined whether the plaintiffs fit the criteria to have a preliminary injunction granted. This preliminary injunction would allow the plaintiffs to continue providing aid and assistance to both the PKK and LTTE without fear of prosecution until the final outcome of the case was decided. The plaintiffs first tried to establish that the PKK and

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[30] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 – Supreme Court 2010.
[31] Brief of The Carter Center, Christian Peacemaker Teams, Grassroots International, Human Rights Watch, International Crisis Group, The Institute for Conflict Analysis and Resolution at George Mason University, The Kroc Insititute for International Peace Studies at Notre Dame University, Operation USA, and Peace Appeal Foundation for Humanitarian Law Project, *Holder v. Humanitarian Law Project* 2010.
[32] *Holder v. Humanitarian Law Project* (2010).

LTTE were not in the wrong, and thus did not deserve the designation as foreign terrorist organizations. If they could establish this claim, there would be no reason to prohibit the HLP from providing aid to these groups. Humanitarian Law Project claimed that the PKK was victim to human rights violations carried out by the Turkish government and therefore disadvantaged by an armed conflict governed by Geneva Conventions and Protocols.[33] Due to these factors, the HLP claimed that the PKK was not a terrorist organization under international law. In regards to LTTE, HLP claimed they were an ethnic group that was subjected to human rights abuses and discriminatory treatment by the Sinhalese.[34] The Sinhalese were the dominant ethnic group in Sri Lanka and also made up the majority of those in power in Sri Lanka.

Not only did the plaintiffs dispute the PKK and LTTE's designations as terrorist organizations, they also claimed that the AEDPA's provisions were unconstitutional. The specific violations they cited were: the First Amendment guarantees of free speech, association, and petition of the government for redress of grievances because the statute criminalized the provision of material support or resources to designated FTOs without requiring a specific intent to further the organizations' unlawful ends; the First and Fifth Amendments because the Secretary of State was granted unreviewable authority to designate organizations as terrorist organizations which, they claimed, invited impermissible viewpoint discrimination; and the First and Fifth Amendments because the terms "material support and resources" and "foreign terrorist organization" were impermissibly vague, failed to provide adequate notice of prohibited activity, and gave government officials unfettered discretion, causing individuals to avoid protected First Amendment activity.[35]

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[33] *Humanitarian Law Project v. Reno* (1998).
[34] *Humanitarian Law Project v. Reno* (1998).
[35] *Humanitarian Law Project v. Reno* (1998).

In response to claims that the plaintiffs were handed criminal sanctions due to guilt by association, which in their view directly violated the First Amendment right to freedom of association, the court claimed this was not the case. The Justices recognized that the AEDPA did designate specific organizations that cannot be provided material support. However, these designations were not based on the political viewpoints or subject matter that the organizations promoted; instead, the designations were based on the fact that they engaged in terrorist activity and had been designated as foreign terrorist organizations by the Secretary of State. Therefore, the viewpoint discrimination argument did not stand and the court did not find that the plaintiffs were being unfairly restrained by guilt by association. This addressed the first challenge the plaintiffs posed, so the court moved on to determine if the government's interest in enacting AEDPA justified its impact on the First Amendment, specifically freedom of association.

In order to defend the AEDPA's relationship to the First Amendment, government officials and attorneys for the State Department claimed that national security and foreign policy were compelling interests that legitimately limited First Amendment rights. The plaintiffs did not dispute that these would be a compelling interest to restrict freedom of speech and association, as these rights are not absolute and are subject to curtailment if the government can demonstrate valid reasons. However, HLP argued that the legislation was directed at their freedom of speech and association rather than at protecting national security and foreign policy. HLP further argued that contributions aimed at furthering political and humanitarian goals were essential to protecting national security and deterring terrorism. In response to this, the court cited the argument of legislators that this material support could a) be diverted to their terrorist activities even if it was aimed at political and humanitarian causes, and b) these funds could free up terrorist organizations' other funds to spend on terrorist activities. Thus the court found that the

government's interests far outweighed those of the plaintiffs. This was qualified, however, by adding that the AEDPA may not restrict First Amendment freedoms more than was essential to furthering these interests.[36] The plaintiffs argued that the AEDPA did restrict First Amendment freedoms more than was essential to protecting the interests of national security and foreign policy. Their reasoning for this argument was that the government restricted their support of what they believed to be legal, political and humanitarian activities of the PKK and LTTE. The prohibition of all types of material support was further bolstered by the claim of legislators that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[37]

The plaintiffs' next argument centered around the constitutionality of the Secretary of State having the unilateral power to designate groups as foreign terrorist organizations. In the judgment of the court, this power was assigned to the Secretary in the AEDPA, but also falls within her duties as Secretary. The Secretary serves at the pleasure of the President to carry out foreign policy objectives; these objectives include, but are not limited to, ensuring the protection of the U.S. government and its citizens as well as providing information to American citizens regarding the political, economic, social, cultural, and humanitarian conditions in foreign countries.[38] Thus, these duties require the Secretary to inform the American people what groups qualify as foreign terrorist organizations. It is also important to note that the State Department identified these groups in conjunction with the Attorney General and the Department of Treasury. Even though she has the power to designate these groups unilaterally, she consulted

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[36] *Humanitarian Law Project v. Reno* (1998).
[37] *Humanitarian Law Project v. Reno* (1998).
[38] "Duties of the Secretary of State." U.S. Department of State. 20 January 2009. Accessed 10 April 2016.

with other stakeholders to ensure these groups did merit the designation of foreign terrorist organization.

The plaintiffs claimed the Secretary's power to designate FTOs was in violation of both the First and Fifth Amendment as it permits viewpoint discrimination. However, there are multiple checks on the Secretary's power to designate foreign terrorist organizations. The AEDPA serves as one such check, as the law lays out guidelines for what constitutes a foreign terrorist organization. Additionally, the courts may review the Secretary's designations within thirty days. The court in its judgment reminded the plaintiffs of the power the executive branch possesses to oversee matters of foreign relations and national security. Finally, the judges concluded that there is no evidence that the Secretary indiscriminately designated either the PKK or the LTTE as terrorist organizations due to a disagreement with their political views. Thus, the court found no substance to the claims that the AEDPA violates the First and Fifth Amendments due to unchecked viewpoint discrimination.

The final complaint on behalf of the plaintiffs was that the AEDPA was unconstitutionally vague, in violation of the First and Fifth Amendments again. Their claim centered around two main arguments: 1) the AEDPA provides the Secretary with unchecked discretion to designate foreign terrorist organizations (which was refuted previously), and 2) the AEDPA's terms are unclear.[39] The Court agreed that "material support or resources," "personnel," and "training" were all unclear as to what exactly they entailed. The judges found that these provisions may prohibit First Amendment-protected activities; thus the plaintiffs demonstrated a probability of success on the merits of their claims of vagueness. As the purpose of this case was to secure a preliminary injunction on behalf of the plaintiffs, this probability of

[39] *Humanitarian Law Project v. Reno* (1998).

success meant that when the case itself was tried fully, these claims of vagueness would most likely be confirmed.

The Court granted, in part, the motion for a preliminary injunction. It was granted solely on the claim that the terms "personnel" and "training" were impermissibly vague. The Court ordered those two terms to be removed from the AEDPA. This decision was affirmed by the Court of Appeals, so it went back to the District Court for summary judgment on the merits. The summary judgment is a decision by the judge on the facts of the case without a full trial. At this point the District Court entered a permanent injunction against the bans on "personnel" and "training," which was then upheld by the Court of Appeals.

Changes Following Passage of the Patriot Act:

While *Humanitarian Law Project v. Reno* was still going through the court system, tragedy struck that would eventually impact this case. On September 11. 2001 two planes crashed into the Twin Towers of the World Trade Center in New York City, New York. This attack elicited similar responses as followed the World Trade Center bombing in 1993 and the Oklahoma City bombing in 1995, but on a larger scale. Just as the AEDPA was passed as a reaction to these attacks, the USA Patriot Act was passed in response to the 9/11 attack.

