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Andrew V. Moshirnia, Valuing Speech and Open Source Intelligence in the Face of Judicial Deference, 4 Harv. Nat'l Sec. J. 385 (2013)

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Tue Apr 2 15:38:03 2019

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ARTICLE

Valuing Speech and Open Source Intelligence in the Face of Judicial Deference

Andrew V. Moshirnia*

Abstract

In seeking to more effectively wage the war on terror, the United States government has come close to declaring war on speech related to terrorism. The Government has taken steps to silence and punish foreign propagandists, foreign reporters, and even Americans who have produced “coordinated” speech with foreign terrorist organizations. While this latter attempt to chill speech raises serious constitutional concerns, the United States Supreme Court has seen little wrong with this approach. Indeed, the Court contorted existing First Amendment jurisprudence in *Holder v. Humanitarian Law Project* so as to uphold 18 U.S.C. § 2339B, an expansive material support statute encompassing “coordinated” speech.

These positions, no doubt taken with American safety in mind, not only damage our First Amendment jurisprudence, but also threaten to choke off the supply of open source intelligence, which derives from publicly available sources. This intelligence is especially vital in the modern war on terror taking place on the ground as well as on the Internet. This Article highlights the extraordinary deference shown by the Court in upholding a material support statute criminalizing non-violent speech and examines other governmental actions designed to chill foreign speech. This piece examines the deleterious effects chilling foreign speech will have on domestic security, detailing the importance of open source intelligence. Finally, this Article concludes by investigating the likely effect the Government’s positions will

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have on Crisis Mapping, an exciting new technology that leverages open source intelligence, social media, and horizontal information sharing, to empower citizens and coordinate humanitarian efforts.

I. Introduction

Commentators often implore the Court to resist the false dichotomy of liberty and security. In times of crisis, governmental actors seem all too willing to sacrifice the former to guarantee the latter.¹ Recently, the United States government has taken steps to chill the speech of foreign combatants, non-governmental organizations (NGOs), lawful permanent residents, and even the foreign and domestic press. The Government has adopted the position that First Amendment speech protections simply do not apply to trials of enemy aliens in American courts, a measure designed to silence foreign propagandists.² Furthermore, the Government has previously detained an individual at Guantanamo Bay on the basis of his employment as a foreign reporter.³ Finally, the Government has claimed that association with terrorists may allow the criminalization of domestic speech that would otherwise enjoy First Amendment protection. While these actions are taken with security in mind, they undermine the ability of the United States to analyze and anticipate future threats. In the age of open source intelligence (OSINT), which is intelligence produced from publicly available information,⁴ our security often derives from the foreign production of

¹ See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans); see also *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927) (criminalizing all association, even non-violent association, with the communist party); *Gitlow v. New York*, 268 U.S. 652 (1925) (reintroducing the “the bad tendency test” found in *Abrams v. United States*, 250 U.S. 616 (1919) to punish political speech that might endanger the government); *Schenck v. United States*, 249 U.S. 47 (1919) (upholding the 1917 Espionage Act).

² While courts are often cognizant of chilling, there is no shortage of justifications for why a speech restrictive statute does not have the effect of chilling. See e.g., *United States v. Al-Bahlul*, 820 F. Supp. 2d 1141, 1250 (USCMCR 2011) (arguing that the decision does not chill speech). The court’s justification disregards the effect penalties would have on future speech.

³ DEP’T OF DEF., UNCLASSIFIED SUMMARY OF EVIDENCE FOR ADMINISTRATIVE REVIEW BOARD IN THE CASE OF SAMI MUHEIDINE MOHAMED AL HAJ 33–35 (Sept. 4, 2006), http://www.dod.mil/pubs/foi/detainees/csrt_arb/ARB_Round_2_Factors_499-598.pdf#33 [hereinafter HAJ REVIEW BOARD].

⁴ National Defense Authorization Act of 2006, Pub. L. No. 109-163 § 931(a)(1), 119 Stat. 3136, available at <http://www.gpo.gov/fdsys/pkg/PLAW-109publ163/html/PLAW-109publ163.htm>.

terror-related intelligence. Cutting off the flow of terror-related foreign and domestic speech will undermine that intelligence, and in turn, American safety.

It is up to the Court to serve as a restraint on such reactions. However, the United States Supreme Court, in *Holder v. Humanitarian Law Project*,⁵ (*HLP*) recently embraced exactly this trade-off, restricting some speech linked to foreign terrorist organizations (FTOs). There, the Court held that 18 U.S.C. § 2339B, a material support statute that restricts “material support” to foreign terrorist groups, could criminalize speech related to foreign terrorist groups, provided that the speech was made in “coordination” with those groups. To facilitate this trade-off, the Court diluted the exacting standard usually demanded for content-based speech restrictions and conducted a curtailed policy and ends-only analysis determining that reducing advocacy for terrorists is essential to the war on terror.⁶ Even if this conclusion were correct, the Court damaged our understanding of First Amendment doctrine through the application of a strange variation of strict scrutiny devoid of any means analysis.⁷ In this rare situation, the First Amendment doctrine of strict scrutiny was perfectly equipped to deliver the right result.

In its analysis, the Court ignored the important relationship between foreign speech and domestic safety. By manipulating established standards to elevate security over liberty, the Court served neither principle. It is unclear how speech associated with foreign terrorist groups deserves less First Amendment protections when that speech does not advocate imminent lawless conduct. Consequently, the nebulous “coordination” test will likely chill otherwise constitutionally protected speech.

HLP will signal to both Congress and lower courts that content-based speech restrictions may survive strict scrutiny, provided that the Government cites a compelling interest in fighting the war on terror. Indeed, lower courts have followed suit, sustaining material support convictions involving the production of speech that would clearly fall below the legal standard for unprotected incitement speech.

⁵ 130 S. Ct. 2705 (2010).

⁶ *Id.* at 2724–29 (using much of the opinion to justify the statute in light of the government’s evidence as to its necessity for the war on terror).

⁷ See *HLP*, 130 S. Ct. at 2734 (Breyer, J., dissenting).

HLP not only appears to be constitutionally dubious, but it will also likely decrease the ability of the intelligence community to fight the war on terror. Deviating from established jurisprudence to protect § 2339B will likely rob us of valuable OSINT at exactly the time when the need for OSINT is most acute. Fear of terrorism and a desire to defer to the executive caused the Court to underestimate the dangers of chilling domestic and foreign speech, including—most ironically—speech that is necessary to advance counterterrorism initiatives.⁸ These policies threaten academics, journalists, and other individuals with access to terrorists groups who produce OSINT, a vital stream of information for a domestic understanding and prosecution of the war on terror.⁹ While each of these positions is individually harmful, in combination they will exact far more damage on the Government’s intelligence efforts.

