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Free Speech and National Security Bootstraps

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FREE SPEECH AND NATIONAL SECURITY BOOTSTRAPS

*Heidi Kitrosser**

This Article focuses on two areas of national security exceptionalism in free speech doctrine: judicial review of material-support laws as applied to speech and judicial responses to free speech defenses to prosecutions for leaking classified information. While there are important differences between these two areas, they share one significant feature. In both realms, courts engage in a very particular kind of “national security bootstrapping.” Specifically, courts effectively treat administrative designations—the decision to label a group a terrorist organization in one case and the decision to classify information in another—as means to bypass the rigorous judicial review to which related speech restrictions would otherwise be subjected.

With respect to material-support laws, the U.S. Supreme Court has shown extraordinary deference to such laws as applied to speech “coordinated” with a designated “foreign terrorist organization” (FTO). Were it not for the terrorist designation, courts would view such restrictions with the utmost skepticism. With respect to classified information, courts have, in the handful of cases on the topic, reviewed prosecutions for leaking classified information with dramatically less rigor than they review restrictions on unclassified statements that the government deems dangerous.

It is troubling that courts treat administrative designations—specifically, both FTO determinations and information classification—as bootstraps by which to yank speech restrictions from the clutches of probing judicial scrutiny. This Article builds on existing scholarly critiques to identify and examine the common thread of national security bootstrapping that runs through both sets of cases. The hope is that in so doing, some greater light may be shed both on the cases themselves and, more broadly, on the costs and benefits of judicial deference to executive national security claims where civil rights and civil liberties are at stake.

* Professor of Law, University of Minnesota Law School. I am very grateful to Alex Tsesis and the *Fordham Law Review* students for organizing and inviting me to participate in the terrific symposium, entitled *Terrorist Incitement on the Internet*, for which I wrote this Article. The symposium was held at Fordham University School of Law. For an overview, see Alexander Tsesis, *Foreword: Terrorist Incitement on the Internet*, 86 *FORDHAM L. REV.* 367 (2017).

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INTRODUCTION

Scholars have debated whether and to what extent U.S. courts defer to the federal government more readily in the national security context than in other settings.¹ Yet in the realm of information control, by which I mean government secrecy as well as efforts to suppress private speech, there are some clearly discernible pockets of national security exceptionalism.² These pockets include the state secrets privilege,³ courts' professed commitment to deferring more vigorously to executive privilege claims grounded in national security than in other rationales,⁴ and judicial reluctance to second-guess

1. See Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226–29, 231–33 (characterizing national security exceptionalism as a common descriptive assumption among scholars, yet citing differences of degree and kind between different versions of the assumption and ultimately challenging exceptionalism as empirically unsupported “in at least one important class of post-9/11 cases”).

2. See, e.g., Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 107 (2017) (arguing that “courts exempt . . . national security secrecy claims from the typical procedural testing to determine their merit” and offering examples to support that claim).

3. See, e.g., *id.* at 117–25; HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY 94–100, 117–22 (2015).

4. See, e.g., *United States v. Nixon*, 418 U.S. 683, 710–11 (1974); *United States v. Poindexter*, 732 F. Supp. 142, 158 (D.D.C. 1990).

national security classifications in Freedom of Information Act litigation.⁵ Free speech doctrine also contains enclaves of exceptionalism.

This Article focuses on two areas of national security exceptionalism in free speech doctrine: judicial review of material-support laws as applied to speech and judicial responses to free speech defenses that arise in prosecutions for leaking classified information. While there are important differences between these two areas, they share one significant feature: in both realms, courts engage in a very particular kind of “national security bootstrapping.” Specifically, courts effectively treat administrative designations—the decision to label a group a terrorist organization in one case and the decision to classify information in another—as means to bypass the rigorous judicial review to which related speech restrictions would otherwise be subjected.

With respect to material-support laws, the U.S. Supreme Court has shown extraordinary deference to such laws as applied to speech “coordinated” with a designated “foreign terrorist organization” (FTO).⁶ While the definition of “coordinated” remains unsettled, the Obama administration took the position that it extends to the writing of amicus briefs on behalf of FTOs.⁷ It could conceivably reach as far as the publishing of op-eds written by FTOs.⁸ Were it not for the terrorist designation, courts would view such restrictions with the utmost skepticism.⁹ With respect to classified information, courts have, in the handful of cases on the topic, reviewed prosecutions for leaking classified information with dramatically less rigor than they review restrictions on unclassified statements that the government deems dangerous.¹⁰

It is troubling that courts treat administrative designations—specifically FTO determinations and information classification—as bootstraps by which to yank speech restrictions from the clutches of probing judicial scrutiny. Elsewhere, I and others have criticized judicial deference to the government in the context of leak prosecutions.¹¹ And a number of commentators have been highly critical of material-support laws and of the Supreme Court’s deferential approach to them in the face of a free speech challenge.¹² This Article builds on these critiques to identify and examine the common thread of national security bootstrapping that runs through both sets of cases. The hope is that in so doing, some greater light may be shed both on the cases

5. See, e.g., Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 159–67 (2006).

6. See *infra* Part I.A.

7. See *infra* note 66.

8. See *infra* notes 67–69.

9. See *infra* Parts I.C, II.A.

10. See *infra* Part III.A.

11. See *infra* note 178 (citing several works in which I offer such criticisms); see also Mika C. Morse, Note, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421, 447 (2010) (making similar criticisms); Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 464 (2014) (same).

12. See *infra* Part I.C.

themselves and, more broadly, on the costs and benefits of judicial deference to executive national security claims where civil rights and civil liberties are at stake.

Parts I and II focus on material-support laws and the underlying mechanisms for designating FTOs and Specially Designated Global Terrorists (SDGTs). Part I summarizes these authorities and explores the major, relevant judicial precedent and scholarly commentary. Part II then builds on the existing scholarly critiques to argue that courts have, in material-support cases, adopted an ill-considered practice of bootstrapping that undermines longstanding principles of free speech doctrine and theory. Finally, Part III shifts gears to discuss prosecutions of classified information leaks and the system by which information is classified.¹³ There, I draw on my previous work on classified leak prosecutions and explain how bootstrapping occurs in that setting and why it poses problems similar to those posed in the material-support cases.

I. TERRORIST DESIGNATIONS AND MATERIAL-SUPPORT LAWS

A. *Material Support of a Foreign Terrorist Organization*

1. The Basic Legal Framework

a. *The FTO Designation Process*

Under the Immigration and Nationality Act (INA), the secretary of state may “designate an organization a foreign terrorist organization” if the secretary finds that the organization is foreign and that it “engages in terrorist activity . . . or terrorism” or “retains the capability and intent to engage in terrorist activity or terrorism” that “threatens the security of United States nationals or the national security of the United States.”¹⁴ “National security” refers to “the national defense, foreign relations, or economic interests of the United States,”¹⁵ and “terrorist activity” includes hijacking, kidnapping, assassination, using certain dangerous weapons, or threatening, attempting or conspiring to commit such acts.¹⁶ To “engage in terrorist activity” means to commit, incite to commit, prepare, or plan terrorist activity, or to support terrorist activity in other specified ways, including by “afford[ing] material support . . . to a terrorist organization.”¹⁷ Terrorism is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”¹⁸

13. For a more in-depth treatment of classified information leak prosecutions and their First Amendment implications, see generally Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 3 U. ILL. L. REV. 881 (2008).

14. 8 U.S.C. § 1189(a)(1) (2012).

15. *Id.* § 1189(d)(2).

16. *Id.* § 1182(a)(3)(B)(iii) (2012); *id.* § 1189(a)(1)(B).

17. *Id.* § 1182(a)(3)(B)(iv); *id.* § 1189(a)(1)(B).

18. 22 U.S.C. § 2656f(d)(2) (2012); 8 U.S.C. § 1189(a)(1)(B).