As the plaintiffs in *Humanitarian Law Project v. Reno* were challenging the constitutionality of provisions of the AEDPA, the United States Congress changed these terms and provisions. In 2001 the USA Patriot Act expanded the definition of material support and resources to include expert training and advice, which helped to define more precisely what the term material support entailed. In response to these changes, the plaintiffs from *Humanitarian*

Law Project v. Reno filed a second action in 2003, again challenging the constitutionality of these terms. In this case, the District Court in Central California held that the plaintiffs' claims were justiciable because the plaintiffs had sufficiently demonstrated a "genuine threat of imminent prosecution" and because the law had the potential to chill First Amendment protected expression.[40] The Court also held that the term "expert advice or assistance" was impermissibly vague.

The parties cross-appealed: both the plaintiff and respondent appealed to the higher court for a review of the decision. While these appeals were pending, the Ninth Circuit Court granted en banc rehearing of the 2003 decision in the original action concerning the terms personnel and training. This rehearing was granted due to intervening legislation; the laws were still being updated as these cases were being heard, thus making the decisions subject to change with the laws. While the parties awaited a decision in the rehearing, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), which again amended the definition of material support. This piece of legislation made it necessary for violators to have knowledge that the groups receiving assistance were foreign terrorist organizations or that they engaged in terroristic activity in order be found guilty. The act also updated the definitions of material support to include "service," defined "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," defined "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other specialized knowledge, and clarified the term "personnel" to only include those that directly worked for or with FTOs.[41]

The en banc Court of Appeals was made up of all of the judges from that circuit regardless of separate panels. These judges affirmed the rejection of First Amendment claims for

[40] *Holder v. Humanitarian Law Project* (2010).
[41] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458.

the same reasons that the Ninth Circuit stated in the 2000 decision. Essentially, the government had a compelling interest to curb free speech due to the nature of the threat of terrorism to national security. Many, including HLP, argued that this is not a reason to place a limit on free speech and that it should be protected at all costs. However, this argument assumes that the right to free speech is absolute and has no limits on its reach. Even in 1968, in the midst of the undeclared Vietnam War, scholars recognized the distinction between speech and action and how they could be restrained in some instances:

> …maintenance of a system of freedom of expression requires recognition of the distinction between those forms of conduct which should be classified as 'expression' and those which should be classified as 'action'; and that conduct classifiable as 'expression' is entitled to complete protection against governmental infringement, while 'action' is subject to reasonable and non-discriminatory regulation designed to achieve a legitimate social objective.[42]

Much of what the plaintiffs claimed was protected under the First Amendment could be categorized as action rather than expression. While these actions may serve to express some underlying messages, they are not in themselves simply expression of viewpoints. Thus, the Court decided the government's interest in protecting national security was more compelling than protecting the actions of the plaintiffs.

In addition to rejecting the First Amendment claims, the Court vacated the panel's 2003 decision, due to changes made in IRTPA. This decision had cited vagueness of terms, which no longer applied due to the changes to the law. The Appeals Court remanded to the District Court. The District Court then consolidated this with the cross-appeals concerning "expert advice or assistance" that the Ninth Circuit had also remanded to the District Court. The Court granted the

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[42] Thomas I. Emerson. "Freedom of Expression in Wartime." *University of Pennsylvania Law Review* 116:6 (1968): 975-1011.

parties summary judgment and gave partial relief to the plaintiffs due to vagueness, which was affirmed by the Court of Appeals.

The Court rejected the plaintiffs' claims that the statutes violated constitutionally protected rights. However, the Court held that the terms "training," "expert advice or assistance," and "service" were all vague. The government petitioned for certiorari and the plaintiffs filed a conditional cross-petition, both of which were granted. The Court did not explicitly state why they granted certiorari, but it may have been because a challenge to the material support statute had not yet been heard by the Court. The Justices may have considered it pertinent to rule on this in order to definitively disallow the support of these FTOs and stop the activities of the HLP. Thus, *Holder v. Humanitarian Law Project* (2010) made its way to the Supreme Court.

***Holder v. Humanitarian Law Project* (2010):**

Holder v. Humanitarian Law Project (2010) upheld the statutes prohibiting material support to designated foreign terrorist organizations. In a 6-3 vote, Chief Justice John G. Roberts delivered the majority opinion joined by Justice John Stevens, Justice Antonin Scalia, Justice Anthony Kennedy, Justice Clarence Thomas, and Justice Samuel Alito, with Justice Stephen Breyer penning the dissent joined by Justice Ruth Bader Ginsburg, and Justice Sonia Sotomayor.

The case centered on challenges to four terms under the umbrella of material support: training, expert advice or assistance, service, and personnel. After the twelve-year history of this case, the plaintiffs narrowed down specifically which terms were most problematic after the various rulings and decisions handed down by the Courts. The plaintiffs argued that these four terms were unconstitutional for three reasons: 1) they violated the Due Process Clause of the

Fifth Amendment because they were impermissibly vague, 2) they violated freedom of speech as protected in the First Amendment, and 3) they violated freedom of association also protected by the First Amendment. These are the same rights that the plaintiffs had argued since they first filed the case in 1998. While the statutes changed over the twelve years that this case was in the courts, the plaintiffs still argued the same rights were being violated. Even though each court prior to the Supreme Court denied the First Amendment claims, the plaintiffs continued to include them. The question of whether their complaints really could be classified as free speech came up, both in the Courts and outside. The government argued that the statute does not regulate speech; rather, it regulates conduct and thus their claims to free speech are invalid. The Court sought to dispute each of the constitutional claims one by one.

Prior to determining the validity of each of these claims, the Court established the process of review that this case demanded. The material support law dealt with restriction on speech and association due to the content of that speech and association. Thus Chief Justice Roberts decided the Court must review the statute with demanding scrutiny.[43] This demanding scrutiny requires that content-based laws be labeled invalid unless the government can show that the limitations on content use the least restrictive means to further a compelling interest on behalf of the government.

David Cole, the attorney for the plaintiffs, argued the case before the Supreme Court. Cole claimed that the plaintiffs sought solely to further the lawful ends of the FTOs that they wished to assist. Justice Scalia responded to this saying that the end that Congress sought was the elimination of these organizations entirely; thus the plaintiffs were at odds with the goals of the U.S. government from the beginning. The intent of labeling these groups as FTOs was to identify

[43] David Cole. "The First Amendment's Borders: The Place of *Holder v. Humanitarian Law Project* in First Amendment Doctrine." *Harvard Law and Policy Review* 6 (2012): 147-177.

them in order to prevent their activities and the support of their activities. Although, as the Justices asserted in their questioning, the plaintiffs were free to advocate on behalf of these organization and speak for their causes, it is when they provide "material support" that the issue arose. Despite being in opposition with the aims of the U.S. government, when asked if this was a betrayal of the nation. Cole claimed it was not. However, Justice Scalia disagreed during oral arguments claiming that while these organizations may not be carrying out terrorist acts specifically against the U.S., they were acting criminally and killing civilians of allies to the U.S.. Thus, this aid to these groups could be detrimental to the relations of the U.S. and the nation's allies if the U.S. was seen as aiding groups carrying out terrorist acts against its allies. Much of Cole's time in front of the nine Justices was focused on attempting to prove why the plaintiffs felt compelled to assist the PKK and LTTE. Cole also devoted much of his time to explaining how the law applied to HLP as there was not yet a conviction. The Justices found it very odd that this was a preemptive case, and none of the plaintiffs had been convicted under the statute they were challenging.

Elena Kagan, then Solicitor General, argued for the government. Unlike the plaintiffs, the government chose a different argument than what it had employed in the lower court proceedings. Previously, their arguments had focused on their claim that the activities in question constituted conduct rather than speech and thus required a lesser level of scrutiny. However, once in front of the Supreme Court, Kagan focused much more on how these aid activities could serve to legitimate the FTOs. She gave the example of Hezbollah, stating that Hezbollah builds homes in addition to building bombs. Therefore if you help Hezbollah build a home you are in

effect helping them to build a bomb.[44] This was based on the assumption that helping the organization with their legal, humanitarian projects freed up resources to carry out their terrorist activities. Kagan was then asked a litany of questions regarding the vagueness of the terms in question and what the difference between providing material support and speaking or advocating on behalf of an organization. She strictly adhered to the argument that the statutes were clear, and had even been amended to be made clearer in the USA Patriot Act and the Intelligence Reform and Terrorism Prevention Act.