Part II of this Article details the vital importance of OSINT in the war on terror, repeated Congressional findings of the same, and recommendations for stronger OSINT collection, analysis, and dissemination.¹⁰ Part III of this Article explores three recent examples—two by the Executive Branch and one by the Supreme Court—of government actions that disrupt OSINT. The three examples discussed in Part III are (1) the Executive Branch’s view that “incitement” speech—a category of speech that receives no First Amendment protection—is broader in scope in the context of an enemy alien’s solicitation trial; (2) the Executive Branch’s treatment and detention of foreign reporters; and (3) the Supreme Court’s adoption of an expansive definition of a material support statute in *Holder v. Humanitarian Law Project*.¹¹ This case is given special attention because it provided the Court with an opportunity to value speech and because recent jurisprudence counseled a different result. Part IV of this Article discusses the dangers of chilling both domestic and foreign speech and why this chilling implicates OSINT.¹² Part V of this Article discusses the possible

⁸ For the proposition that these holdings arise out of a desire to defer to the executive see, for example, *HLP*, 130 S. Ct. at 2727–30. See also *id.* at 2727 (finding that “evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference”).

⁹ Brief for the Academic Researchers and the Citizen Media Law Project as Amici Curiae Supporting Respondents/Cross-Petitioners, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89) 2009 WL 4271309 [hereinafter *CMLP Brief*].

¹⁰ *Infra* text accompanying notes 14–99.

¹¹ *Infra* text accompanying notes 100–257.

¹² *Infra* text accompanying notes 258–288.

impact of the positions of the Government on Crisis Mapping, a technology greatly aiding intelligence gathering and the coordination of humanitarian efforts.¹³ Part VI concludes, arguing that the Court should have halted the governments continued policy of chilling speech. The Court's flirtation with a return to the tradition of restricting speech out of blind deference to military concerns has far reaching implications for how we approach the First Amendment, foreign policy, journalism, human rights, military intelligence and national security.

II. The Importance of OSINT

While the Government surely intends to increase U.S. security by limiting speech activities tied to terrorism, the removal of vital intelligence sources will put the United States in a more vulnerable position. This Part provides a definition of OSINT, a history of the United States' approach to gathering this valuable intelligence, and the particular importance of OSINT in the war on terror. Separately, this Part provides an introduction to Crisis Mapping, perhaps the most powerful new use of OSINT that assists in intelligence gathering and coordinating humanitarian assistance.

OSINT is defined as "the systematic collection, processing, analysis and production, classification and dissemination of information derived from sources openly available to and legally accessible by the public in response to particular Government requirements serving national security."¹⁴ OSINT is commonly derived from newspapers, journals, radio, television, and the Internet.¹⁵ Analysts and military commanders estimate that 80 to 90 percent of U.S. intelligence comes from open sources.¹⁶

¹³ *Infra* text accompanying notes 289–369.

¹⁴ FLORIAN SCHAURER & JAN STORGER, OSINT REPORT 3/2010 2 (2010).

¹⁵ See RICHARD A. BEST, JR. & ALFRED CUMMING, CONG. RESEARCH SERV., RL 34270, OPEN SOURCE INTELLIGENCE (OSINT): ISSUES FOR CONGRESS, 5–6 (2007), available at <http://www.fas.org/sgp/crs/intel/RL34270.pdf>, [hereinafter CRS REPORT]. See also Noah Shachtman, *All-Seeing Blimp on the Rise*, <http://noahshachtman.com/blog/page/63> (quoting Rear Adm. Ronald Henderson, deputy director of operations for the Joint Staff, "I spend a lot of time watching TV because—if you think about it—it's the best intelligence network in the world").

¹⁶ See NORTH ATLANTIC TREATY ORGANIZATION [NATO], OPEN SOURCE INTELLIGENCE READER 17 (2002); Robert David Steele, *Open Source Intelligence*, in STRATEGIC INTELLIGENCE: THE INTELLIGENCE CYCLE 98 (Loch Johnson ed., 2007).

According to the NATO OSINT Handbook, “OSINT is absolutely vital to the all-source intelligence process. OSINT provides the historical background information, the current political, economic, social, demographic, technical, natural, and geographic context for operations, critical personality information, and access to a wide variety of tactically useful information about infrastructure, terrain, and indigenous matters. . . . [T]his vital element of . . . intelligence. . . has been too long neglected.”¹⁷ OSINT publications specifically mention aid organizations, NGOs, and the traditional media as important sources of OSINT. The 2002 NATO OSINT handbook notes that NGOs have “deep direct knowledge that can be drawn upon through informal coordination.”¹⁸ Religious aid organizations are also “an essential source of overt information and expert perceptions.”¹⁹ Academic papers, too, are a valuable source of OSINT.²⁰

OSINT intelligence assists tradecraft and the intelligence cycle in four ways, increasing: immediacy of information, the ease of validating existing information, efficiency in collecting information, and the opportunity to disseminate information. First, open sources may alert classified sources of rapidly changing events.²¹ CIA agents learned of the fall of the Berlin Wall by watching it on Television.²² More recently, intelligence agencies tracked the development of the green revolution in Iran by examining Twitter messages (Tweets), blog posts, and YouTube uploads.²³ Second, OSINT lends context to and validates existing classified

¹⁷ NATO OPEN SOURCE INTELLIGENCE HANDBOOK 36 (2001) [hereinafter *OSINT Handbook*].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See MARK M. LOWENTHAL, INTELLIGENCE, FROM SECRETS TO POLICY 79 (2003); *CRS Report*, *supra* note 15, at 6–7. Robert Steele, an OSINT expert, argues that intelligence must derive from the “seven tribes” of intelligence: government, military, law enforcement, business, academic, ground truth (non-governmental and media), and civil (citizens, labor unions, religions). Robert David Steele, *Open Source Intelligence* 129, 145 n.2, in HANDBOOK OF INTELLIGENCE STUDIES, (Loch K. Johnson, ed., 2007).