The INA directs the secretary of state to make FTO determinations “in consultation with the Secretary of the Treasury and the Attorney General.”¹⁹ It also requires the secretary of state to notify specified members of the Senate and House of Representatives, via “classified communication,” “[s]even days before making [an FTO] designation.”²⁰ Seven days after providing this notice, the secretary must publish the FTO designation in the *Federal Register*,²¹ which takes effect upon publication.²² At that point, the secretary of the treasury is authorized to require U.S. financial institutions to freeze the FTO’s assets.²³

Publication in the *Federal Register* provides the only notice to which the FTO is entitled under the statutory scheme.²⁴ The D.C. Circuit has, however, held that FTOs with property or other presence in the United States have a due process right to notice and an opportunity to submit written objections to the secretary of state prior their designation.²⁵ Even in such cases, however, the government may bypass predesignation notice where the secretary makes “an adequate showing” that such notice “would impinge upon the security and other foreign policy goals of the United States.”²⁶ FTOs without a presence in the United States have no constitutional right to predesignation notice.²⁷

Once a designation is published in the *Federal Register*, an FTO may, within thirty days of publication, seek review of the designation by the D.C. Circuit.²⁸ That review, however, is “quite limited.”²⁹ It is based solely on the administrative record.³⁰ Classified portions of the record—to which the FTO “never has access”³¹—may be submitted “for *ex parte* and *in camera* review.”³² The court must reject designations that are “arbitrary, capricious,” or “an abuse of discretion,” unconstitutional or contrary to statute, or “lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court.”³³ FTOs also may petition the

19. 8 U.S.C. § 1189(d)(4); *see also id.* § 1189(a)(1).

20. *Id.* § 1189(a)(2)(A)(i).

21. *Id.* § 1189(a)(2)(A)(ii).

22. *Id.* § 1189(a)(2)(B)(i).

23. *Id.* § 1189(a)(2)(C).

24. *See* Laura Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 653 (2008); Brent Tunis, Note, *Material-Support-to-Terrorism Prosecutions: Fighting Terrorism by Eroding Judicial Review*, 49 AM. CRIM. L. REV. 269, 273–74 (2012).

25. *Nat’l Council of Resistance of Iran v. Dep’t of State (NCRI)*, 251 F.3d 192, 200–03 (D.C. Cir. 2001); *see also* Louisa C. Slocum, *OFAC, the Department of State, and the Terrorist Designation Process: A Comparative Analysis of Agency Discretion*, 65 ADMIN. L. REV. 387, 403–04 (2013) (discussing the *NCRI* opinion).

26. *NCRI*, 251 F.3d at 208.

27. Slocum, *supra* note 25, at 403 (citing *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

28. 8 U.S.C. § 1189(c)(1).

29. *NCRI*, 251 F.3d at 196.

30. *Id.*

31. *Id.* at 197.

32. 8 U.S.C. § 1189(c)(2). A panel of the D.C. Circuit observed that the record “generally” includes classified information. *NCRI*, 251 F.3d at 197.

33. 8 U.S.C. § 1189(c)(3).

secretary biannually to have their designations removed.³⁴ In addition, they may seek judicial review of petition denials, which would entail the same procedures and have the same scope as judicial review of initial designations.³⁵

b. Material Support of an FTO

It is a federal crime to provide “material support” to an FTO.³⁶ Although a person must know that the organization is a designated FTO, one need not intend to further terrorism through his or her support of the FTO.³⁷ Indeed, a person may engage in material support even if she subjectively intends, and reasonably acts, to steer the group away from terrorism or to further humanitarian ends through her support.³⁸

“Material support” means “any property . . . or service,” including “expert advice or assistance” or “personnel.”³⁹ The only exceptions are for “medicine or religious materials.”⁴⁰ “Training” is defined as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge,”⁴¹ and “expert advice or assistance” is defined to mean “advice or assistance derived from scientific, technical or other specialized knowledge.”⁴² To be prosecuted for providing personnel, one must have “knowingly provided, attempted to provide, or conspired to provide [an FTO] with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control.”⁴³ If one works “entirely independently of the [FTO] to advance its goals or objectives,” that person “shall not be considered to be working under the foreign terrorist organization’s direction and control.”⁴⁴

2. Holder v. Humanitarian Law Project

In 2010, in *Holder v. Humanitarian Law Project*,⁴⁵ the Supreme Court upheld the material-support law in the face of First Amendment and vagueness challenges.⁴⁶ The plaintiffs were U.S. citizens and domestic organizations that wished to “provide support for the humanitarian and political activities” of two FTOs—the Kurdistan Workers’ Party (“PKK”)

34. *Id.* § 1189(a)(4).

35. *Id.* § 1189(c).

36. *See* 18 U.S.C. § 2339B(a)(1) (2012).

37. *Id.*

38. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15–17 (2010); Wadie E. Said, *Humanitarian Law Project and the Supreme Court’s Construction of Terrorism*, 2011 BYUL REV. 1455, 1492–93.

39. 18 U.S.C. § 2339B(g)(4).

40. *Id.* §§ 2339A(b)(1), 2339B(g)(4).

41. *Id.* § 2339A(b)(2).

42. *Id.* §§ 2339B(g)(4), 2339A(b)(3).

43. *Id.* § 2339B(h).

44. *Id.*

45. 561 U.S. 1 (2010).

46. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010).

and the Liberation Tigers of Tamil (“LTTE”).⁴⁷ The plaintiffs sought, among other things, to train PKK members on “how to use humanitarian and international law to peacefully resolve disputes” and to teach “PKK members how to petition various representative bodies such as the United Nations for relief.”⁴⁸ The Court agreed that these activities constituted expression and that the statute as applied to them had to be evaluated under some form of heightened scrutiny.⁴⁹ Yet despite this formal invocation of something higher than intermediate scrutiny⁵⁰—presumably meaning strict scrutiny, although the Court never used those words⁵¹—the Court effectively deferred deeply to the government’s claims.⁵²

The Court accepted the government’s view that even material support that is directed toward humanitarian, nonviolent ends—as in plaintiffs’ proposed efforts to teach PKK members how to engage in peaceful dispute resolution and to petition groups such as the United Nations for relief—could facilitate an FTO’s terrorist activities.⁵³ Such support, the government argued and the Court agreed, could free up resources that the FTO might then divert toward terrorism.⁵⁴ It also could enhance FTOs’ legitimacy, thus “mak[ing] it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.”⁵⁵ Finally, such support “furthers terrorism by straining the United States’ relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks.”⁵⁶

The Court’s assessment of these points was underscored by extraordinary deference to Congress and the executive branch. The Court repeatedly stressed two considerations: the relative expertise of the political branches in the realms of national security and foreign relations⁵⁷ and the

47. *Id.* at 8–10.

48. *Id.* at 14–15.

49. *Id.* at 28.

50. *Id.*

51. *See, e.g.,* Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 19–20 (2012) (citing this aspect of the court’s analysis); Said, *supra* note 38, at 1498–99 (same).

52. *See, e.g.,* Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 589 (2014) (deeming the *Humanitarian Law Project* decision’s “deferential posture in the context of heightened scrutiny . . . inconsistent with most modern law”); Huq, *supra* note 51, at 25 (describing *Humanitarian Law Project*’s “version of strict scrutiny” as “strikingly forgiving”); Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 496 (2012) (“[T]he opinion displays a deference to the government’s claims that is both unnecessary to the decision and inconsistent with the heightened scrutiny that the Court adopts.”); Aaron Tuley, Note, *Holder v. Humanitarian Law Project: Redefining Free Speech Protection in the War on Terror*, 49 IND. L. REV. 579, 601 (2016) (“Although the majority in *Humanitarian Law Project* stated that it was applying . . . the strict scrutiny standard, it did not . . . apply it correctly.”).

53. *Humanitarian Law Project*, 561 U.S. at 33–36.

54. *Id.* at 29–30.

55. *Id.* at 30.

56. *Id.* at 32.