First, the Court tackled the Fifth Amendment challenge. In order for the statute to be found impermissibly vague, the Court had to decide whether the statute provided a person of ordinary intelligence fair notice of what was prohibited.[45] In order to answer this question, the Justices examined each term at issue in relation to the activities in which plaintiffs wished to engage. In regards to wanting to train members of the PKK on how to use law to peacefully resolve disputes and how to petition representative bodies for relief, the Court posited that a person of ordinary intelligence would understand that these fall under the training of a specific skill, which is prohibited.[46] The Court also argued that this activity fell under the scope of expert advice or assistance, because a reasonable person would recognize that teaching the PKK these tactics emerged from advice founded in specialized knowledge. In regard to providing personnel and service, the Court did not find that the actions HLP wished to engage in fell under these categories and thus the vagueness claim did not apply. The Court argued that the statutory terms were clear in their applications to the plaintiffs' proposed conduct, especially in light of the

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[44] Oral Argument, 23 February 2010, *Holder v. Humanitarian Law Project* (2010). U.S. Supreme Court. Accessed 31 March 2016.
[45] *Holder v. Humanitarian Law Project* (2010).
[46] *Holder v. Humanitarian Law Project* (2010).

narrowed definitions that Congress provided. Thus the statute was not impermissibly vague in violation of the Due Process Clause of the Fifth Amendment.

After settling this claim, the Court moved on to the argument that the material support statute violated freedom of speech as protected in the First Amendment. The plaintiffs claimed that Congress had banned their "pure political speech," while the government argued that the only thing at issue was conduct not speech. The Court found the statements of both the plaintiffs and the government to be overstated in regards to political speech vs. conduct; the Justices reminded plaintiffs that the statute does not prohibit independent expression, and they reminded the government that the plaintiffs wish to communicate with the PKK and LTTE, which occasionally falls under speech. The Justices also cited the government's compelling interest in protecting national security, and the wide berth afforded to the government to do this. They revisited the argument provided in *Humanitarian Law Project v. Reno* that money is fungible and just because the FTO claims it will be used for humanitarian goals does not mean that it will not in reality be used to further terrorist actions. In addition to this argument in support of national security, the Justices argued that providing FTOs with material support of any kind serves to further terrorism globally. This is due to the strain placed on United States relations with its allies and the potential to undermine cooperative efforts between nations to prevent terrorist attacks both in the United States and abroad.[47] For the final argument regarding this claim, the Court recognized deference to both Congress and the Executive branch in matters related to national security or foreign relations that has been in place for decades. National security allows for a wider berth to be given as it is related to ever developing threats, which Congress and the Executive were designated to handle. Taken altogether, these arguments

[47] *Holder v. Humanitarian Law Project* (2010).

allowed the Justices to find that the statute, as applied to the plaintiffs in this case, was not in violation of the First Amendment right to freedom of speech.

Finally, the Justices addressed the plaintiffs' claim that the statute violated their freedom of association as set forth in the First Amendment. The Court refuted this claim because the statute did not prohibit being a member of one the designated FTOs or independently advocating for the group. Thus the Supreme Court upheld the statute and declared it was not in violation of the Constitution.

Justice Breyer wrote the dissent in which he claimed that the government did not make a strong enough case to justify the criminal prosecution for actions involving communication and advocacy of political ideas protected by the First Amendment. He argued that the First Amendment protects advocacy of all action, even if it is unlawful, as long as it does not incite or produce "imminent lawless action," the standard set forth in *Brandenburg v. Ohio* (1969).[48] In that case, Clarence Brandenburg (a Ku Klux Klan member) was arrested for advocating violence under Ohio's criminal syndicalism statute which prohibited advocating crime as a means of accomplishing political reform and assembling with groups that were formed to advocate these unlawful means of accomplishing political reform.[49] Brandenburg invited a reporter from a Cincinnati television station to a Ku Klux Klan rally at which members burned a wooden cross and made speeches about Klan activities and encouraging the potential for "revengeance" in the words of Brandenburg.[50] He was arrested for violating the criminal syndicalism statute which prompted Brandenburg to challenge the statute claiming it was unconstitutional under the First and Fourteenth Amendments. The Supreme Court overturned Brandenburg's conviction stating

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[48] *Holder v. Humanitarian Law Project* (2010).
[49] *Brandenburg v. Ohio,* 395 S. Ct. 444 – Supreme Court 1969.
[50] *Brandenburg v. Ohio* (1969).

that the government cannot punish the advocacy of force or illegal activity unless it is intended to incite imminent lawless action. Thus the "imminent lawless action" precedent was set, which replaced the "clear and present danger" standard set in *Schenck v*. *United States* (1919). The "clear and present danger" standard tested whether the speech in question were of a nature to create a clear and present danger of bringing about unlawful activity. In his concurrence, Justice Douglas wrote:

> This is, however, a classic case where speech is brigaded with action. They are indeed inseparable, and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution.[51]

This particular quote is interesting because it provides insight into a question presented in *Holder*, which is whether the material support in question is pure political speech or conduct. Douglas contended that speech and action can be quite intertwined and often action is a means of expression. However, in *Holder* the majority decided that what the HLP claimed was speech was, in their opinion, considered conduct. Douglas also made mention of the circumstances surrounding the curtailment of speech, which showed that it was understood that rights in times of war are different. "Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace."[52] The idea of restricting rights during wartime was not a new phenomenon; however it is interesting that Douglas clarified the war as declared. Do the same rules apply when the war is undeclared? Thus, following the logic of *Brandenburg's* imminent lawless action test, Breyer argued that the HLP did not intend to further the terrorist aims of the FTOs and therefore the material support statute could not criminalize their activity. He claimed that the First Amendment protected the HLP's advocacy for these groups.

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[51] *Brandenburg v. Ohio* (1969).
[52] *Brandenburg v. Ohio* (1969).

Also incorporating the freedom of association claim, Breyer noted that a person who associates with a group that participates in unlawful activities does not automatically forfeit his or her rights. Demonstrating that Breyer was thinking about the current state of undeclared war and the need to balance national security and civil liberties, he wrote that "not even the war power removes constitutional limitations safeguarding essential liberties."[53] This was in response to his colleagues' arguments that the threat of terrorism was ever-present and national security needed to be protected. Post-9/11 the government increased anti-terrorism measures and entered into undeclared war. These increased measures were a part of protecting national security and diminishing the terrorist threat. Thus these interests came to the forefront. One of the key points of this case was that the government's interest in protecting national security and foreign relations was more compelling than the interests of the plaintiffs. The prominence of these interests was due to the state of undeclared war.

Breyer also challenged the argument that the material support provided was fungible and could be used towards terrorist activities instead of humanitarian causes. He admitted that for money and tangible aid this fungibility was a correct assessment, money is easy to move around and there is no way of knowing for sure where it goes. However, advocacy and teaching were not fungible in the same manner and Breyer believed the majority overstretched this concept to back up their position. This overstretching was all based in the assertion that the aid had the possibility of being redirected to terrorist activities which would undermine the government's interest in protecting national security. This compelling interest was the foundation upon which the government's case sat.

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[53] *Holder v. Humanitarian Law Project* (2010).

Breyer also took issue with how to distinguish when speech will and will not be prosecuted. In his opinion, it was hard to determine where the line between accepted speech and prosecutable speech was which was liable to cause a chilling effect on protected speech. The chilling effect argument was first employed in the 1950s and 1960s and operates under the belief that the wrongful limitation of speech is more harmful than the overextension of free speech.[54] The chilling effect was applicable in *Holder* because, in Breyer's opinion, limiting this speech was liable to cause the marketplace of ideas to be limited as well out of fear of prosecution.

The dissent disagreed with the majority's caveat that as long as the activity was not coordinated with the FTO it was legal as well. In his opinion, it was difficult to distinguish the exact manner in which the activity had to be coordinated and which types of advocacy and communication were unprotected. This coordination could mean anything from simply advocating on behalf of the FTO's causes to being completely involved in all of their activities and planning.

Breyer also believed that the interpretation of the provision that required knowledge of an FTO's terrorist activities in order to be prosecuted is wrong. He proposed a different interpretation of that part of the statute: First Amendment free speech should only be criminalized if the defendant knows or intends that his activities will further the FTO's terrorist actions. This differed from the majority's interpretation because it only criminalized communication and association with these groups if it was guaranteed, or more than likely, that this interaction would contribute to unlawful activity. The majority's interpretation criminalized interactions with them even if there was no intent to further criminal activity.