²¹ CODY BURKE, FREEING KNOWLEDGE, TELLING SECRETS: OPEN SOURCE INTELLIGENCE AND DEVELOPMENT 21 (2007); *OSINT Handbook*, *supra* note 17, at 39–40.

²² ANTONIO J. MENDEZ, THE MASTER OF DISGUISE: MY SECRET LIFE IN THE CIA 337 (1999); see also *OSINT Handbook*, *supra* note 17, at 39–40.

²³ Mark Landler & Brian Stetler, *Washington Taps Into a Potent New Force in Diplomacy*, N.Y. TIMES, June 16, 2009, http://www.nytimes.com/2009/06/17/world/middleeast/17media.html?_r=0. The use of trackback scripts to monitor Twitter is fairly simple and can give early warning about

information.²⁴ Third, OSINT increases the efficiency of the intelligence effort by focusing the attention of valuable classified assets. If open sources provide information sufficient to answer an intelligence objective, covert assets can devote their attention to hidden activities. Finally, OSINT provides the intelligence community with the opportunity to reveal information without jeopardizing classified sources.²⁵ OSINT can therefore be more easily shared with other nations, NGO's, and the public at large. Collaboration of this kind is especially important in the global war on terror, with a widespread enemy and numerous intelligence agencies for both national and multinational groups.²⁶

A. The Importance of OSINT in Context of Novel Terror Threat

The United States has turned to OSINT when traditional military intelligence has failed. In 1941, the United States established the Foreign Broadcast Monitoring Service (FBMS) under the FCC.²⁷ Perhaps the most famous example of using OSINT was the analysis of orange prices in Paris to determine the success of bridge bombing missions during WWII.²⁸ Six years later, FBMS was renamed the Foreign Broadcast Intelligence Service (FBIS),²⁹ put under the control of the War Department,³⁰ and finally placed under CIA control.³¹ The FBIS detected several events, including the Sino-Soviet split, that were not predicted by the CIA.³² Following the World Trade Center attacks of 2001, several government commissions noted that

data risk. See *Tracking Tweets in your SIEM*, /DEV/RANDOM (Feb. 27, 2012), <http://blog.rootshell.be/2012/02/27/tracking-tweets-in-your-siem/>.

²⁴ *OSINT Handbook*, *supra* note 17, at 39–40.

²⁵ *Id.* at 33, 39–40.

²⁶ BURKE, *supra* note 21, at 21.

²⁷ See JOSEPH E. ROOP, FOREIGN BROADCAST INTELLIGENCE SERVICE: HISTORY PART I: 1941–1947 7–8 (1969), available at http://www.foia.cia.gov/sites/default/files/FBIS_history_part1.pdf.

²⁸ See Maj. D. Marshall Bornn, *Service members, civilians learn to harness power of Open Source Information*, Army.mil, Jan. 9 2013, <http://www.army.mil/article/94007>; see also CARL J. SCHNEIDER & DOROTHY SCHNEIDER, WORLD WAR II: EYEWITNESS HISTORY 144 (2007); Nathan Siebach, *OPSEC: Operations Security*, 2 THE DIAMOND JOURNAL 8 (2009).

²⁹ See ROOP, *supra* note 27, at 50.

³⁰ *Id.* at 280.

³¹ See *id.* at 299, 300 (noting transfer to the Central Intelligence Group, the successor of the OSS, and the direct predecessor of the CIA).

³² BURKE, *supra* note 21, at 13.

the Intelligence Community had failed to take advantage of open source intelligence and recommended a consolidated OSINT program.³³

Numerous congressional commissions have urged the intelligence community to recognize the importance of OSINT in the face of novel security threats. In 1996, the Aspen Brown Commission criticized the Intelligence Community for its failure to utilize open source information. Intelligence agencies were moving “inexplicably slow[ly],” failing to provide analysts with a computer infrastructure or access to existing open source data bases. Though the 9/11 Commission did not focus on OSINT, it did suggest the establishment, within the CIA, of a clearinghouse for open source information. According to a 2007 report,³⁴ the 9/11 Commission thought OSINT was important but simply did not have enough time to evaluate the issue. The Intelligence Reform and Terrorism Prevention Act of 2004 contained a consensus on the need for an open source center to collect and analyze open source intelligence.³⁵ Congress noted that OSINT “[is] a valuable source that must be integrated into the intelligence cycle to ensure the United States policymakers are fully and completely informed.”³⁶ Similarly, in 2005, the commission on Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (the WMD Commission), urged the creation of an open source center and noted that “[r]egrettably, all too frequently these ‘non-secret’ sources are undervalued and underused by the Intelligence Community.”³⁷

The importance of OSINT has also been touted by members of the intelligence community. George Tenet, the Former Director of the CIA, and other commentators argued that a failure to integrate OSINT into the

³³ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 399–400, 413 (2004).

³⁴ *CRS Report*, *supra* note 15, at 10–11.

³⁵ See Section 1052, Pub. L. 108–458, 118 Stat. 3638 (2004).

³⁶ *Id.*

³⁷ THE COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, 395 (2005); BURKE, *supra* note 21, at 21 (“The use of OSINT has been stymied by the mistaken belief that only secrets hold intelligence value. NATO identifies this as ‘excessive secrecy and compartmentalization,’ an over reliance on select methods in the name of operational security.”).

intelligence cycle³⁸ caused agencies to miss the lead up to India's detonation of three nuclear devices in 1998.³⁹

While the failure to predict the arrival of a new nuclear power was an embarrassment, intelligence failures take on a much greater urgency when placed in the terrorism context. Intelligence analysts have repeatedly noted that OSINT is vital in the war on terror, primarily due to the diffuse nature of the terrorist threat and America's reliance on multiple international allies.⁴⁰ Stephen Mercado, a CIA analyst, noted that OSINT or overt intelligence, often betters covert intelligence in speed, quantity, quality, clarity, ease of use, and affordability.⁴¹ Furthermore, Mercado "maintain[s] that OSINT often equals or surpasses secrets in addressing such intelligence challenges . . . as proliferation, terrorism, and counterintelligence."⁴² This is especially true as "[i]t is virtually impossible to penetrate a revolutionary terrorist organization, particularly one structured and manned the way al-Qa`ida is."⁴³ Instead, we must rely "on the intelligence community's overt collectors and analysts."⁴⁴

³⁸ See generally Harold M. Greenberg, *Is the Department of Homeland Security an Intelligence Agency?*, 24 J. INTELLIGENCE & NAT. SEC. 216–35 (2009).