57. *See id.* at 33–34 (stating that “evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference” given the relative expertise of each and that “[i]t is vital

reasonableness of those branches' judgments in this case.⁵⁸ The latter element made the Court's reasoning appear to be closer to rational basis review than to strict scrutiny, with the Court suggesting that the government must prevail so long as its concerns could not reasonably be ruled out. For instance, the Court criticized the dissent for being "unwilling to entertain the prospect that training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities."⁵⁹

The plaintiffs' vagueness claims were also unsuccessful. The plaintiffs had argued that they wished to advocate on behalf of the PKK and the LTTE. The statute prohibits advocacy "performed in coordination with, or at the direction of, a foreign terrorist organization,"⁶⁰ but it does not restrict "independent advocacy."⁶¹ The plaintiffs protested that this distinction was too vague to tell them whether their intended advocacy was prohibited, but the Court declined to address this claim.⁶² According to the Court, the plaintiffs had not adequately specified "the degree to which *they* seek to coordinate their advocacy with the PKK and LTTE."⁶³ The Court also rejected plaintiffs' vagueness challenges regarding planned teaching and training activities because, in the Court's view, the statute plainly encompassed those activities.⁶⁴

Although the Court never clearly delineated the distinction between "independent" and "coordinated" speech, it emphasized the distinction's significance. Indeed, to the Court, the distinction helped to mitigate First Amendment concerns about the statute.⁶⁵ The distinction's importance, and the uncertainty surrounding its meaning, was evident throughout the *Humanitarian Law Project* litigation. During oral argument before the Supreme Court, for example, then-Solicitor General Elena Kagan said that the Obama administration would consider it material support to file an amicus brief "for" an FTO but not to do so independently in support of a position favorable to an FTO.⁶⁶ At the same oral argument, plaintiffs' attorney David Cole pointed out that the *New York Times*, *Washington Post*, and *Los Angeles Times* have all published op-eds by spokespersons for Hamas, which is an FTO.⁶⁷ Each news organization, Cole argued, might have violated the material-support law by having "coordinated with the

in this context 'not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch'" (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981))).

58. *See id.* at 36 ("At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive . . . That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it.").

59. *Id.* at 38.

60. *Id.* at 24.

61. *Id.* at 23.

62. *Id.* at 24–25.

63. *Id.* at 25.

64. *Id.* at 22–23.

65. *Id.* at 24–26, 31–32, 35–36, 39–40.

66. Transcript of Oral Argument at 46–47, *Humanitarian Law Project*, 561 U.S. 1 (No. 08-1498).

67. *See id.* at 13–14.

Hamas spokesperson in editing and accepting and then publishing his editorial.”⁶⁸ Justice Antonin Scalia responded that “[i]t depends on what coordinating means,” which “we can determine . . . in the next case.”⁶⁹

3. Post-*Humanitarian Law Project* Developments

Since *Humanitarian Law Project*, little judicial light has been shed on the line between independent and coordinated speech. The most relevant decision is *United States v. Mehanna*,⁷⁰ a 2013 opinion by the First Circuit. In *Mehanna*, the prosecution alleged two bases for violation of the material-support statute: the defendant Tarek Mehanna’s unsuccessful efforts to find and join a terrorist training camp in Yemen and his translating of Arab-language materials into English.⁷¹ “[A]t least some” of the materials “constituted [Al Qaeda]-generated media and materials supportive of [Al Qaeda] and/or jihad,” and Mehanna posted them on At-Tibyan, “a website . . . for those sympathetic to [Al Qaeda] and Salafi-Jihadi perspectives.”⁷² The jury returned a general verdict convicting Mehanna on all counts, but Mehanna appealed on the ground that his translations constituted independently made protected speech, and that the verdict might have been based on the protected translations.⁷³ The First Circuit rejected Mehanna’s challenge. In its view, the trial court acted appropriately in advising the jury that it “need not worry about . . . the First Amendment” because the material-support statute already accommodates it by punishing only coordinated speech.⁷⁴ Nor did the judge err in “treat[ing] the question of whether enough coordination existed to criminalize [Mehanna’s] translations as fact-bound and [leaving] that question to the jury.”⁷⁵ Moreover, the court declined to consider Mehanna’s contention that there was insufficient evidence to characterize his translations as coordinated speech because his “Yemen trip supplied an independently sufficient evidentiary predicate for the convictions.”⁷⁶

In a sense, *Mehanna* does not add very much to our understanding of the line between independent and coordinated speech. The relevant jury instruction, of which the First Circuit approved, largely echoed the material-support statute and the *Humanitarian Law Project* majority opinion in informing jurors that the statute punishes only FTO-directed or coordinated speech and not independent advocacy.⁷⁷ And the First Circuit simply did not

68. *Id.* at 14–15.

69. *Id.* at 15; cf. Marjorie Heins, *The Supreme Court and Political Speech in the 21st Century: The Implications of Holder v. Humanitarian Law Project*, 76 ALA. L. REV. 561, 588 (2013) (recounting examples cited by plaintiffs and government throughout the litigation to demonstrate potential breadth of prohibited advocacy).

70. 735 F.3d 32 (1st Cir. 2013).

71. *Id.* at 41–42.

72. *Id.* at 41.

73. *Id.* at 47.

74. *Id.* at 48–49.

75. *Id.* at 49.

76. *Id.* at 50.

77. *Id.* at 48.

weigh in on whether the translation-related evidence sufficed to show direction or coordination.⁷⁸

Yet *Mehanna* does demonstrate the potential for expansive prosecutorial interpretations of coordinated advocacy and for judicial permissiveness regarding the same. The United States did not allege that the defendant translated materials directly for Al Qaeda. It alleged, rather, that he provided translations to a website that supported Al Qaeda ideologically, hoped to spread its message, and sometimes took translation requests from members of Al Qaeda.⁷⁹ The United States further alleged that Mehanna himself hoped to aid Al Qaeda through his translations.⁸⁰ Among the acts that the government deemed material support in its indictment were conspiring to “create like-minded youth in the Boston area”⁸¹ and translating a text entitled “39 Ways to Serve and Participate in Jihad.”⁸² While the United States thus attempted to show some kind of working relationship between Mehanna and Al Qaeda, it alleged no more than an indirect relationship through a website.⁸³ More broadly, the prosecution suggested a view of coordination expansive enough to encompass unilateral efforts to convince others of the rightness of an FTO’s cause.⁸⁴

At the same time, there is some post-*Humanitarian Law Project* evidence that the coordination requirement is not utterly toothless. Shortly after *Humanitarian Law Project* was decided, a district court dismissed a claim against defendants Council on American-Islamic Relations and Council on American-Islamic Relations–Canada (collectively “CAIR”).⁸⁵ That case involved a civil lawsuit against the defendants for providing criminal material

78. *Id.* at 50; see also Marty Lederman, *Avoidance of the First Amendment Questions in the Mehanna Case*, JUST SECURITY (Nov. 14, 2013) <https://www.justsecurity.org/3174/avoidance-amendment-questions-mehanna-case/> [<https://perma.cc/M5K5-GSMA>] (concluding that the First Circuit “avoided resolution of any constitutional questions”).

79. See Brief for the United States in Opposition at 5, 16, *Mehanna v. United States*, 135 S. Ct. 49 (2014) (No. 13-1125); cf. Benjamin Wittes, *David Cole and Peter Margulies: An Exchange on Tarek Mehanna*, LAWFARE (Apr. 22, 2012), <https://www.lawfareblog.com/david-cole-and-peter-margulies-exchange-tarek-mehanna> [<https://perma.cc/A36E-R8RE>] (excerpting competing evaluations by David Cole and Peter Margulies of government’s coordination evidence).

80. Brief for the United States in Opposition at 5, 16, *Mehanna*, 135 S. Ct. 49 (No. 13-1125).

81. Second Superseding Indictment ¶ 5, *United States v. Mehanna*, 669 F. Supp. 2d 160 (D. Mass. 2009) (No. 09-CR-10017-GAO).

82. *Id.* ¶ 21. A commentator later deemed this translation “[t]he centerpiece of the government’s case against Mr. Mehanna’s speech activities.” See Andrew F. March, *A Dangerous Mind?*, N.Y. TIMES (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/opinion/sunday/a-dangerous-mind.html> [<https://perma.cc/9LQH-MDGM>].

83. See, e.g., Bhagwat, *supra* note 52, at 601 (“Mehanna was prosecuted . . . despite the lack of any evidence that he had direct contact with an FTO.”); Wittes, *supra* note 79 (citing a similar view by David Cole in response to Peter Margulies’ defense of the government’s position in *Mehanna*).

84. See, e.g., Bhagwat, *supra* note 52, at 610 (arguing that the proceedings in *Mehanna* “suggest[] that coordination/membership can be unilateral”); George D. Brown, *Notes on a Terrorism Trial—Preventive Prosecution, “Material Support” and the Role of the Judge After United States v. Mehanna*, 4 HARV. NAT’L SEC. J. 1, 25–26 (2012) (explaining that the prosecution’s approach lends itself to a very open-ended interpretation of “coordination”).