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[54] Frederick Schauer. "Fear, Risk, and the First Amendment: Unraveling the Chilling Effect." *Boston University Law Review* 58 (1978): 685-732.

In the final section of his dissent, Justice Breyer made clear his thoughts on civil liberties in wartime. '"We have long since made clear that a state of war is not a blank check…when it comes to the rights of th[is] Nation's citizens."'[55] This quote came from *Hamdi v*. *Rumsfeld* (2004), in which Hamdi was being held prisoner indefinitely under premise of the War on Terror.[56] The Court found that while the government can hold enemy combatants, they must grant the detainees due process. Breyer used this precedent to bolster his argument that despite the expanded powers of government in wartime, this does not call for a curtailment of all constitutionally granted rights. Although, as Justice Douglas pointed out in *Brandenburg v*. *Ohio* (1969), there is a bit more leeway for government to exercise discretion regarding speech and other rights during wartime. He recognized that the powers to provide for national defense and foreign affairs are entrusted to the Executive and Legislative branches, but he reiterated that the Courts also have an obligation to protect the rights granted to citizens in the Constitution. Thus in his opinion, the majority went too far in restricting rights with the argument that it was due to the extremities of wartime. He claimed that regardless of the circumstances, rights of citizens are to be upheld.

Implications:

This was the most visible federal case since the 1960s to pass the test set forth in *Brandenburg v*. *Ohio* (1969). Essentially, speech must be protected unless it incites imminent lawless action. *Holder* was the first case to pass this test because the Justices claimed that the speech that the plaintiffs advocated would cause unlawful activity.

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[55] *Holder v. Humanitarian Law Project* (2010)
[56] "Hamdi v. Rumsfeld." Oyez. Accessed 3 March 2016.

Humanitarian groups were especially surprised and disappointed by the outcome of this case. One of the more prominent figures that spoke in opposition to the *Holder* decision was former President Jimmy Carter. He claimed that the decision threatened to criminalize much of the work that the Carter Center, which promotes human rights globally, does. Carter expressed this in a statement he released to the American Civil Liberties Union:

> We are disappointed that the Supreme Court has upheld a law that inhibits the work of human rights and conflict resolution groups. The 'material support law' – which is aimed at putting an end to terrorism – actually threatens our work and the work of many other peacemaking organizations that must interact directly with groups that have engaged in violence. The vague language of the law leaves us wondering if we will be prosecuted for our work to promote peace and freedom.[57]

Specifically, the Carter Center monitored the elections in Lebanon in 2009 in order to ensure they were free and fair. Under the material support statute, the Center's actions in explaining what the monitors would be looking for in the election would constitute expert advice and could be considered illegal.[58] This is just one example of the humanitarian services that would be limited by this statute, as many groups have claimed they are in fear of prosecution since the deliverance of this opinion.

There are others, though, who do not believe this case has such broad, sweeping implications for First Amendment rights and humanitarian aid. Robert Chesney, professor of law at the University of Texas, wrote in his analysis of the case that the Justices were intentionally narrow in their decision. They only interpreted the statute as applied to the types of aid that the plaintiffs claimed they wished to carry out, rather than all possible types of aid. This left open the door for future cases regarding this statute. Chesney also pointed out that the material support statute has not been used to convict offenders in "expression-sensitive ways" meaning that most

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[57] American Civil Liberties Union. "Court Upholds Broad Interpretation Of Anti-Terrorism Law That Inhibits Work of Humanitarian Groups." 21 June 2010. Accessed 10 April 2016.
[58] David Cole. "The First Amendment's Borders."

offenders were blatantly supplying weapons and items of that nature to FTOs.[59] The vast majority of these convictions were not of humanitarian workers with no intent to aid the terrorist activities of these groups. Rather, they were people clearly attempting to aid these terrorist groups in their unlawful activities. For Chesney, this justified the upholding of the material support statute because although it makes providing humanitarian aid more difficult, it also prosecutes those who are purposely assisting terrorist activities.

It is clear that the Justices were well aware of the current state of affairs in the United States when crafting their opinions. While it is easier to see in Breyer's dissent that he kept the interests of national security in mind in light of the War on Terror, these sentiments were also alive in the majority opinion. There are some scholars that believe this case was a detriment to First Amendment protections and it was based in fear of terrorism. Wadie Said, a professor at the University of South Carolina School of Law, claimed:

> The logical implication of *Humanitarian Law Project* is that terrorism is now an existential threat to the United States wherever it occurs…and that existential threat must be thwarted, even to the detriment of the First Amendment.[60]

Wadie Said is not alone in this opinion. Americans are becoming more and more likely to believe that they must choose between security and First Amendment rights. While national attention was not entirely focused on the outcome of this case, many humanitarian groups were watching and saw this as an attack on their rights to carry out their work. In this sense, they do feel they are forced to choose between security and their protected freedoms.

Dennis v. United States (1951) also involved free speech restrictions in a similar way to *Holder*. The petitioners, Eugene Dennis et al., were indicted for violating provisions of the Smith

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[59] Robert Chesney. "The Supreme Court, Material Support, and the Lasting Impact of *Holder v. Humanitarian Law Project*." *Wake Forest Law Review Forum* 1 (2010): 13-19.
[60] Wadie E. Said. "Humanitarian Law Project and the Supreme Court's Construction of Terrorism." *Brigham Young University Law Review*, 2011: 1455-2011.

Act. This statute prohibited advocating the overthrow of the U.S. government by force or violent means or being part of a group that advocated the violent overthrow of the government. The petitioners were members of the Communist Party of the United States of America, and as such were accused of advocating the violent overthrow of the U.S. government. The Court was asked to answer two questions in this case: 1) whether the sections of the Smith Act that the petitioners were charged under were in violation of the First Amendment, and 2) whether these provisions violated the First and Fifth Amendments due to indefiniteness.[61] The Court focused closely on the issue of intent in this case; primarily, whether the petitioners actually intended to overthrow the government and whether this intent was required in order to be convicted under the Smith Act. Congress did not explicitly require intent in the wording of the Smith Act, instead legislators used the terms "knowingly or willfully."[62] However, the majority found it pertinent to include intent in their considerations. This differs from the majority opinion in *Holder* which did not care for intent of furthering the terrorist aims of the foreign terrorist organizations. Rather, the Justices claimed that whether the HLP members intended to further these aims or not their actions could assist in terrorist activity. Justice Breyer did give consideration to intent in his dissent and suggested a provision that would require intent for furthering terrorist activity in order to be convicted under the material support statute. This difference in the opinions is interesting to note as both of these cases dealt with the security of the nation, *Dennis* regarding the overthrow of the central government and *Holder* regarding potential terrorist activity.

A 6-2 majority in *Dennis* found that the Smith Act did not violate the First Amendment, as it was in the interest of the government to be able to protect itself from violent overthrow. In this sense, *Holder* seems to be in line with the *Dennis* decision. The Justices in both cases argued

[61] *Dennis v. United States*, 341 S. Ct. 494 – Supreme Court 1951.
[62] *Dennis v. United States* (1951).

that free speech is not an absolute right and never has been, and there are some concerns which take precedence over free speech. The security of the U.S. government is one of those concerns, especially during times of conflict (*Dennis* took place during the Cold War). However, these cases differ because of the intent of the groups in danger of criminal charges. In *Dennis*, the petitioners advocated for the violent overthrow of the government and were part of a group that supported this advocacy. In *Holder*, the HLP claimed its members did not intend to assist in the terrorist activities of the FTOs, they solely wished to aid the humanitarian activities of those groups. Although the Justices in the majority for *Holder* did not see intent as in need of consideration, I believe it is an important aspect of these cases. However, if intent is set aside, *Dennis* is a precedent for *Holder*. In both cases, the Justices found that national security was a more compelling interest than the right for the involved parties to speak freely on the matters at hand. Both cases also occurred during times of conflict which may have furthered the deference given to the government in these matters as there are greater powers allowed for the government in times of conflict.