³⁹ CRS REPORT, *supra* note 15, at 23–24.

⁴⁰ See, e.g., *Using Open-Source Information Effectively: Hearing Before the Subcomm. On Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 109th Cong. 13 (2005) (statement of Eliot A. Jardines) ("From Pea[r] Harbor to the September 11th terrorist attacks, intelligence failures have largely resulted not from a lack of information, but rather the inability to effectively disseminate that information or intelligence. In looking at the nature of the homeland security and first responder communities, it is apparent that open source intelligence is particularly useful. Due to its unclassified nature, OSINT can be shared extensively without compromising national security.").

⁴¹ Stephen C. Mercado, *Reexamining the Distinction Between Open Information and Secrets*, 49 CIA STUD. IN INTELLIGENCE 2 (2005), available at https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/Vol49no2/reexamining_the_distinction_3.htm.

⁴² *Id.*

⁴³ Stephen C. Mercado, *Sailing the Sea of OSINT in the Information Age*, 48 CIA STUD. IN INTELLIGENCE 3 (2004), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol48no3/article05.html>. See also Brief for Robert D. Steele and Other Former Members of the U.S. Intelligence Community as Amicus Curiae Supporting Petitioner, *Al Bahlul v. United States*, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013), *reh'g en banc granted, order vacated* Apr. 23, 2013 (No. 11-1324), 2012 WL 1423657 at *8 (noting that MICHAEL SCHEUR, *THROUGH OUR ENEMIES' EYES: OSAMA BIN LADEN, RADICAL ISLAM, AND THE FUTURE OF AMERICA* (1st ed. 2002) "is a book based wholly on open-source materials and which is relied upon by many in the

The use of OSINT in the fight against al-Qaeda is especially important in light of the technological versatility of that organization. The as-Sahab institute, al-Qaeda's complex multimedia production and Internet-based messaging wing, provides an "example of why open source collection and analysis is so important in today's technology-driven and globalized world."⁴⁵ Al-Qaeda's use of Internet channels limits detection by conventional intelligence gathering, allowing it to plot with relative impunity. Furthermore, al-Qaeda's rapid adoption of new technologies is well known,⁴⁶ reinforcing our own need to implement flexible intelligence strategies, based in large part on open resources. In the words of one intelligence official, "[open source information] is no longer the icing on the cake, it is the cake itself."⁴⁷ It makes little sense to stem the flow of this valuable strategic resource in the name of greater security.

B. Historical Examples of the Effectiveness of OSINT

Due to the fact that OSINT is "[n]either glamorous nor adventurous,"⁴⁸ it is often discounted. For many outside the intelligence community, the notion of national intelligence gathering evokes images of covert meetings with deep cover agents. But this simply does not reflect reality. Lt. Gen. Samuel V. Wilson, former director of the Defense Intelligence Agency, noted that "Ninety percent of intelligence comes from open sources. The other ten percent, the clandestine work, is just the more dramatic. The real intelligence hero is Sherlock Holmes, not James Bond."⁴⁹ This Section seeks to combat OSINT's handicap: the lack of understanding that it is open information collection and analysis that undergirds the intelligence cycle. There are numerous successful OSINT

Intelligence Community, as well as by policy makers and law enforcement involved in counter-terrorism efforts") [hereinafter *Amicus Intelligence Brief*].

⁴⁴ Mercado, *supra* note 43.

⁴⁵ CRS REPORT, *supra* note 15, at 3.

⁴⁶ *Id.* at 6. See, e.g., Arnaud de Borchgrave, *Networked and Lethal*, WASH. TIMES, Sept. 25, 2007, at 18 ("[A]l-Qaida is right on the cutting edge of the adoption of new technologies. They grab hold of the new stuff as soon as it becomes available and start using it.").

⁴⁷ CRS REPORT, *supra* note 15, at 3.

⁴⁸ Mercado, *supra* note 43.

⁴⁹ Richard S. Friedman, *Open Source Intelligence: A Review Essay*, 285, in INTELLIGENCE AND THE NATIONAL SECURITY STRATEGIST: ENDURING ISSUES AND CHALLENGES (2006) (quoting Lt. Gen. Sam Wilson, USA Ret. Former Director, Defense Intelligence Agency).

case studies demonstrating the importance of civilian data collection and intensive data analysis.

1. Reporter Interviews

Intelligence targets often volunteer vital information to journalists. Mercado provides one such story, stressing the importance of reporters in debriefing subjects:

Stanislav Levchenko, a KGB officer working under cover as a reporter in Japan, defected to the United States in 1979. In 1983, a Japanese journalist conducted more than 20 hours of interviews with him, during which the former operative named agents and discussed tradecraft. The resulting book and Levchenko's press conferences were, according to a US intelligence officer, more revealing than his CIA debriefing.⁵⁰

Journalists have played a vital role in the War on Terror by locating terrorists and disseminating al-Qaeda produced videos, which are themselves useful pieces of OSINT. For example, Al-Jazeera reporter Yosri Fouda was invited to interview two al Qaeda leaders, Khalid Sheikh Mohammed and Ramzi Bin AlShibh.⁵¹ During the interview Mohammed confirmed his place in the al-Qaeda hierarchy, discussed AlShibh's role in planning the World Trade Center attacks, and confirmed that al-Qaeda was responsible for the attacks.⁵² Mohammed also used aliases of then-at-large Osama Bin Laden.⁵³ Finally, Mohammed gave Fouda several video disks

⁵⁰ Mercado, *supra* note 43; see also *Amicus Intelligence Brief*, *supra* note 43, at *13 n. 20 (“Credentialed and accomplished foreign journalists and reporters working for news organizations who produce films and articles could also be deterred. Foreign reporting is often a vital source of open source intelligence. One example is the Al Jazeera reporter Yosri Fouda, who tracked down two al Qaeda leaders, Khalid Sheikh Mohammed and Ramzi Bin AlShibh, on his own before they were captured by U.S. forces. Although al Qaeda contacted and provided Mr. Fouda with information to help their own cause, Mr. Fouda's openly published book *Masterminds of Terror* was an enormous benefit to U.S. intelligence officials.”).

⁵¹ *We Left Out Nuclear Targets, For Now*, GUARDIAN, Mar. 2, 2003, <http://www.guardian.co.uk/world/2003/mar/04/alqaida.terrorism>.

⁵² *Id.* (“‘I am the head of the al-Qaida military committee,’ he began, ‘and Ramzi is the coordinator of the Holy Tuesday operation. And yes, we did it.’”).