85. *In re: Terrorist Attacks on September 11, 2001*, 740 F. Supp. 2d 494 (S.D.N.Y. 2010).

support to Al Qaeda.⁸⁶ Plaintiffs alleged that CAIR, through “‘PSYOPS’ (psychological operations), ‘disinformation activities,’ and propaganda campaigns,” sought—in furtherance of the goals of Hamas, another FTO—to “legitimize the activities of Islamic militants and neutralize opposition to Islamic extremism, and thereby serve as ‘perception management’ in support of Al Qaeda.”⁸⁷ The court noted the absence of any alleged ties between CAIR and Al Qaeda beyond ideological agreement.⁸⁸ It explained that “[m]erely because the services defendants allegedly provide are beneficial to terrorist organizations generally who share the same radical and ideological views as Hamas, does not expose defendants to liability for any act of terrorism committed by another one of those organizations.”⁸⁹

Humanitarian Law Project and subsequent cases also demonstrate the range of speech that, if coordinated, is punishable as material support. *Humanitarian Law Project* itself involved the teaching of peaceful conflict resolution and of how to petition groups such as the United Nations for relief.⁹⁰ *Mehanna* concerned translating and posting documents.⁹¹ And while the court in *In re: Terrorist Attacks* dismissed the claim against CAIR, it declined to do the same for a claim against World Assembly of Muslim Youth (WAMY).⁹² The allegations against WAMY included that it “uses its publications, youth camps, Islamic Centers, mosques conferences and other sponsored events, to provide ideological foundation for the Al Qaeda movement.”⁹³ Citing *Humanitarian Law Project*, the court explained that “[e]stablishing meeting places, holding public forums, or issuing publications to disseminate virulent rhetoric is not actionable . . . unless such services are being provided as support to a foreign terrorist organization.”⁹⁴

As *In re: Terrorist Attacks* illustrates, the criminal material-support laws have given rise not only to prosecutions but also to derivative civil lawsuits filed by plaintiffs allegedly injured by FTOs. The plaintiffs in these cases have sued social media companies, including Facebook and Twitter, for providing criminal material support to FTOs by allowing them to obtain accounts.⁹⁵ While some of the allegations in the lawsuits likely pertain to constitutionally unprotected speech by the FTOs, many of them pertain to

86. *Id.* at 504–05, 515–16.

87. *Id.* at 518.

88. *Id.* at 518–19.

89. *Id.*

90. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 22 (2010).

91. *United States v. Mehanna*, 735 F.3d 32, 41 (1st Cir. 2013).

92. *In re: Terrorist Attacks*, 740 F. Supp. 2d at 519–20.

93. *Id.* at 519.

94. *Id.*

95. *See, e.g.*, KATHLEEN ANN RUANE, CONG. RESEARCH. SERV., R44626, THE ADVOCACY OF TERRORISM ON THE INTERNET: FREEDOM OF SPEECH ISSUES AND THE MATERIAL SUPPORT STATUTES 6 (2016), <https://fas.org/sgp/crs/terror/R44626.pdf> [<https://perma.cc/76RZ-D7YW>] (discussing the lawsuits); Benjamin Wittes & Zoe Bedell, *Facebook, Hamas, and Why a New Material Support Suit May Have Legs*, LAWFARE (July 12, 2016), <https://www.lawfareblog.com/facebook-hamas-and-why-new-material-support-suit-may-have-legs> [<https://perma.cc/8UWU-XHXF>] (“The last few months have seen a spree of lawsuits filed against social media companies for allegedly providing material support to terrorists . . . by effectively allowing those groups to use their systems.”).

FTO speech—such as broadly disseminated propaganda—that would be protected outside of the material-support context.⁹⁶ Courts thus far have held that the Communications Decency Act (CDA) immunizes these service providers from such lawsuits,⁹⁷ but it seems unlikely, in light of *Humanitarian Law Project*, that courts would deem the First Amendment to protect the providers should other courts interpret the CDA differently, or should Congress amend it. Indeed, in a pre-*Humanitarian Law Project* case, a federal district court rejected a First Amendment defense from a satellite television programming provider in New York for retransmitting the signal of “Al Manar, a television station associated with . . . Hezbollah,” an FTO.⁹⁸ The defendant in that case, Javaid Iqbal, eventually pled guilty to material support and was sentenced to sixty-nine months in prison.⁹⁹

B. Specially Designated Global Terrorists

Beyond the INA, the government has a yet more flexible set of tools at its disposal to punish speech activities as terrorist support. Under the International Emergency Economic Powers Act (IEEPA) of 1977, the president may declare a national emergency with respect to an “unusual and extraordinary threat, which has its origin in whole or in substantial part outside the United States, to the national security, foreign policy, or economy.”¹⁰⁰ Upon doing so, the president gains the authority to “investigate, block assets and prohibit transactions with designated persons”¹⁰¹ in order to “deal with [that] threat.”¹⁰²

96. See, e.g., *Fields v. Twitter*, 217 F. Supp. 3d 1116, 1119, 1125 (N.D. Cal. 2016) (summarizing FTO Twitter activity about which plaintiffs complain, ranging from direct recruitment messages to “instructional guidelines,” “promotional videos,” and “propaganda”).

97. *Cohen v. Facebook, Inc.*, No. 16-CV-4453, 2017 WL 2192621, at *10–13 (E.D.N.Y. May 18, 2017); *Fields*, 217 F. Supp. 3d at 1118, 1123–24; see also Russell Spivak, *Facebook Immune from Liability Based on Third-Party Content*, LAWFARE (May 23, 2017), <https://www.lawfareblog.com/facebook-immune-liability-based-third-party-content> [<https://perma.cc/E99L-7V6H>] (citing arguments against CDA immunity but noting that recent court decisions make it “increasingly unlikely that any case against a service provider can actually break through the [CDA] wall”).

98. Bhagwat, *supra* note 52, at 593.

99. Benjamin Weiser, *A Guilty Plea in Providing Satellite TV for Hezbollah*, N.Y. TIMES (Dec. 23, 2008), <http://www.nytimes.com/2008/12/24/nyregion/24plea.html> [<https://perma.cc/UHR7-AT69>]; Benjamin Weiser, *S.I. Man Gets Prison Term for Aid to Hezbollah TV*, N.Y. TIMES (Apr. 23, 2009), <http://www.nytimes.com/2009/04/24/nyregion/24cable.html> [<https://perma.cc/ZFA7-7TKW>]; see Press Release, U.S. Attorney’s Office, S. Dist. of N.Y., *Staten Island Man Sentenced to Sixty-Nine Months in Prison for Providing Material Support and Resources to Hizballah* (Apr. 23, 2009), <https://archives.fbi.gov/archives/newyork/press-releases/2009/nyfo042309a.htm> [<https://perma.cc/F8TB-38H7>].

100. 50 U.S.C. § 1701(a) (2012).

101. See *id.* § 1702; *Anti-Money Laundering: Blocking Terrorist Financing & Its Impact on Lawful Charities: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Fin. Servs.*, 111th Cong. 5–21 (2010) [hereinafter *Anti-Money Laundering Hearing*] (statement of Daniel L. Glaser, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury).

102. 50 U.S.C. § 1701(b).

Pursuant to IEEPA and other authorities, President George W. Bush issued Executive Order 13,224 (“EO 13,224”) shortly after September 11, 2001.¹⁰³ In the order, President Bush declared a national emergency, designated twenty-seven Specially Designated Global Terrorists (SDGTs), and authorized the blocking of SDGTs’ assets.¹⁰⁴ EO 13,224 also provided means for additional SDGT designations to be made. Among other things, it empowered the secretary of the treasury, in consultation with the secretary of state and the attorney general, to designate as SDGTs persons who provide material support for, or who are “otherwise associated with,” other SDGTs.¹⁰⁵ In other words, “[m]ere *association*—quite apart from demonstrated material support—is sufficient” to designate a target an SDGT and to freeze its assets.¹⁰⁶ The treasury department has since taken the position that it need have only reasonable suspicion of association or material support to justify designation.¹⁰⁷

Upon designating a person or entity an SDGT, the treasury department freezes its assets.¹⁰⁸ The department also has discretion, under the USA PATRIOT Act,¹⁰⁹ to freeze assets upon initiating an investigation into a potential designee.¹¹⁰ A designated or potential SDGT may apply to the treasury department for a license to use blocked funds for specified transactions, such as to pay lawyers’ fees.¹¹¹

Despite EO 13,224’s post-September 11 origin, it does not “contain any limiting language restricting it to the entities who committed the 9/11 attacks.”¹¹² EO 13,224 is instead “a global order that [applies] generally to ‘foreign terrorists’” and their supporters and associates.¹¹³ Indeed, the national emergency declared in the order has been renewed every year since

103. See, e.g., Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 4–6, 19–20 (2005) (providing background on IEEPA); Donohue, *supra* note 24, at 647–52 (providing background on EO 13,224).

104. Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,079 (Sept. 23, 2001) [hereinafter EO 13,224]; see also Donohue, *supra* note 24, at 650; *Executive Order 13224*, U.S. DEP’T ST., <https://www.state.gov/j/ct/rls/other/des/122570.htm> [<https://perma.cc/4BFM-MZUR>] (last visited Oct. 16, 2017).

105. EO 13,224, *supra* note 104, § 1(d); see also Donohue, *supra* note 24, at 650.

106. Donohue, *supra* note 24, at 651.

107. See *Anti-Money Laundering Hearing*, *supra* note 101, at 42–43 & n.11 (written statement of Michael German, Policy Counsel, American Civil Liberties Union).

108. Slocum, *supra* note 25, at 399.

109. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S. Code).

110. Slocum, *supra* note 25, at 392–93 & n.34.

111. *Id.* at 399.

112. Zac Copeland, *The National Emergency Under Executive Order 13224 Moves into Year 16*, LAWFARE (Nov. 3, 2016), <https://www.lawfareblog.com/national-emergency-under-executive-order-13224-moves-year-16> [<https://perma.cc/QD5X-DEWL>].

113. *Id.*

2001 and therefore has been active for nearly seventeen years.¹¹⁴ As of late 2016, more than 950 persons and entities had been designated as SDGTs.¹¹⁵

Courts engage in “highly deferential review[s]” of SDGT determinations.¹¹⁶ As administrative decisions, they are reviewed under the “arbitrary and capricious” standard,¹¹⁷ and “[c]ourts are particularly mindful that their review is highly deferential when matters of foreign policy and national security are concerned.”¹¹⁸ Furthermore, courts have held that SDGTs’ due process demands are satisfied by “a post-deprivation administrative remedy and the opportunity to submit written submissions to [the treasury department],” and that SDGTs are entitled neither to the classified evidence on which the executive relied in designating them nor to “procedures which approximate a judicial trial.”¹¹⁹

Since *Humanitarian Law Project*, only one court has spoken in depth about the SDGT system’s First Amendment implications. In *Al Haramain Islamic Foundation v. U.S. Department of the Treasury*,¹²⁰ the Ninth Circuit addressed a free speech challenge by the Multicultural Association of Southern Oregon (MCASO) to section 2(a) of EO 13,224, which prohibits U.S. persons or entities from providing “services to or for the benefit of” any SDGTs.¹²¹ MCASO challenged section 2(a) as applied to its planned “advocacy coordinated with and for the benefit of” Al Haramain Islamic Foundation, Oregon (“AHIF Oregon”), a designated SDGT.¹²² Among other things, MCASO alleged that it wished to “speak to the press, hold demonstrations, and contact the government,” all in coordination with AHIF Oregon.¹²³

“For purposes of the First Amendment analysis,” the court discerned “no difference between section 2(a) of EO 13,224 and the statute at issue in [*Humanitarian Law Project*].”¹²⁴ It thus concluded that strict scrutiny applies, as it had (at least theoretically) in *Humanitarian Law Project*.¹²⁵ Yet

114. *Id.* (“Although the initial orders did not include expiration dates, § 202(d) of the National Emergencies Act requires the termination of a declared emergency after a year unless the executive continues it.”)

115. *Id.*

116. *Kadi v. Geithner*, 42 F. Supp. 3d 1, 10 (D.D.C. 2012) (quoting *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007)).

117. *Id.*

118. *Id.*; see also *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 979–80 (9th Cir. 2012).

119. *Kadi*, 42 F. Supp. 3d at 29 (citing *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 163–64 (2003)); see also *Al Haramain*, 686 F.3d at 982 (“[W]e join all other courts to have addressed the issue in holding that, subject to the limitations discussed below, the government may use classified information, without disclosure, when making designation determinations.”); *id.* at 984–85 (explaining why predeprivation notice is not required).

120. 686 F.3d 965 (9th Cir. 2012).

121. *Id.* at 995 (citing EO 13,224, *supra* note 104, § 2(a)).

122. *Id.*

123. *Id.* at 998. The Ninth Circuit held that, unlike the proposed speech activities in *Humanitarian Law Project*, these proposals were sufficiently concrete as to warrant preenforcement review. *Id.*

124. *Id.* at 997.

125. *Id.* at 998.

in applying strict scrutiny, the court found the case materially distinguishable from *Humanitarian Law Project*, in large part because of AHIF Oregon's status as a domestic organization. The court found "little evidence that the pure-speech activities proposed by MCASO on behalf of the domestic branch [of AHIF Oregon] will aid the larger international organization's sinister purposes," and concluded that EO 13,224 could not constitutionally be applied.¹²⁶ *Al Haramain* signals, on the one hand, that First Amendment claims likely will fail, as in *Humanitarian Law Project*, insofar as they challenge the SDGT framework as applied to speech coordinated with foreign SDGTs. On the other hand, the *Al Haramain* decision suggests an important limit on *Humanitarian Law Project*'s reach—speech is relatively likely to be protected, at least in the Ninth Circuit, when it is coordinated with domestic SDGTs.¹²⁷

*C. Existing Critiques of Humanitarian Law Project,
Material-Support Laws, and Designation Processes*

A number of thoughtful critiques of *Humanitarian Law Project* have been penned in the seven-plus years since it was decided. The most elemental criticism raised is that aspects of the case fly in the face of well-established precedent. Several writers observe that the Court, in deferring so heavily to the government, acted incompatibly with the strict scrutiny standard that it purported to apply.¹²⁸ Others suggest that the Court's reasoning runs counter to incitement doctrine and particularly to *Brandenburg v. Ohio*,¹²⁹ the landmark 1969 case.¹³⁰ Under *Brandenburg*, speakers cannot be penalized for inciting violence unless they intend to and are likely to cause imminent unlawful activity.¹³¹ Furthermore, some scholars deem *Humanitarian Law Project*'s reasoning incompatible with free association precedent. In particular, they argue that under *Scales v. United States*,¹³² speakers cannot be punished for coordinating with terrorist groups unless they specifically

126. *Id.* at 1001.

127. See, e.g., David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 150 (2012) (pointing out the *Humanitarian Law Project* court's statement that the case did not involve speech coordinated with a domestic group and arguing that *Al Haramain* "points the way toward an understanding of [*Humanitarian Law Project*] that takes the Supreme Court at its word, and limits its reasoning to the very particular facts presented").

128. See *supra* note 52 and accompanying text.

129. 395 U.S. 444 (1969) (per curiam).

130. See, e.g., Cole, *supra* note 127, at 156–58; Andrew V. Moshirnia, *Valuing Speech and Open Source Intelligence in the Face of Judicial Deference*, 4 HARV. NAT'L SEC. 385, 427–28, 435–38 (2013); Tunis, *supra* note 24, at 294–95; Erwin Chemerinsky, *Free Speech and the 'War on Terror,'* TRIAL, Jan. 2011, at 54–55; Emma Sutherland, Note, *The Material Support Statute: Strangling Free Speech Domestically?*, 23 GEO. MASON C.R.L.J. 229, 249–50 (2013); cf. Bhagwat, *supra* note 52, at 610–11 (describing the tension between *Brandenburg* and lower court applications of *Humanitarian Law Project*).

131. *Brandenburg*, 395 U.S. at 447.

132. 367 U.S. 203 (1961).

intend to further a group's unlawful ends.¹³³ Many, though not all,¹³⁴ of these First Amendment-based critiques take aim not only at *Humanitarian Law Project* but also at the material-support laws themselves.