This case was an anomaly in Supreme Court jurisprudence, mostly due to the fact that it is the only case to pass the *Brandenburg v. Ohio* test. In addition to that however, it does not have many peers other than *Dennis v. United States* (1951). Specifically, a case that was similar (*Citizens United*) had a very different outcome. I argue that this is due to the emphasis on the threat of terrorism and the push to protect national security that was present in *Holder*. The uneasiness of undeclared war may have played a role in keeping these interests at the forefront of the Justices' minds in deciding this case. When compared to the other cases examined in this thesis, this case does stick out from the group as the only one that restricted free speech.

Chapter 3: *Snyder v. Phelps* (2011)

The next case to be examined is *Snyder v*. *Phelps* (2011), which presents a more standard free speech challenge regarding protesting. In *Snyder*, the Justices protect speech and claim that the speech in question was within the realm of protected public speech. This case helps to examine a different aspect of speech than that in *Holder*: the distinction between public and private speech. Public speech is any speech that relates to matters of public concern; *Snyder* explored this distinction and the importance of public speech. This case is a contrast to *Holder* because the outcome for speech is quite different. In *Holder*, the Justices upheld the material support statute and restricted free speech (or what was claimed as speech in the case).

Snyder began as a tort law claim on behalf of Albert Snyder against the Westboro Baptist Church (WBC). The WBC protested the funeral of Albert Snyder's son Matthew Snyder, a fallen Marine, which Albert claimed caused him irreparable mental and emotional distress. Albert Snyder filed a tort complaint, which journeyed through the court system all the way to the Supreme Court because the WBC claimed its speech was protected under the First Amendment. Shortly after the funeral protest, Maryland passed a statute imposing regulations on funeral protesting. However, the WBC's protest would have been within these regulations anyway if the statute had been in effect at the time. The issue came down to whether the pain inflicted upon Albert Snyder outweighed the interest of protecting the speech of the WBC. Interestingly enough, Matthew Snyder had been killed in the line of duty where he was fighting to protect the rights of Americans, including the WBC who protested his funeral. This case showed the legal protection that public speech is given, even if some deem that speech to be outrageous and arguably offensive.

In an 8-1 decision the Court ruled in favor of the WBC, holding that its speech was protected under the First Amendment. Chief Justice John Roberts once again wrote the majority decision, with a concurrence from Justice Stephen Breyer, and Justice Samuel Alito the lone dissenter. Roberts, who was so adamant in *Holder* that the "speech" of the Humanitarian Law Project was not protected and must be curtailed in favor of national security interests, was again adamant in *Snyder* but this time claiming that protection of speech was of the utmost importance. This may be because of the nature of that speech; *Snyder* was public speech, carried out in the form of picketing targeted at public policy; while the speech involved in *Holder* was judged to be falling into the realm of illegal "conduct" and "material support" involving matters pertinent to national security.

Facts of the Case:

Pastor Fred Phelps founded the Westboro Baptist Church (WBC) in Topeka, Kansas, in 1955.[63] According to its website, the Westboro Baptist Church claimed to "adhere to the teachings of the Bible, preach against all form of sin, and insist that the sovereignty of God and the doctrines of grace be taught and expounded publicly to all men."[64] Members have been carrying out their mission through various means of protest, including picketing groups and faith denominations since 1991 that are accepting of homosexuality. In 2005, the Westboro Baptist Church began picketing at military funerals as well. In their minds, American soldiers killed in combat should be blamed for serving a nation accepting homosexuals, adultery, and other beliefs and activities considered sins by the Westboro Baptist Church.

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[63] Westboro Baptist Church. "About Us." God Hates Fags: 2016. Accessed 10 April 2016.
[64] Westboro Baptist Church. "About Us."

On March 10, 2006 the Westboro Baptist Church travelled to Westminster, Maryland to protest the funeral of Marine Lance Corporal Matthew A. Snyder. Matthew Snyder was killed in the line of duty on March 3, 2006 while serving in Iraq.[65] His family prepared his funeral arrangements to include a service at St. John's Catholic Church followed by a burial service. The WBC members set themselves up on a plot of public land approximately one thousand feet from the funeral behind a temporary fence. Their tactics included displaying signs, singing hymns, and reciting Bible verses. The signs had messages such as "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."[66] These signs were also used at two other protests the WBC organized that day, one near the Maryland State House and one at the United States Naval Academy. Albert Snyder, father of deceased Matthew Snyder, saw the tops of the signs on his way to the funeral. Later that night he was able to see what was written on the signs via a news broadcast on television. Additionally, a few weeks after this broadcast the picketers posted an epic on the WBC website. This was a lengthy essay that contained a discussion of the protest as well as denunciations of the Snyders for supporting the military and being members of the Catholic Church. While this essay was not included in the petition for certiorari, it was mentioned in lower court proceedings.

In response to these activities, Albert Snyder filed a lawsuit against Fred Phelps, his daughters, and the Westboro Baptist Church as a whole. The tort complaints were filed in the United States District Court for the District of Maryland. A tort complaint is a claim of

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[65] Paul Minnich. Complaint on behalf of Albert Snyder in the United States district Court: District of Maryland. Accessed 15 March 2016.
[66] *Snyder v. Phelps*, 131 S. Ct. 1207 – Supreme Court 2011.

wrongdoing by another citizen against oneself in which the inflicted harm does not involve the violation of a contract. The torts that Albert Snyder claimed were defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.[67] Phelps contended that his speech, and the speech of his family and fellow protestors, was protected under the right to free speech provided for in the First Amendment. Thus, Phelps moved for summary judgment which would decide the case on its merits before a trial was held. Summary judgment favorable to the WBC was granted on the claims of defamation and publicity given to private life; the Court concluded that Albert Snyder could not prove these claims. The claims of intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy went on to trial. To prove his tort claims, Albert Snyder contended that his emotional injuries caused severe depression and further exacerbated pre-existing health conditions. The jury found in favor of Snyder on the remaining torts and held WBC liable for $2.9 million in compensatory damages (money awarded to Snyder) and $8 million in punitive damages (money to be paid as punishment to reform the liable party). In response to post-trial claims made by WBC, the District Court reduced the punitive damages award to $2.1 million.

The WBC appealed the decision claiming that the church was "entitled to judgment as a matter of law" because its speech was in compliance with the First Amendment free speech protections.[68] The Court of Appeals concluded that the WBC's statements were matters of public concern, not provably false, and were expressed solely through hyperbolic rhetoric, thus they were protected. In response, Snyder filed a petition for a writ of certiorari on December 23, 2009. The Supreme Court granted certiorari. Although the Justices did not explicitly state their reason

[67] *Snyder v. Phelps* (2011).
[68] *Snyder v. Phelps* (2011).

for granting certiorari, CNN stated that the Court had never addressed the specific issues of laws designed to protect the sanctity and dignity of memorial and funeral services and the privacy of family and friends of the deceased.[69] The Justices may also have granted certiorari because the Court had previously dealt with one other case concerning the tort of intentional infliction of emotional distress, but it involved a public figure rather than a private citizen. *Snyder* provided the Court with an opportunity to further shape how this law is interpreted.

The original case that dealt with the intentional infliction of emotional distress on a public figure was *Hustler Magazine v*. *Falwell* (1988). Hustler Magazine published a depiction of minister Jerry Falwell portrayed him as having engaged in a drunken incestuous rendezvous with his mother in an outhouse.[70] Falwell sued the magazine for invasion of privacy, libel, and intentional infliction of emotional distress. The majority found that the magazine's speech was protected under the First Amendment. The fact that Falwell was a public figure played into this opinion quite a bit: "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[71] The Justices claimed that Falwell and all other public figures were subject to this type of critique as they provide important commentary on issues of public concern. Additionally, the majority asserted that the depiction of Falwell could not reasonably be considered to be describing actual facts about Falwell, thus his libel claim is void. This left the intentional infliction of emotional distress claim, to which the Justices stated the magazine's speech was protected under the First Amendment. They claimed

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[69] Bill Mears. "Justices to hear case over protests at military funerals." CNN: Politics. 9 March 2010. Accessed 10 April 2016.
[70] *Hustler Magazine v. Falwell,* 485 S. Ct. 46 – Supreme Court 1988.
[71] *Hustler Magazine v. Falwell* (1988).

that the government cannot restrict speech based on its content, even if that content is offensive to some. This theme is present throughout the cases discussed in this chapter. *Hustler* was actually referenced by Snyder's lawyers often throughout the *Snyder* case, even though the tort was not upheld. This was because courts, after the *Hustler* decision, began interpreting the application of *Hustler* as only concerning public figures. The courts believed this case to imply that the free speech protections were less rigorous when the speech was directed at a private citizen.