⁵³ *Id.* (“‘Sheikh Abu Abdullah,’ sometimes ‘Sheikh Osama’ or simply ‘the Sheikh.’”).

and cassettes, including the last statement of one of the hijackers, an al-Qaeda documentary about “the new crusades” and a video of the beheading of Daniel Pearl. Fouda later published a book, *Masterminds of Terror*, which was of enormous help to the U.S. intelligence community.⁵⁴ Both Mohammed and AlShibh were later apprehended by U.S. forces.

2. Parsing Foreign Diction

The FBIS also had a long string of successes based on careful analysis of foreign dispatches, correctly predicting the Sino-Soviet split,⁵⁵ the 1979 Chinese invasion of Vietnam,⁵⁶ and the Soviet military withdrawal from Afghanistan.⁵⁷

Predicting the Sino-Soviet Split. Western observers assumed that the relative friendship of the Soviet Union and the People’s Republic of China would be long lasting, due to geo-political concerns and shared ideologies.⁵⁸ However, following the death of Stalin, the relationship deteriorated, with China criticizing Soviet proxies and the Soviets doing likewise. The two countries openly argued at the 22nd Congress of the Communist Party of the Soviet Union in 1961.⁵⁹ Finally, in 1962 the two countries broke relations in the immediate aftermath of the Cuban Missile Crisis.⁶⁰ The wider American intelligence community did not recognize any such split until 1963, when the PRC published The Chinese Communist Party’s Proposal Concerning

⁵⁴ *Amicus Intelligence Brief*, *supra* note 43, at 13 n 20. See generally YOSRI FOUDA & NICK FIELDING, *MASTERMINDS OF TERROR: THE TRUTH BEHIND THE MOST DEVASTATING TERRORIST ATTACK THE WORLD HAS EVER SEEN* (2004).

⁵⁵ Harold P. Ford, *Calling the Sino-Soviet Split*, CIA STUDIES IN INTELLIGENCE (1998–1999), available at https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art05.html.

⁵⁶ J. Niles Riddel, Deputy Director, Foreign Broadcast Information Service, Remarks at the First International Symposium – “National Security and National Competitiveness: Open Source Solutions” (Dec. 2, 1992), available at <http://www.fas.org/irp/fbis/riddel.html>.

⁵⁷ NORTH ATLANTIC TREATY ORGANIZATION [NATO], *OPEN SOURCE INTELLIGENCE READER* 56–58 (2002); Riddel, *supra* note 56.

⁵⁸ Ford, *supra* note 55.

⁵⁹ RODERICK MACFARQUHAR, *THE ORIGINS OF THE CULTURAL REVOLUTION: THE COMING OF THE CATAclysm 1961–1966* 128–29 (1997).

⁶⁰ ALFRED D. LOW, *THE SINO-SOVIET DISPUTE: AN ANALYSIS OF THE POLEMICS* 131–35 (1976).

the General Line of the International Communist Movement,⁶¹ to which the USSR replied with an Open Letter of the Communist Party of the Soviet Union⁶² announcing formal ideological breaks between the respective Communist systems.⁶³ By 1964, Mao asserted that the USSR had been the victim of a counter-revolution reintroducing capitalism.

The FBIS predicted this split at least seven years before the mainline intelligence agencies realized what had occurred.⁶⁴ In April 1956, FBIS noted that a Beijing People's Daily article had attacked the USSR's "cult of the individual" and certain "important mistakes" Stalin had made.⁶⁵ The article criticized the USSR's eagerness to eliminate counterrevolutionaries, lack of preparedness before World War II, neglect of the agricultural sector, mishandling of the Yugoslav break with the Comintern, and, most notably, the crude implementation of policies in China.⁶⁶ At the same time, the article hailed Mao as "our great leader" and the true, all-out defender of "the theories of Marxism-Leninism."⁶⁷

The FBIS continued to point out that Sino-Russian and Sino-Soviet history, including land grabs by the then Russian Empire and mistreatment of the Chinese Communist Party counseled a future split. Tellingly, as late as 1963 the heads of the American intelligence community refused to recognize an imminent split.⁶⁸ While the American Intelligence community accepted the reality of a Sino-Soviet split after 1963, American foreign

⁶¹ *The Letter of the Central Committee of the Communist Party of China in Reply to the Letter of the Central Committee of the Communist Party of the Soviet Union of March 30, 1963*, available at <http://www.marxists.org/history/international/comintern/sino-soviet-split/cpc/proposal.htm>.

⁶² *Open Letter of the Central Committee of the Communist Party of the Soviet Union to all Party Organizations, to all Communists of the Soviet Union*, available at <http://www.marxists.org/history/international/comintern/sino-soviet-split/cpsu/openletter.htm>.

⁶³ Ford, *supra* note 55.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Summary Record of 516th meeting of the National Security Council, 31 July 1963, Foreign Relations of the United States, 1961–1963, Vol. XXII, China, at 373. ("[Director of Central Intelligence] McCone added that, although the differences between the Russians and the Chinese are very great, he did not think they were very deep or that a final break between the two powers would occur.").

policy lagged and continued to treat the split as temporary. As noted by one of the C.I.A.'s most influential analysts, Harold P. Ford:⁶⁹

By 1967, Nixon had come to the view that 'American policy toward Asia must come urgently to grips with the reality of China . . . We simply cannot afford to leave China forever outside the family of nations, there to nurture its fantasies, cherish its hates, and threaten its neighbors.' But it took later empirical military evidence to demonstrate that the Sino-Soviet split was for real: armed hostilities in 1969 between Soviet and Chinese border forces, threats (or bluffs?) by Moscow that it might suddenly launch nuclear strikes to destroy China's nuclear weapons facilities, and the beginnings of a massive buildup of Soviet armed strength along China's borders.⁷⁰

Predicting Chinese Invasion of Vietnam. Like the Sino-Soviet split, Western observers had assumed that Chinese-Vietnamese relations would remain warm due to ideological, geo-political, and racial concerns.⁷¹ However, from 1974 on, a long series of land border incidents eroded Sino-Vietnamese relations.⁷² After Vietnam signed a mutual defense treaty on November 3, 1978, that was specifically aimed at China, China began to use increasingly bellicose language. As some have noted, "FBIS analysts anticipated the February 1979 Chinese invasion of Vietnam by demonstrating that the language used in authoritative Chinese warnings to Vietnam had almost never been used except in instances such as the 1962 Chinese intrusions into India in which Beijing had actually used military force."⁷³ Chinese forces invaded Vietnam on February 17, 1979, starting a war that would last 28 days and cost over 55,000 lives.⁷⁴

⁶⁹ Scott Shane, *Harold P. Ford, C.I.A. Analyst, Dies at 89*, N.Y. TIMES, Nov. 11, 2010, http://www.nytimes.com/2010/11/12/world/12ford.html?_r=0.