Some scholars agree with the *Humanitarian Law Project* Court that speech coordinated with FTOs ought not to be protected but voice concerns about important aspects of the Court's reasoning. For example, Peter Margulies argues that the basic distinction between (unprotected) coordinated speech and (protected) independent advocacy is justified.¹³⁵ Such a distinction provides a safe harbor for independent speech, while allowing the government needed flexibility to fight foreign terrorists who would exploit information asymmetries between themselves and U.S. persons with whom they might coordinate.¹³⁶ Yet Margulies faults the *Humanitarian Law Project* Court on several fronts, including for deferring excessively to the government, for using ambiguous language that could be taken to condone punishing speakers who lend ideological legitimacy to FTOs, and for leaving uncertain the distinction between independent and coordinated advocacy.¹³⁷

Ashutosh Bhagwat makes a somewhat parallel set of arguments about associational freedoms.¹³⁸ There is a legally significant distinction between coordinated and uncoordinated speech, he argues, because coordinated speech triggers associational protections rather than speech protections, and associational rights extend only to peaceable groups.¹³⁹ Nonetheless, Bhagwat takes issue with much of the *Humanitarian Law Project* Court's reasoning.¹⁴⁰ Like Margulies, Bhagwat laments the murkiness of the line between coordinated and uncoordinated speech.¹⁴¹ Bhagwat points to *Mehanna*—in which “coordination was alleged and allowed to go to the jury based on the defendant's actions alone, taken in response to a general plea from an FTO”¹⁴²—as a troubling product of that uncertainty.¹⁴³

Beyond critiquing *Humanitarian Law Project*, a number of scholars and advocates have examined the material-support laws and the FTO and SDGT designation and enforcement processes more broadly. For example, critics long have raised due process concerns regarding many aspects of the designation procedures. These include the government's use of classified

133. See, e.g., Cole, *supra* note 127, at 147–49; Heins, *supra* note 69, at 611; Huq, *supra* note 51, at 28–29, 29 n.86; Said, *supra* note 38, at 1492–93. But see Chesney, *supra* note 103, at 69–70 (taking the view, several years before *Humanitarian Law Project*, that *Scales* requires specific intent before membership can be prosecuted and suggesting that the provision of services beyond mere membership may not require the same, as “even facially innocuous aid can facilitate the group's capacity to do violence by enhancing the group's standing or popularity”).

134. See *infra* notes 136–41.

135. Margulies, *supra* note 52, at 458–59, 479–95.

136. *Id.*

137. *Id.* at 463, 495–96, 498–512.

138. See generally Bhagwat, *supra* note 52.

139. *Id.* at 616–28.

140. *Id.* at 585–90.

141. *Id.* at 603–04.

142. *Id.* at 610.

143. *Id.*

evidence to which designees lack access; the limited scope of the administrative and judicial review opportunities provided designees to challenge their status; and the government's ability to seize potential SDGTs' assets upon initiating investigations, which forces groups to seek government permission to fund their own defenses.¹⁴⁴

Critics have also challenged the implementation of designation and material-support provisions as discriminatory. For example, Laura Donohue wrote in 2008 that both the FTO and SDGT frameworks have “had a disparate impact on the Arab Muslim community”¹⁴⁵ and that, “while some Arab or Muslim organizations do threaten U.S. interests, there is reason to believe that this threat has been greatly exaggerated.”¹⁴⁶ At the same time, she observed that “many other organizations, which *do* pose a threat to U.S. national security—and are neither Arab nor Muslim—have escaped the more onerous provisions in the anti-terrorist finance regime.”¹⁴⁷ Michael German of the ACLU offered striking evidence of such double standards while testifying before Congress in 2010:

[I]n contrast to the treatment of U.S.-based Muslim charities, Chiquita Brands International was allowed to pay a fine of \$25 million following its payment of \$1.7 million directly to two designated terrorist groups in Colombia between 1997 and 2004. Chiquita admitted to these payments in 2003, but no criminal charges were filed, its assets were never seized or frozen, and Chiquita continues to operate. In another example, [the treasury department] has never designated Halliburton or General Electric, or frozen their assets, despite both companies' conduct of business with Iran, which is designated as a state sponsor of terrorism. Former Assistant Secretary of the Treasury Paul Craig Roberts, who served under President Ronald Reagan, observed, “I think the attack on the Muslim charities was just easy, it was an easy, soft target.”¹⁴⁸

II. ON DESIGNATIONS, BOOTSTRAPS, AND THE FIRST AMENDMENT

A. *FTO & SDGT Designations as Bootstraps to Bypass Precedent*

Critics of *Humanitarian Law Project* are correct that the case deviates markedly from precedents central to modern free speech doctrine. It is a cornerstone of that doctrine that speakers cannot be punished for inciting

144. See, e.g., *Anti-Money Laundering Hearing*, *supra* note 101, at 42 (written statement of Michael German, Policy Counsel, American Civil Liberties Union) (“IEEPA effectively allows the government to shut down an organization forever, without notice or hearing, on the basis of secret evidence, and without any meaningful judicial review.”); Donohue, *supra* note 24, at 663 (concluding that “[t]he designation process for SDGTs and FTOs expands executive authority without providing even rudimentary procedural due process protections” and citing the concerns listed in the text accompanying this footnote, among others).

145. Donohue, *supra* note 24, at 672.

146. *Id.* at 675.

147. *Id.* at 676.

148. *Anti-Money Laundering Hearing*, *supra* note 101, at 44 (written statement of Michael German, Policy Counsel, American Civil Liberties Union).

violence unless the exacting *Brandenburg* standard, or genuine strict scrutiny, is met.¹⁴⁹ And the Court's reliance on the concept of coordination only worsens matters. As *Mehanna* illustrates, the definition currently is so open ended that it enables unilaterally undertaken speech to be penalized.¹⁵⁰ More so, the definition's haziness and potential breadth surely chill prospective speakers.¹⁵¹ Nor is a highly clarifying definition likely to be forthcoming, given the Supreme Court's refusal to decide facial vagueness challenges or to consider insufficiently detailed, as-applied preenforcement challenges.¹⁵²

More fundamentally, *Humanitarian Law Project* employs the concept of coordination in a manner that belies both speech and association precedents. To the *Humanitarian Law Project* Court, coordinated speech is a speech-plus of sorts, to which ordinary speech protections do not apply with full force.¹⁵³ Nor does such speech receive associational protections. The latter cover "membership," whereas coordinated speech is more akin to membership-plus-speech.¹⁵⁴ Coordination, in short, is neither pure membership nor pure speech but a combination of both. Under *Humanitarian Law Project*, rather than this combination warranting protections at least as strong as—if not stronger than—those that apply to individual speech,¹⁵⁵ the combination leads to substantially diminished protections.¹⁵⁶ This approach rests on a tautology: the bar on coordinated speech does not raise the same First Amendment issues as would restrictions on "mere membership" or "pure political speech" because coordinated speech is neither of those things. Instead, it is something called "material support," and material support receives less protection.¹⁵⁷

The concepts of material support and coordinated speech, and *Humanitarian Law Project*'s deferential approaches to both, are grounded in

149. See *supra* notes 128–37 and accompanying text.

150. See *supra* Part I.A.3.

151. See, e.g., Huq, *supra* note 51, at 22–23 (citing examples of potentially criminal lobbying and lawyering activity in the wake of *Humanitarian Law Project*); Margulies, *supra* note 52, at 498 (“[A] scholar who studies [an FTO] may wish to interview [FTO] leaders A journalist may wish to do the same . . . as will a human rights group”). Definitional ambiguity leaves such actors vulnerable to “substantial legal exposure.” *Id.*

152. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–25 (2009).

153. *Id.* at 39–40.

154. See *id.*

155. See Bhagwat, *supra* note 52, at 609 (“There is a strong argument to be made that, for reasons both historical and theoretical, when the political rights protected by the First Amendment, such as speech and association, are exercised in tandem, they deserve special solicitude.”).

156. Cf. *id.* at 609–10 (criticizing the *Humanitarian Law Project* Court for rendering associational freedom “wholly illusory” by characterizing it only as formal membership, and embracing a similarly empty right to “independent advocacy” by leaving the door open for such advocacy itself to “become proof of coordination”).