Snyder v. Phelps **Opinion**

Snyder v. *Phelps* (2011) held that the speech of the Westboro Baptist Church was protected under the First Amendment. In an 8-1 vote, Chief Justice John G. Roberts delivered the majority opinion joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and a concurrence from Justice Stephen Breyer. Justice Samuel Alito was the lone dissenter.

In order to prove the infliction of intentional emotional distress, the defendant must have intentionally and recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.[72] To begin exploring this, the Justices first examined whether the speech was of public or private concern. Speech is considered to be of public concern when it can fairly be considered as relating to any matter of political, social, or other concern to the community. Citing *Connick v*. *Myers* (1983), the majority noted, "Speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special

[72] *Snyder v. Phelps* (2011).

protection."[73] In contrast, the restriction of private speech does not raise the same constitutional concerns as that of public speech. To establish whether the speech was of public or private concern, the Justices tested its content, form, and context.

The majority held that the content of the signs clearly related to broad issues of interest to society at large. These issues were the political and moral conduct of the United States, the fate of the nation, homosexuality in the military, and scandals involving the Catholic Church. Furthermore, these signs were designed to convey the WBC's views on these issues to as wide and broad an audience as possible. In regards to the argument made by Albert Snyder that the signs were a personal attack on his son, the Justices held that the WBC had been clear in its views on these issues before even having knowledge of Matthew Snyder and there had been no preexisting relationship with the Snyders that would cause an attack of this sort. Thus, the majority opinion confirmed that this speech was of public concern rather than private.

The Justices pointed out that the WBC members were in full compliance with all regulations and had alerted the local authorities ahead of time that they would be picketing. Thus, they had the right to be where they were and they were not disruptive of the funeral, because their picketing was quiet and peaceful. This led the Justices to believe that the distress caused by the picketing was solely due to the content and viewpoint of the message conveyed. The historical interpretations of the First Amendment free speech protections do not allow for speech to be restricted solely on the basis of its upsetting nature. The majority therefore found that the tort for intentional infliction of emotional distress does not stand.

Moving on to the other two torts in question, the Justices then examined Snyder's claim of intrusion upon seclusion. Snyder claimed he was a member of a captive audience at his son's

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[73] *Snyder v. Phelps* (2011).

funeral. The Justices reiterated that the picketers were far away from the memorial service and did not interfere with the service and that Snyder could only see the tops of the signs. Thus, his claim of intrusion upon seclusion was not upheld. This then struck down the civil conspiracy claim because the activity that WBC was alleged to conspire about was put aside in the first two torts. The Justices in the majority recognized that speech can cause pain, but they cannot react to the pain of one individual by punishing the speaker and limiting public debate. However, these same Justices were willing to restrict speech in *Holder* because of the potential for harm it had. What is the difference between limiting speech due to its harm potential in *Holder* and *Snyder*? It may be the national security concerns that were present in *Holder* and not in *Snyder*. In *Snyder*, the harm is only to one individual (and his family), whereas the potential harm in *Holder* could be upon the country as a whole. Thus, the Justices did not feel the need to restrict speech if it was only causing emotional and mental pain to one person rather than to the nation.

Justice Breyer concurred with the majority. He agreed that the speech of the Westboro Baptist Church did address matters of public concern. However, he felt that the analysis of speech needed to go further. Breyer noted that the decision did not address the television newscast that aired after the picketing, or the essay that was posted on WBC's website detailing the picketing and launching an attack on the Snyders. His concurrence pointed out that it is important to remember that picketing is not absolute and that a state can regulate it in some instances. He gave the example of a person assaulting another person in order to make the news and thus have a platform to express their views. Breyer claimed that the ends here, of speaking on matters of public concern, would not have justified the means, the assault. Thus the Court's decision here should not be taken as being applicable to every single case, as it was a quite narrow decision dealing with the specific details of this case. Breyer agreed with the majority's

application to this case, but in other cases he believes there could be room for regulation depending on the manner in which the protesting is carried out. He did not want this decision to encourage future picketers to employ overly aggressive means of picketing in order to gain attention for their cause.

Justice Alito wrote the only dissent. He began by stating, "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."[74] He recognized the protections offered for speech in the First Amendment, but argued that the interest of public debate does not allow for citizens to inflict severe emotional injury at a time of intense emotional sensitivity through vicious verbal attacks. Alito then delved into his disagreements with the tort for intentional infliction of emotional distress.

Justice Alito claimed that the tort had overly rigorous requirements and was difficult to satisfy. In order to find a person liable of a tort of intentional infliction of emotional distress, the conduct must be so severe that no reasonable man could be expected to endure it and,

> So outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.[75]

He questioned whether this leaves the state powerless to protect individuals even in horrendous circumstances. This echoed his line of questioning during oral arguments. While the attorney for the WBC, Margie J. Phelps, was arguing on behalf of the Westboro Baptist Church, he asked her if the First Amendment ever allows for the tort of intentional infliction of emotional distress. This seemed to foreshadow the argument that he made in his dissent, especially when Ms. Phelps answered that she did not believe this tort could coexist with free speech under the First Amendment. Ms. Phelps believed that the First Amendment protections of free speech would

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[74] *Snyder v. Phelps* (2011).
[75] *Snyder v. Phelps* (2011).

override a tort claim in every instance. Ms. Phelps' claim only further reinforced Alito's argument that the requirements to find a person liable of this tort are overly rigorous. The majority found, in Alito's view, that the tort complaints were valid but that the First Amendment protected the speech regardless. Alito believed that this attack was so vicious and inflicted such grave injury that the First Amendment should not protect it. Alito did not agree that this was simply discussion on matters of public concern, he viewed it as a pointed attack intended to be vicious and to have the outcome of distress upon the Snyder family.

According to Alito, the WBC purposely utilized these means of communicating its message in order to gain more publicity. He claims that they capitalized on the grief of the Snyder family and friends in order to garner more attention for their cause. This was proven through the examination of their methods of carrying out the picket. Alito pointed out that the WBC members sent out a press release informing the public of their protest ahead of time to ensure maximum publicity. Alito believed that the picketers chose this specific funeral and method of protest because they knew they could receive the most news coverage of their pickets. This would then broadcast their message to more people than if they had employed less aggressive tactics. Alito did not believe this was an acceptable tactic to get its message out because it caused pain to others in order for the WBC to gain publicity.

Alito also claimed that the essay that the WBC posted after the picket showed that the picket was directed at Matthew Snyder personally. The essay was not included in the petition for certiorari, which is why the majority did not include it in their decision. However, Justice Alito claimed that it largely contributed to this case because of the personal attacks on Matthew Snyder and his family that it contained. The essay was posted on the WBC website and was titled: "The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist

Church to Help the Inhabitants of Maryland Connect the Dots."[76] The video specifically attacked Matthew for being a Catholic and a member of the military and condemned his family for condoning these activities. Due to this, Alito claimed that the messages conveyed by the WBC were not rooted in the religious beliefs of the members about the country as a whole, but directed explicitly toward Matthew Snyder.

While the majority claimed that the First Amendment protected the speech of the WBC and this exempted members from tort liability, Alito disagreed that their speech was protected. He supported this claim with three arguments. First, he reiterated his belief that the attack on Matthew was of central importance to their message. He furthered this argument by saying that just because the speech was interspersed with speech that is protected, it should not automatically be protected as well. He next asserted that he saw no precedent for the majority's distinction that the speech was protected because there was no prior grudge against Matthew Snyder on the part of the WBC. He claimed that even though there was no prior relationship, this did not diminish the injury of the statements made. Finally, Alito argued that the fact that the statements were made on a public street should not influence whether or not they satisfied the intentional infliction of emotional distress tort. He also noted that although Maryland enacted a statute regarding protestation of funerals after this instance, the actions of the WBC would still have been protected under this statute. Therefore, in his opinion, the statute did nothing to protect against the intentional infliction of emotional distress. Alito also claimed that the creation of these laws even further demonstrated the need for special speech restriction at funerals.