⁷⁰ Ford, *supra* note 55.

⁷¹ See BRANTLY WOMACK, CHINA AND VIETNAM: THE POLITICS OF ASYMMETRY 175 (2006) (noting that the relationship between the two countries was described "as close as lips and teeth").

⁷² RONALD BRUCE ST. JOHN, THE LAND BOUNDARIES OF INDOCHINA: CAMBODIA, LAOS AND VIETNAM, 35 (1998).

⁷³ Riddel, *supra* note 56.

⁷⁴ David R. Dreyer, *One Issue Leads to Another: Issue Spirals and the Sino-Vietnamese War*, 6 FOREIGN POL'Y ANALYSIS 297 (2010).

Predicting the Soviet Military Withdrawal from Afghanistan. The Soviet Union invaded Afghanistan in 1979, starting a nine-year conflict “involving nearly one million Soviet soldiers.”⁷⁵ Years after the initial incursion with large Soviet losses, intelligence officials were uncertain of a timetable for Soviet withdrawal. The ascension to Secretary General of Mikhail Gorbachev, who had up to that time been seen as a party member loyal to the current Communist orthodoxy, seemed to most observers to promise little change in foreign policy. However, in May 1985, the FBIS correctly detected the change in policy leading to the February 1989 Soviet military withdrawal from Afghanistan.⁷⁶ Gorbachev raised Foreign Minister Andrei Gromyko, one of the original architects of the war, to the honorific office of President of the Presidium of the Supreme Soviet and replaced him with Eduard Shevardnadze, a noted critic of the war.⁷⁷ Analysis of Gorbachev’s personnel moves was not the only clue of a policy change. The FBIS also noted the appearance of stories critical of the war in Soviet newspapers, the early returns of “Glasnost.”⁷⁸ In effect, Gorbachev manipulated the Soviet media by allowing the unprecedented publishing of critiques of the war and then used the incredible appearance of critical press articles to foster a sense of public dissatisfaction with the war.⁷⁹ The FBIS monitored this effort and correctly predicted that Gorbachev’s actions would force a reluctant military withdrawal. This prediction could have allowed the United States to reduce covert aid to the mujahedin in anticipation of a rapid end to the war.⁸⁰ Such a reduction would have been advisable in order to limit further arming of radical Muslims who would later target Americans.⁸¹ However,

⁷⁵ Rafael Reuveny & Aseem Prakash, *The Afghanistan War and the Breakdown of the Soviet Union*, 25 REV. OF INT’L. STUD. 693, 696 (1999).

⁷⁶ Riddel, *supra* note 56.

⁷⁷ GREGORY ELLIOTT & MOSHE LEWIN, *THE SOVIET CENTURY* 238 (2005).

⁷⁸ WILLIAM MALEY, *THE AFGHANISTAN WARS* 119–20 (2002).

⁷⁹ For more on the impact of the war on the USSR, see Rafael Reuveny & Aseem Prakash, *The Afghanistan War and the Breakdown of the Soviet Union*, 25 REV. OF INT’L. STUD. 693 (1999).

⁸⁰ This prediction also could have allowed the United States to craft a better plan for post-war treatment of the volatile Afghan situation and avoid a power vacuum. Of course, this was not the course taken, and the Taliban reaped the rewards of American apathy towards the region.

⁸¹ It is widely alleged that al-Qaeda grew from American funding, networking, and weapons related to the Soviet-Afghan war. See William D. Hartung, *We Arm The World*, TOMPAINE.COMMONSENSE (Oct. 27, 2006), http://www.tompaine.com/articles/2006/10/27/we_arm_the_world.php (“[T]he early foundations of al-Qaida were built in part on relationships and weaponry that came from

anti-Soviet sentiment, as well as other policy factors, prevented this from occurring.

3. Analyzing publishing patterns

A great deal of OSINT may derive from analysis of so-called “gray” literature which include trip reports, working papers, discussion papers, unofficial government documents, proceedings, preprints, research reports, studies, and market surveys with limited public availability. While the text of documents contains actionable information, publishing patterns also provide valuable intelligence. During the Cold War, U.S. intelligence agents tracked the publication patterns of Soviet scientists.⁸² When certain scientists ceased to publish for extended periods of time, this signaled that they were sequestered to work on new technologies.⁸³ The known specialties of these scientists helped inform the actions of covert intelligence agents, who could be directed to investigate a possible Soviet break through.⁸⁴

C. Modern Datamining, Webmining, and OSINT: Terrorism Informatics

While OSINT has traditionally relied on human driven intelligence, modern datamining and webmining techniques create the possibility for automaticity and quantitative-based investigations. These novel techniques have been employed in numerous ways by the intelligence community to create actionable information reports relating to the war on terror. This Section outlines several of these promising methods, including: deep web analysis, automated content analysis of jihadi recruitment videos, semantic analysis of language used in jihadi forums, social network analysis, and terrorist detection using web browsing pattern analysis.

Deep Web Analysis. Terrorist entities frequently make use of websites that are beyond the reach of search engines—the so-called “Deep Web.”⁸⁵

the billions of dollars in U.S. support for the Afghan mujahadin during the war to expel Soviet forces from that country.”).

⁸² See Amy Sands, *Integrating Open Sources into Transnational Threat Assessments*, in TRANSFORMING U.S. INTELLIGENCE 63, 67–68 (Jennifer E. Sims & Burton Gerber eds., 2005).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Mohit Kumar, *What is the Deep Web? A First Trip Into the Abyss*, HACKER NEWS, May 30, 2012, <http://thehackernews.com/2012/05/what-is-deep-web-first-trip-into-abyss.html>.