157. *Humanitarian Law Project*, 561 U.S. at 26 (“Congress has not . . . sought to suppress ideas or opinions in the form of ‘pure political speech.’ Rather, Congress has prohibited ‘material support.’”); see also Huq, *supra* note 51, at 29 (observing that the *Humanitarian Law Project* Court “argued, a bit tautologically, that § 2339B ‘does not criminalize mere membership,’ but rather only material support” (quoting *Humanitarian Law Project*, 561 U.S. at 18)).

the FTO designation system. The Court stressed in *Humanitarian Law Project* that the material-support law “only applies to [FTOs],”¹⁵⁸ that Congress and the executive branch believe that FTOs are “so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct,”¹⁵⁹ and that deference to this judgment is “vital” given the political branches’ relative expertise.¹⁶⁰ Most important, the Court accepted that the taint of an FTO’s status infects not only that FTO but also others who speak with it or on its behalf.¹⁶¹ The infection transforms their coordinated speech into something different and constitutionally lesser than “pure” speech or association.¹⁶²

By accepting the notion that FTO status is so transformative, both for the FTO and for speech coordinated with it, *Humanitarian Law Project* effectively uses FTO status as a bootstrap. With that strap, it yanks criminal penalties for speech past the skeptical judicial analyses that precedent would otherwise demand. SDGT designations similarly serve as bootstraps—albeit, according to the Ninth Circuit, with respect only to foreign SDGTs.¹⁶³

I do not mean to suggest that existing doctrinal standards ought not be adjusted to address certain clearly defined instances of coordinated speech. In a different context—that of prosecuting publications of classified information—I have argued that a slight softening of *Brandenburg*’s imminence requirement might be appropriate, as damage from such publication can take time to manifest.¹⁶⁴ A similar argument might be made about speech undertaken in close coordination with certain terrorist groups because globally dispersed, well-resourced groups may lay and carry out plans slowly but steadily over time through cells.¹⁶⁵ Indeed, the plaintiffs in *Humanitarian Law Project* themselves maintained that the Court could resolve any constitutional problems simply by interpreting the material-support statute to require specific intent.¹⁶⁶

Yet while there is room for reasonable argument about the details of the ideal legal standard, such a standard should, as elaborated below, be searching and skeptical. Moreover, whatever its particulars, it should be arrived at only after careful consideration of the speech interests at stake; the blind spots, biases, and relative advantages of the political branches; and the relevant existing precedent. The Court failed in *Humanitarian Law Project*

158. *Humanitarian Law Project*, 561 U.S. at 35.

159. *Id.* at 29.

160. *Id.* at 34.

161. *Id.* at 29.

162. *Id.* at 28.

163. *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 998–1000 (9th Cir. 2012).

164. See Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221, 1263 n.186 (2015).

165. *Cf. Dennis v. United States*, 341 U.S. 494, 568–69 (1951) (Jackson, J., concurring) (contrasting the free speech problem posed by a “hot-headed speech on a street corner” with that presented by “a well-organized, nation-wide conspiracy”).

166. Opening Brief for *Humanitarian Law Project*, et al. at 22, *Humanitarian Law Project*, 561 U.S. 1 (Nos. 08-1498, 09-89), 2009 WL 3865433, at *22.

to grapple with these factors in any meaningful way. Instead, it simply bypassed them, using as bootstraps the FTO system and the government's judgments regarding the impact of FTO status on coordinated speech. In so doing, the Court presented the political branches' national security judgments as nearly unquestionable, the speech values at issue as minor, and its own deferential posture as unremarkable—and even compatible with strict scrutiny.

B. *The Trouble with Bootstrapping*

In bootstrapping past rigorous judicial review in *Humanitarian Law Project*, the Court bypassed not just doctrine but core insights of the free speech theory that animate it. Perhaps the most widely embraced such insight is that speech about government and politics is deeply valued under the First Amendment for its essential contributions to the project of self-government.¹⁶⁷ Also central is the notion that there is a high potential for incompetence and abuse of power where the government seeks to pick winners and losers among speakers based on the content of their speech.¹⁶⁸ Indeed, there is special reason to fear abuse in the realm of public affairs where government actors are most likely to have professional and reputational investments at stake.¹⁶⁹

The material-support context illustrates the special value of speech regarding public affairs and the special risks of suppressing it. Even putting aside the serious due process concerns that have been raised about FTO and SDGT designation procedures,¹⁷⁰ it is indisputable that the executive possesses very broad discretion to make those designations. That discretion

167. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 757 (2011) (Kagan, J., dissenting) ("The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate."); *Texas v. Johnson*, 491 U.S. 397, 411 (1989) (deeming it troubling that respondent was "prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values"); *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931))); see also Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SECURITY L. & POL'Y 409, 421 n.59, 422 n.63 (2013) (citing a range of scholarship about free speech and noting that "[e]ach of these works deems such speech either central to the First Amendment's purpose, or encompassed in a broader free speech value or set of values").

168. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 33–34, 44–46, 86, 162–63 (1982) (demonstrating that all major free speech theories, including self-government theory, share a basic core of distrust of government and that this ought to be a central motivating concern of free speech doctrine).

169. See Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 324 (deeming it a corollary of free speech theories grounded in distrust of government or of speech's checking value that "wariness is called for whenever government seeks to restrict speech about its own operations"); cf. Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 548, 553–54, 557–65 (1977) (discussing speech's role as an essential check on government actors and exploring the connection between this theory and other free speech values).

170. See *supra* note 144 and accompanying text.

can be exercised by, among other things, bootstrapping from prior determinations that are themselves acts of broad decision-making discretion. For example, the executive may designate a group an FTO on the basis that it materially supported another FTO.¹⁷¹ Parallel criteria exist in the SDGT context.¹⁷² The very existence of the SDGT category itself rests on a strained executive interpretation of the underlying statutory authority¹⁷³ and on repeated presidential renewals of a state of emergency characterized by an “unusual and extraordinary threat” over the course of seventeen years.¹⁷⁴

The executive’s wide discretion to designate FTOs and SDGTs, combined with its broad enforcement leeway regarding material-support prosecutions and blocking orders, also makes it likely that political considerations and other biases will influence decision-making. Recall, for example, concerns voiced to the effect that Muslim charities and organizations have been disproportionately targeted while other groups’ serious transgressions are overlooked or treated relatively leniently.¹⁷⁵

It is especially dangerous, from the perspective of free speech theory, for the executive to direct such discretion against material support that takes the form of speech. With such power, the executive can readily manipulate public debate about designated groups, the designation process itself, or related matters. The rights of individuals and groups to speak to or on behalf of FTOs and SDGTs are valuable counterweights against potential abuses or incompetence by the government. And it does not suffice to leave only limited avenues, such as the ability to engage in independent speech, available. Courts repeatedly, and with good reason, have rejected the notion that government has wide latitude to limit speakers’ expressive or associational choices. Indeed, Justice Scalia, writing for a majority of the Court, famously rejected the argument that legislatures could freely draw content-based restrictions even within categories of “unprotected speech,” citing such restrictions’ skewing effect on public discourse¹⁷⁶ and the risk that they amount to “official suppression of ideas.”¹⁷⁷

III. BOOTSTRAPPING IN ANOTHER SETTING: PROSECUTING LEAKS OF CLASSIFIED INFORMATION

The use of administrative designations as national security bootstraps is not peculiar to the material-support setting. The executive branch and the courts similarly treat information-classification decisions as bootstraps with which to pull prosecutions for leaking classified information past the intensive judicial scrutiny that would otherwise apply. Elsewhere, I have

171. *See supra* notes 14, 17 and accompanying text.

172. *See supra* text accompanying note 105.

173. *See* Donohue, *supra* note 24, at 686 (“[T]here is serious question as to whether the IEEPA authorizes Executive Order 13,224.”).

174. *See supra* text accompanying notes 100, 114–20.

175. *See supra* text accompanying notes 146–54.

176. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (stating that the City of St. Paul “has no . . . authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules”).

177. *Id.* at 390, 395.

discussed classified information leak prosecutions and their First Amendment implications in great detail.¹⁷⁸ Here, I take a more abbreviated look at the topic to illustrate how bootstrapping takes place in this setting and poses First Amendment problems similar to those posed in the material-support context.