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[76] *Snyder v. Phelps* (2011).

The case for *Snyder* as a typical free speech opinion

Snyder v. Phelps largely followed the reigning free speech jurisprudence of the Roberts Court. Other cases concerning free speech that were decided during the same time period seemed to not only have similar themes, but to have similar outcomes as well. Two of these cases were *United States v. Stevens* (2010) and *Brown v. Entertainment Merchants Association* (2011). These cases, like *Snyder*, dealt with speech that others found to be offensive or inappropriate. However, in each case the Court upheld free speech rights and claimed that the constitutionality of speech cannot be determined by examining the content of the speech.

United States v. Stevens (2010) dealt with animal cruelty videos. Robert Stevens was indicted under a federal law that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty for creating and distributing videos of dogfighting.[77] Stevens claimed that these were protected under the First Amendment, while the government claimed that depictions of animal cruelty were unprotected by the First Amendment. The majority opinion of the Court, in another 8-1 decision, disagreed that animal cruelty depictions were an unprotected class. The Justices in the majority claimed that the speech cannot be subjected to a test of social costs vs. social benefits based solely on its content.

> The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[78]

The Justices recognized that the animal cruelty depictions may have been distasteful to some viewers, but the speech cannot be limited solely because the content is not appealing to everyone. The Court stated that the animal cruelty videos did not fall into any of the categories of

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[77] *United States v. Stevens*, 599 S. Ct. 460 – Supreme Court 2010.
[78] *United States v. Stevens* (2010).

unprotected speech such as child pornography. In these categories of unprotected speech "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required…the balance of competing interests is clearly struck."[79] Essentially, in order for speech to be considered unprotected, the negative results of the speech must far outweigh any potential benefit of the speech. This balancing of competing interests is also often compounded with other factors, such as being intrinsically linked to a crime in the way that child pornography is linked to the abuse of children, which strengthens the argument for the speech to be unprotected. In addition to the speech not falling under an unprotected speech classification, the majority in this case also found that the statute was overbroad. The outcome of *Stevens* shows that the Court was protective of speech, even speech that may be offensive to some viewers. Chief Justice John Roberts also wrote this opinion and the lone dissent was again Justice Samuel Alito, just as the votes were in *Snyder*.

There has been much scholarly debate over Chief Justice Roberts' First Amendment opinions. He has assigned many opinions dealing with the First Amendment to himself, which points to a keen interest in free speech and expression. Roberts did write both the *Snyder* opinion and the *Holder* opinion in addition to this *Stevens* opinion, which present vastly different rulings on free speech. In *Holder*, Roberts is quick to establish that speech can be curtailed with a compelling interest. However, in *Snyder* and *Stevens*, Roberts is adamant that speech cannot be restricted easily or based on its content. This is somewhat resolved when one examines that caveat provided in *Holder*. Roberts did not classify the material support activities the Humanitarian Law Project wished to engage in as speech, rather he believed they were action. But, he asserted that the group was free to speak about and advocate for these foreign terrorist

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[79] *United States v. Stevens* (2010).

organizations as long as it was not part of a coordinated effort to assist their endeavors. In this sense, he was still protecting classic public speech. Additionally, Justice Alito wrote the dissents in *Stevens* and *Snyder*. He dissented for similar reasons in these cases. He believed that the Justices in the majority did not leave room for local governments and communities to handle these issues at their own level. He does not believe in the use of free speech protections to enable citizens to verbally assault each other, as his *Snyder* dissent showed, nor does he believe that the Court should decide matters definitively that could better be handled locally as portrayed in the *Stevens* dissent. As Adam J. White, a lawyer in Washington, D.C., stated: "Alito, more than any of his colleagues, would not allow broad characterizations of the freedom of speech effectively to immunize unlawful actions."[80] Alito is more concerned with looking at how these statutes affect the communities and what their actual implementation looks like, rather than solely examining how they fit into free speech jurisprudence.

The other case that similarly protected unpopular speech was *Brown v. Entertainment Merchants Association* (2011). This case dealt with a California statute that restricted the sale of violent video games to minors. The video games were interpreted to qualify for First Amendment free speech protections as they "communicate ideas…through many familiar literary devices (such as characters, dialogue, plot, and music)…"[81] The majority, written by Justice Antonin Scalia, followed closely its decision in Stevens. The Court held that the statute unconstitutionally placed restrictions on speech based on its content. Scalia quoted *United States v. Playboy Entertainment Group, Inc.* in his opinion, "Under our Constitution, 'esthetic and moral judgments about art and literature…are for the individual to make, not for the Government

[80] Adam J. White "The Burkean Justice: Samuel Alito's understanding of community and tradition distinguishes him from his Supreme Court colleagues." *The Magazine* 18 July 2011: 20-29.

[81] *Brown v. Entertainment Merchants Association*, 08 S. Ct. 1448 – Supreme Court 2011.

to decree, even with the mandate or approval of a majority."[82] Thus, he would rather the individuals decide for themselves whether this material was suitable or not rather than the government tell them it is not suitable. Scalia also pointed out that while there is a legitimate interest in protecting children and not subjecting them to inappropriate material, to restrict minors' access to certain ideas and materials would strip them of their First Amendment protections. As Scalia noted, disgust is not a valid reason to restrict free expression. Once again, the Roberts Court defended free speech in defiance of those wishing to censor it for content-based objections to it. At least in the realm of unpopular speech, this Court has staunchly protected free speech rights.

Snyder presents a contrast to *Holder v. Humanitarian Law Project* (2010), as it not only has a very different outcome but shows a different type of speech. Through examining both of these cases, we are presented with a more comprehensive understanding of the Roberts Court jurisprudence regarding free speech. In *Holder* we see the instances in which the Court would not uphold free speech, which are few and far between. While in *Snyder* we see the typical case in which public speech is protected. All of the necessary elements are present: the speech is on topics of public concern, it is within time, place, and manner restrictions, and it is not a personal attack on the Snyders to settle a private score. Regarding the time, place, and manner regulations, the protest took place on a public plot of land 1,000 feet away from the funeral itself and was peaceful in nature. Moreover, the speech of the WBC did not stray into the category of action. The WBC did not advise any specific action, nor were any material goods (including, for example, teaching or training) involved in the WBC demonstration. These elements point to why

[82] *Brown v. Entertainment Merchants Association* (2011).

Snyder delivered an opinion protective of free speech. The next chapter will examine further why *Holder* was different.

Chapter 4: A History of Restricting Speech in Wartime

The analysis of *Holder v. Humanitarian Law Project* (2010) and *Snyder v. Phelps* (2011) enables us to closely examine the Roberts Court free speech jurisprudence. This jurisprudence has been characterized by strong protection of speech in more traditional, straightforward speech cases, but restriction of speech in other areas that are less defined. For example, the Court upheld free speech in *Snyder, Brown v. Entertainment Merchants Association,* and *United States v. Stevens*, which all dealt with various forms of speech considered to be offensive to some parties. The differences in the speech in *Holder* and *Snyder* impacted why each was relatively unprotected and protected, respectively. The speech in *Snyder* was a) on issues of public concern, b) within the regulations of time, place, and manner restrictions of speech, and c) not deemed to be due to a previously existing feud between the Snyders and the WBC. Free speech in *Holder* was deemed to be outweighed by the concern for national security, as any attempts to provide material support to the foreign terrorist organizations could serve to legitimate the organizations further whether this was the intention or not, according to the majority opinion.

The *Holder* decision was based heavily in national security concerns of the government. Much of the majority opinion cited various arguments and documents provided by the State Department, Congress, and other government officials and agencies that claimed this speech in the form of material support would greatly impact both national security and foreign relations. My original question frames *Holder* and the regulation of free speech as a 21st century or post-9/11 phenomenon. This is not entirely the case. *Holder* does follow other free speech cases that were decided in times of conflict, most notably *Dennis v. United States* (1951). I find that this phenomenon of curtailing free speech is not isolated to the 21st century as a result of the 9/11

attacks on the Twin Towers in New York City, New York. It is part of a much longer history of regulating free speech in the name of national security.

Is *Holder* a part of a history of wartime speech restrictions?