These non-indexed sites may use a variety of methods to prevent detection from web crawlers (that is, automated browsers that follow hyperlinks, indexing sites for later queries).⁸⁶

Analysts in 2006 began a detailed web analysis in order to detect Internet use patterns.⁸⁷ Specifically, analysts sought to determine the technological sophistication of various terror groups, their preferred avenues for disseminating technological propaganda, and their use of covert messaging. As a first step, analysts compiled a list of known terrorist groups and their associated URLs.⁸⁸ Next, this set of URLs was expanded through link and forum analysis—that is, an automated process examining out-links and in-links from a target URL and a semi-automated process combing message boards for links to forums posted by extremists.⁸⁹ Finally, after arriving at this expanded list, analysts tailored a web crawler to download all files, both textual and multimedia, from these sites.⁹⁰ This automated crawler populated the study database with 1.7 million documents.⁹¹ The resulting investigation of coding style, file type, total link-ins, and other objective measures allowed for statistical analysis of organizational technological sophistication, content richness (examining the use of video and audio files), and site interconnectedness.⁹²

Analysis of Jihadi Recruitment Videos. Using a similar harvesting method, researchers downloaded 705 multimedia files used in jihadi recruitment.⁹³

⁸⁶ James Bruce, *How To Build A Basic Web Crawler To Pull Information From A Website (Part 1)*, MAKEUSEOF.COM (Dec. 10, 2010), <http://www.makeuseof.com/tag/build-basic-web-crawler-pull-information-website/>.

⁸⁷ Jialun Qin, Yilu Zhou, Edna Reid, & Hsinchun Chen, *Studying Global Extremist Organizations' Internet Presence Using the Dark Web Attribute System: A Three Region Comparison Study*, in TERRORISM INFORMATICS: KNOWLEDGE MANAGEMENT AND DATA MINING FOR HOMELAND SECURITY 244–45 (Hsinchun Chen et al. eds., 2008).

⁸⁸ Jialun Qin, Yilu Zhou, Edna Reid, & Hsinchun Chen, *Studying Global Extremist Organizations' Internet Presence Using the Dark Web Attribute System: A Three Region Comparison Study*, in TERRORISM INFORMATICS: KNOWLEDGE MANAGEMENT AND DATA MINING FOR HOMELAND SECURITY 237 (Hsinchun Chen et al. eds., 2008).

⁸⁹ *Id.* at 244.

⁹⁰ *Id.*

⁹¹ *Id.* at 245.

⁹² *Id.* at 248–62.

⁹³ Arab Salem, Edna Reid, & Hsinchun Chen, *Content Analysis of Jihadi Extremist Groups' Videos*, in TERRORISM INFORMATICS: KNOWLEDGE MANAGEMENT AND DATA MINING FOR HOMELAND SECURITY 273 (Hsinchun Chen et al. eds., 2008) (see text and Table 13-2).

Content was coded into video type, content properties, verbal expressions/quotations, and technical features (such as the use of logos). The study established a standard structure for these videos, identifying typical images (specifically transport vehicles and military convoys that are the frequent targets of insurgents), quotations, and identifiers.⁹⁴ The effort may lead to a more systematic means of identifying jihadi videos and their origin.

Semantic Analysis. Researchers have examined the most frequent words and word-combinations used in particular jihadi forums.⁹⁵ By identifying the diction most employed by groups, researchers have taken steps to create automated detection systems which will flag particular forums for review and use language as predictors of imminent events.

Social Network Analysis. Links between terrorist web pages, blogs, and discussion forums can be visualized and analyzed in order to detect intergroup cooperation and alliances.⁹⁶ While terrorist affiliations are often uncertain, webmining may establish patterns of mutual assistance or antagonism between groups, providing the intelligence community with greater insight into field operations.

Web Browsing Pattern Analysis. While monitoring the access points of known terrorist web sites may detect terrorist users, this resource intensive practice is not feasible in part due to floating IP addresses.⁹⁷ Instead, researchers have developed models for wide area network monitoring in which a detection system identifies suspected terrorists by analyzing the informational content of websites that those individuals access.⁹⁸ Such a method is less likely than direct site monitoring to result in false positives, because cross-referencing has a higher rate of detecting terrorist users who

⁹⁴ *Id.* at 277–83.

⁹⁵ Ahmed Abbasi & Hsinchun Chen, *Analysis of Affect Intensities in Extremist Group Forums*, in *TERRORISM INFORMATICS*, *supra* note 93, at 285.

⁹⁶ V. Burris, E. Smith, & A. Strahm, *White Supremacist Networks on the Internet*, 33.2 *SOC. FOCUS* 215–35 (2000).

⁹⁷ Yuval Elovici et al., *Content-Based Detection of Terrorists Browsing the Web Using an Advanced Terror Detection System (ATDS)*, in 3495 *INTELLIGENCE AND SECURITY INFORMATICS LECTURE NOTES IN COMPUTER SCIENCE* 244, 366 (2005).

⁹⁸ *Id.* at 371.

access a large amount of clustered suspect content, for example accessing bomb making sites, jihadi sites, and maps of military deployment.⁹⁹

These techniques provide multiple avenues to predict and combat terrorism, demonstrating the importance of content rich data. OSINT, be it based on modern automated datamining or traditional human driven analysis, relies on a rich environment of open information. Chilling the production of this information thwarts these valuable efforts, which by some accounts provide the great majority of our actionable intelligence. While the popular consciousness imagines that our intelligence results from secret agents and clandestine meetings, our vital intelligence flows instead from journalists, researchers, and academics. Unfortunately, recent legal positions by the U.S. Government and decisions by the Supreme Court threaten to chill the very speech that forms the foundation of our intelligence analysis. In doing so, the decision harms our nation's capacity for intelligence gathering and heightens the security threats we face.

III. Recent Government Positions Threaten to Chill Valuable Intelligence

The Government's and the Court's recent legal stances are intended to chill sources of open source intelligence involving terrorists themselves, foreign reporters, and domestic individuals who have had contact with foreign terror organizations. In the trial and appeal of al-Qaeda propagandist, Ali Hamza Al-Bahlul, the Government has advanced the theory that no part of the First Amendment reaches enemy aliens tried in an American courtroom.¹⁰⁰ The chilling effects of *HLP* are exacerbated by the trial of Al-Bahlul. Taking these precedents together, a future court could merge the broad definition of material support with a solicitation charge decoupled from First Amendment limitations. That is, if the Court may disregard the First Amendment in solicitation cases involving foreign combatants and in material support cases involving Americans who have associated with terrorists, the Government will be emboldened to ignore First Amendment concerns in crimes involving the solicitation of material support for terrorism. The Government has also detained and threatened

⁹⁹ *Id.*

¹⁰⁰ Reply Brief for Government/Appellee, *Al Bahlul v. United States*, CMCR (No. 09-001), *5 (2009), available at [http://www.defense.gov/news/2%20-%20Prosecution%20Reply%20Brief%20\(30%20OCT%2009\)%20\(58%20pages\).pdf](http://www.defense.gov/news/2%20-%20Prosecution%20Reply%20Brief%20(30%20OCT%2009)%20(58%20pages).pdf) [hereinafter *Bahlul Reply*].

several foreign reporters, specifically noting the subsequent chilling of speech as a desired result.