*A. Judicial and Executive Branch Positions
on Leaks and the First Amendment*

Although the United States lacks an official-secrets act that automatically criminalizes classified information leaks, it has a patchwork of laws that come close to having that effect.¹⁷⁹ Through these laws, particularly the Espionage Act,¹⁸⁰ the executive is empowered to prosecute government employees or other insiders for conveying virtually any classified information without authorization, including information conveyed to journalists.¹⁸¹

Only one federal appellate court, the Fourth Circuit, has considered a First Amendment challenge to an Espionage Act prosecution for leaking information to the press. In *United States v. Morison*,¹⁸² authored by Judge Donald Russell and joined by Judge J. Harvie Wilkinson, the court took the view that the defendant, who transmitted classified satellite photos to a magazine for publication, had engaged in pure theft and that “no First Amendment rights [were] implicated” by his prosecution.¹⁸³ Both Judge Wilkinson and Judge James Phillips, the panel’s third judge, wrote separate concurring opinions expressing the view, contra the majority opinion, that the prosecution implicated the First Amendment.¹⁸⁴ However, although neither identified the precise standard that it would employ, each concurrence supported a deferential role for the judiciary.¹⁸⁵ The handful of district court cases addressing First Amendment challenges to Espionage Act prosecutions follow *Morison*’s lead in embracing a very minimal role for judicial review.¹⁸⁶

178. See generally KITROSSER, *supra* note 3, at 58–66, 105–12, 129–42 (2015); Kitrosser, *supra* note 13; Kitrosser, *supra* note 167; Kitrosser, *supra* note 164; Heidi Kitrosser, *Leaks, Leakers, and a Free Press*, HARV. L. & POL’Y REV. (Mar. 9, 2017), <http://harvardlpr.com/2017/03/09/leaks-leakers-and-a-free-press/> [https://perma.cc/QTL3-UFRS]. Part III, including citations within, is drawn mostly from these previous works.

179. See, e.g., Susan Hennessey & Helen Klein Murillo, *The Law of Leaks*, LAWFARE (Feb. 15, 2017), <https://www.lawfareblog.com/law-leaks> [https://perma.cc/WU6U-LM2C].

180. 18 U.S.C. §§ 792–799 (2012).

181. See, e.g., Stephen I. Vlodeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1534 (2008) (noting that, given the Espionage Act’s breadth, “it appears that there can never be a ‘legal’ public disclosure of classified national security information under the Espionage Act”).

182. 844 F.2d 1057 (4th Cir. 1988).

183. *Id.* at 1068.

184. *Id.* at 1080–81 (Wilkinson, J., concurring); *id.* at 1085–86 (Phillips, J., concurring).

185. *Id.* at 1083–84 (Wilkinson, J., concurring); *id.* at 1085–86 (Phillips, J., concurring); see also Kitrosser, *supra* note 167, at 430–31 (describing the concurring opinions).

186. Kitrosser, *supra* note 167, at 417–18.

For its part, the executive branch has, in the smattering of leak prosecutions undertaken across administrations, consistently taken the view reflected in *Morison's* majority opinion that classified information is government property and its conveyance is theft, not speech. It has argued, in short, that there simply are no First Amendment issues raised by leak prosecutions.¹⁸⁷

The judicial and executive branch positions very much rely on the information classification system and on particular classification decisions as bootstraps to drag leak prosecutions past the challenging judicial scrutiny that would otherwise apply. Indeed, as we saw in the material-support context, the *Brandenburg* standard ordinarily applies to speech prosecutions based on potential harm to national security.¹⁸⁸ Under *Brandenburg*, such speech can be punished only if the speaker intended to and if her speech is imminently likely to spark illegal behavior.¹⁸⁹ Nor are government employers entitled, outside of the classified information context, to strip employees of all First Amendment protections for conveying information about which they signed confidentiality agreements.¹⁹⁰ Even where an employee's penalty is confined to her employment terms—such as termination or demotion, as opposed to criminal or civil sanctions—courts will evaluate the penalty pursuant to a balancing test so long as the penalized speech took place outside of the scope of employment.¹⁹¹ Where the allegedly leaked information is classified, however, courts and prosecutors have used that fact as a bootstrap to bypass *Brandenburg*, strict scrutiny, and even the more limited protections of the employee speech cases.

B. *The Trouble with Bootstrapping in This Setting*

The problems with bootstrapping in this setting largely parallel the difficulties identified in the material-support context. The treatment of classified leaks as categorically or nearly unprotected runs directly counter to major tenets of free speech theory—tenets that are widely embraced by courts in virtually all other relevant settings. Courts and scholars ordinarily deem speech about national or international affairs, including national security, to lie at the very heart of the First Amendment and thus to deserve its highest protections.¹⁹² Also central to free speech theory are the belief that speech is a crucial check on those who govern us and the corollary wariness of government efforts to manipulate speech about itself.¹⁹³ An executive power to determine via classification and prosecutorial choices which government information may and may not be shared legally is deeply antithetical to these precepts.

187. *Id.* at 413–14.

188. *See supra* Part I.C.

189. *See supra* notes 128–37.

190. *See* Kitrosser, *supra* note 164, at 1234–37 (discussing the government employee speech cases and their relationship to classified information leak prosecutions); *see also* Kitrosser, *supra* note 167, at 419–21, 433–36.

191. *See supra* note 190 and accompanying text.

192. *See supra* note 167.

193. *See supra* notes 168–75.

These theoretical insights are very much bolstered by the realities of the classification system. The problem of rampant overclassification has been widely acknowledged by experts from across the political spectrum.¹⁹⁴ For example, Erwin Griswold, who served as Richard Nixon's solicitor general, deemed it "apparent to any person who has considerable experience with classified material that there is massive over-classification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."¹⁹⁵ Given classification's ubiquity, leaks of classified information by government employees make up much of journalism's lifeblood.¹⁹⁶ More so, many leaks come from the very top—engineered by, or with the tacit approval of, the White House.¹⁹⁷

By treating classification decisions as bootstraps with which to yank classified leak prosecutions past the significant First Amendment protections that otherwise would apply, courts enable a dangerous level of executive branch control over speech. This approach facilitates sweeping discretion by administrations to classify politically inconvenient information and to prosecute—as well as to deter through the threat of prosecution—those who might leak such information. At the same time, administrations remain free to selectively leak or declassify information that casts them in a favorable light. This scheme ignores basic lessons of free speech theory, lessons manifest elsewhere in free speech doctrine.

This is by no means to say that classified information leaks warrant absolute protection. Nor is it necessarily the case that the most rigorous doctrinal standards, such as the *Brandenburg* test, should apply without revision. As I have explored elsewhere, a somewhat less rigorous test may be more appropriate for this context.¹⁹⁸ Alternatively, a First Amendment "public accountability defense"—similar to one that Yochai Benkler has proposed as a legislative fix¹⁹⁹—might be called for. Yet by treating information's classified status as fully or nearly determinative of a

194. See Kitrosser, *supra* note 167, at 426–28.

195. Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST (Feb. 15, 1989), <https://www.washingtonpost.com/archive/opinions/1989/02/15/secrets-not-worth-keeping/a115a154-4c6f-41fd-816a-112dd9908115> [<https://perma.cc/95V8-GLVP>].

196. See, e.g., Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 236 (2008) ("Leaks of classified information, including classified national security information, have become one of the primary ways the government communicates information to the public."); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 528–29 (2013) (citing the prevalence of leaked information in news stories).

197. See, e.g., William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1469–70 (2008); Papandrea, *supra* note 196, at 251–52 (describing the ubiquity of, and strategies behind, authorized leaks from the top); Pozen, *supra* note 196, at 529–30 ("Journalists and government insiders have consistently attested that leaking is far more common among those in leadership positions.").

198. See Kitrosser, *supra* note 167, at 441; Kitrosser, *supra* note 164, at 1263–76.

199. See Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 285–86 (2014) (supporting a statutory public accountability defense for leakers).

prosecution's constitutionality, courts fail to confront the competing interests at stake or to grapple with the range of possible doctrinal responses.

CONCLUSION

What is most interesting, and most troubling, about the cases explored here is not the extent to which they embrace judicial deference, but the indirect and unreflective route by which they arrive at this approach. Much of the fuel for traversing this road comes from the administrative designations at issue in the cases and their impact on judicial perceptions of the very nature of the speech at issue. In the material-support context, FTO status transforms coordinated speech into material support.²⁰⁰ In the classified-leaks setting, classification status transforms information into government property and its conveyance into something more akin to theft than to speech.²⁰¹ With their perceptions of the underlying speech so shaped, courts shift their analytical orientation from deeply skeptical to highly deferential, while barely acknowledging either the speech values at stake or their opinions' doctrinal novelty.²⁰² The resulting judicial deference flies in the face of decades of hard-won lessons about the government's tendency to overstate the national security risks of speech and transparency. Yet even those who support the conclusions reached in these cases might agree that the courts have not adequately troubled themselves with their decisions' impacts on free speech. One might protest that the courts ought to, at the very least, deliberate meaningfully about political branch measures to curtail deliberation, whether in the name of national security or otherwise.

200. *See supra* Part I.

201. *See supra* Part II.B.

202. *See supra* Parts I.D, II.B.