Brandenburg v. *Ohio* (1969) not only set the imminent lawless action standard, but it also dealt with similar questions to those that *Holder* examined. The leader of a Ku Klux Klan group was convicted for violating the Ohio Criminal Syndicalism statute which prohibited "voluntarily assembling with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism" and "advocating…the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[83] This first section of the law that addressed assembly seemed similar to the material support statute at issue in *Holder*. In *Holder* the members of the HLP were also afraid of prosecution for associating with certain groups and teaching or advising them. However, *Brandenburg* overturned the conviction and struck down the Criminal Syndicalism statute, whereas *Holder* upheld the material support restraint. The majority opinion in *Brandenburg* stated:

> Since the statute…purports to punish mere advocacy and to forbid…assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions.[84]

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[83] *Brandenburg v. Ohio*, 395 S. Ct. 444 – Supreme Court 1969.
[84] *Brandenburg v. Ohio* (1969).

The Justices might argue that the actions of HLP could incite imminent lawless action using their fungibility argument. This argument stated that money is easier to move around than other forms of assistance and it is therefore impossible to know exactly what money given to a foreign terrorist organization is actually being spent on even if it was supposed to be spent on the humanitarian goals of the FTO. However, Breyer criticized this argument for not being fleshed out and sufficiently examined. *Brandenburg* set a precedent stating that criminalization of association, assembly, and speech, even if the speech was advocating for seemingly unlawful causes, were violations of the Constitution. As Justice Douglas pointed out in *Brandenburg v. Ohio*, placing restrictions on these rights is much easier to do when the expanded wartime powers of the government are at play. Taking this into account, *Holder*, when examined with cases during wartime (or undeclared wartime), seems to fit well.

One such case similar to *Holder* is *Dennis v. United States* (1951). *Dennis* involved restriction of free speech during the Cold War era, which, much like the era in *Holder*, was a time of undeclared conflict. A large part of the majority opinion in *Dennis* focused on the intent of the petitioners to advocate or incense the overthrow of the United States government. The Court found that the petitioners did in fact intend to incite the overthrow of the government due to their membership in the Communist Party of the United States of America. However, in *Holder* the Humanitarian Law Project claimed they did not intend to further the terrorist aims of the designated foreign terrorist organizations; they claimed only to assist in the humanitarian goals. The group, and later Justice Breyer in his dissent, even suggested adding in an intent provision into the material support statute. This provision would require an intent to further the terrorist aims of an FTO in order to be convicted under the material support statute, in addition to actually providing material support. But the majority found that this was not necessary. Whether

intent was present or not did not matter to the case. Instead they held that the actions of HLP could potentially further the terrorist aims of the FTOs, whether purposefully or not. Thus the aid to these organizations was now criminal because of the implementation of the material support statute and its evolution from the Anti-Terrorism and Effective Death Penalty Act to the Intelligence Reform and Terrorism Prevention Act of 2004.

The *Dennis* decision was careful to reaffirm that free speech is not a completely absolute right:

> An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.[85]

This notion is widely recognized by the Court, including in the *Holder* case. In this sense, *Holder* did follow the precedent of *Dennis*. Thus, it may be that *Holder* did not align with other free speech cases of its time. However, it aligned with previous cases that dealt with the rights of free speech when those rights could impact the security of the nation.

This poses a new question, that maybe this curtailment of speech was not unique to the 21st century era of undeclared war, but a phenomenon typical of all eras of international conflict. Thus, my original question may not have been broad enough to encompass this issue. Rather, it may be better to ask if *Holder* was part of a history of restricted rights during wartime and eras of national security concerns. I argue that yes, Holder is part of this larger framework of restricting rights during wartime and as such, it is not unique.

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[85] *Dennis v. United States*, 341 S. Ct. 494 – Supreme Court 1951.

Free Speech outside the context of national security

Snyder bears some relationship to national security because it involves a soldier who was serving in a military action overseas. Marine Lance Corporal Matthew Snyder was killed while serving in Iraq in 2006. The Westboro Baptist Church picketed his funeral, as they do many military funerals. Matthew's father, Albert Snyder, sued the WBC claiming intentional infliction of emotional distress. The WBC argued that its speech fell under First Amendment free speech protection. The Court found in favor of WBC upholding its speech as constitutional. The majority claimed that the speech was considered public speech and thus worthy of protection. The Court did not examine the impact this case may have had on national security and foreign relations because these were not the dominant concerns. Speech considered to be offensive and distressing, by the plaintiff, and of public interest, by the defendant, was the dominant concern. Additionally, *Snyder* did hold true to many of the historical precedents and contemporary cases such as *Hustler Magazine v*. *Falwell*, which also dealt with free speech in regards to tort law, *United States v*. *Stevens* which allowed depictions of animal cruelty, and *Brown v*. *Entertainment Merchants Association* which struck down a law restricting minors' access to violent video games.

Hustler Magazine v. *Falwell* set a precedent in the realm of tort law and free speech. The case was also heavily referenced both in the oral arguments and the Justices' opinions in *Snyder*. While this case was slightly different from *Snyder,* because it dealt with a public figure, the legal arguments and ultimate decision were applicable to *Snyder*. Jerry Falwell, a well-known minister, sued *Hustler Magazine* for publishing a depiction of him having drunken sex with his mother in an outhouse. The magazine claimed that it was within its free speech rights to publish

it, and the Court ruled in favor of the magazine claiming that offensive speech is still protected. The majority in *Hustler Magazine* stated,

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances…contribute to the free interchange of ideas…[86]

Thus, even speech that may be offensive must be protected under the First Amendment in order to ensure the free flow of debate and an open marketplace of ideas. *Snyder* followed this precedent both in striking down an intentional infliction of emotional distress claim due to free speech protections, and in asserting that offensive speech is protected because speech cannot be censored based on content.

The *Snyder* decision also aligned with other free speech decisions of the Roberts Court. For example, *United States v*. *Stevens* struck down a statute that criminalized depictions of cruelty to animals. The Court held that, "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[87] The Justices explained that even speech that does not contribute some benefit to society is protected under the First Amendment. Those in the majority claimed that much of the speech uttered on a daily basis does not contribute benefits to society but it is still allowed. *Stevens* was similar to *Snyder*, because there were groups (including Justice Alito who penned the dissent) that believed the speech of the Westboro Baptist Church should not be protected because it was so offensive. The sole fact that the speech is offensive to certain people does not make it obscene and in need of criminalization.

Brown v. *Entertainment Merchants Association* also struck down a law that the Court deemed to be restrictive of free speech. The state of California passed a law that restricted

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[86] *Hustler Magazine v. Falwell*, 485 S. Ct. 46 – Supreme Court 1988.
[87] *United States v. Stevens*, No. 08, S. Ct. 769 – Supreme Court 2010.

minors from purchasing or renting violent video games. The Court argued that video games qualified as speech and could not be restricted due to their content or subject matter (as they did not qualify as obscene or pass the strict scrutiny test). This demonstrates once again that *Snyder* fit within the pattern of the Roberts Court's jurisprudence regarding free speech.

Free speech is not an absolute right. There are instances in which it can be regulated or curtailed in the presence of a more compelling interest. This was demonstrated in *Holder v*. *Humanitarian Law Project*. However, this curtailment is not a trend that is new to the post-9/11 era. There is a much larger history of restricting free speech during times of war, even undeclared wars, that precedes *Holder*. While *Holder* may stick out among the more recent free speech cases of the 21st century, when examined in relation to cases with similar national security concerns and different types of speech it fits in quite well. Additionally, the curtailment of free speech due to national security concerns is not a phenomenon that has spread to cases in which national security is not a predominant theme. Free speech cases involving other topics do not seem to invoke these concerns in their decisions; rather, the Justices rely more on the precedents that uphold free speech in cases such as *Snyder*. The speech in question in *Snyder* was quite different from the speech in *Holder*. The Westboro Baptist Church in *Snyder* spoke on issues of public concern, followed all regulations in place for their protest, and their speech was not directed as a personal attack on the Snyders. In contrast, the speech in question in *Holder* did not fit the criteria to be protected. The majority saw it as a threat to national security and the speech itself was not so compelling as to outweigh this concern because it did not contribute to public debate. National security is a heightened issue during this era of undeclared war; however, it has not so deeply influenced the Supreme Court as to completely change their free speech jurisprudence.

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