A. Stripping Judicial Review of Foreign Terrorist Organization (FTO) Designations

As the Government's speech restrictions flow from a speaker's membership, association, or coordination with an FTO, it is necessary to first understand that the FTO designation process occurs with little judicial oversight or review. The perception of legitimacy plays a significant role in the listing and delisting of a group as an FTO.¹⁰¹ These determinations are opaque, may be the result of political trends rather than clear fact-finding, and not subject to meaningful judicial review.¹⁰² Public perceptions may also play an important role in this predicate determination.

"The FTO designation has at least three consequences: the Secretary of the United States Treasury Department may freeze the FTO's assets, 8 U.S.C. § 1189(a)(2)(C); FTO members are barred from entering the United States, *id.* § 1182(a)(3)(B)(i)(IV), (V); and those who knowingly provide "material support or resources" to an FTO are subject to criminal prosecution, 18 U.S.C. § 2339B(a)(1)."¹⁰³

A designated organization can seek review before the D.C. Circuit within thirty days after publication in the Federal Register of the Secretary's designation, amended designation or determination in response to a petition for revocation.¹⁰⁴ The court's review is then based "solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information" that the Secretary used to reach her decision.¹⁰⁵ If the designation is found to be arbitrary, capricious, and not in accordance with the procedures required by law, it must be set aside.¹⁰⁶ However, this standard of review applies only to the first and

¹⁰¹ For a description of the FTO Designation Review Process, see *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 223 (2010).

¹⁰² *See, e.g., People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 25 (D.C. Cir. 1999) (noting that "the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence").

¹⁰³ *People's Mojahedin Org. of Iran v. Dep't of State*, 613 F.3d 220, 223 (D.C. Cir. 2010).

¹⁰⁴ *See* 8 U.S.C. § 1189(c)(1) (2006).

¹⁰⁵ *Id.* § 1189(c)(2).

¹⁰⁶ *See id.* § 1189(c)(3).

second requirements for listing as an FTO, namely, (1) that the organization is foreign and (2) that it engages in terrorism or terrorist activity or retains the capability and intent to do so. The third criterion (that the organization's activities threaten U.S. nationals or national security) is not reviewable in court, as it presents a political question.¹⁰⁷

The current scheme for review of FTO designation cannot seriously be called robust judicial review. The People's Mujahedin of Iran (MEK), for example, shows that political favor, rather than actual fact-finding, may determine a group's designation. The group, made up of Marxist Iranian dissidents, focused its attacks against the Islamic Republic of Iran.¹⁰⁸ The group was designated as an FTO in 1997, a move which one Clinton official characterized as "intended as a goodwill gesture to Tehran and its newly elected moderate president, Mohammad Khatami."¹⁰⁹ The group appealed this designation for the next 15 years. It presented very strong evidence when seeking de-listing (though it nonetheless unfairly failed to obtain de-listing through the judiciary), including evidence that the group had: ceased its military campaign; renounced violence; handed over arms to U.S. forces in Iraq; cooperated with U.S. officials; shared intelligence with the United States regarding Iran's nuclear program; disbanded its military units; had members sign a document rejecting violence and terror; obtained de-listing as a terrorist organization in the U.K. and the EU; and had letters of information presented on its behalf from retired members of the U.S. military, U.S. members of Congress, and U.K. members of parliament.¹¹⁰

¹⁰⁷ People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999).

¹⁰⁸ State Department, *Patterns of Global Terrorism: 1997, App. B, Background Information on Terrorist Groups* (Jan. 20, 2001), available at <http://www.state.gov/www/global/terrorism/1997Report/backg.html> ("The MEK directs a worldwide campaign against the Iranian Government that stresses propaganda and occasionally uses terrorist violence. During the 1970s, the MEK staged terrorist attacks inside Iran to destabilize and embarrass the Shah's regime; the group killed several US military personnel and civilians working on defense projects in Tehran. The group also supported the takeover in 1979 of the US Embassy in Tehran. In April 1992 the MEK carried out attacks on Iranian embassies in 13 different countries, demonstrating the group's ability to mount large-scale operations overseas.").

¹⁰⁹ Norman Kempster, *U.S. Designates 30 Groups as Terrorists*, L.A. TIMES, Oct. 9, 1997, <http://articles.latimes.com/1997/oct/09/news/mn-40874>.

¹¹⁰ See People's Mojahedin Org. of Iran v. U.S., 613 F.3d 220 (D.C. Cir. 2010); Josh Rogin, *Are the MEK's U.S. Friends its Worst Enemies?*, FOREIGN POL'Y, Mar. 8, 2012,

The Government noted MEK's possible consideration of suicide attacks in Iraq and the MEK's possibly fraudulent fundraising efforts as justification for refusing to de-list the group.¹¹¹ The Government's argument was hard to understand, as the MEK was confined to an American-controlled camp at this time and therefore had little to no operational capacity. In a climate where the Government may rely largely on classified (and therefore uncontested) hearsay,¹¹² there are few, if any, effective avenues of correcting or overturning FTO designations through the courts.

The MEK's expensive lobbying efforts eventually paid off.¹¹³ Secretary of State Hillary Clinton de-listed the MEK in September 2012.¹¹⁴ Curiously, this de-listing occurred after reports that linked MEK to Israeli-

http://thecable.foreignpolicy.com/posts/2012/03/08/are_the_mek_s_us_friends_its_worst_enemies.

¹¹¹ See *People's Mojahedin*, 613 F.3d at 230 ("Some of the reports included in the Secretary's analysis on their face express reservations about the accuracy of the information contained therein. See, e.g., Suppl. Admin. R., MEK-11 (describing "possible plans to attack [the] international zone in Baghdad" but conceding that "the ultimate sources of the information was [sic] unknown and as such, their access, veracity, and motivations were unknown"). Similarly, while including reports about the Karbala suicide attack plot described above, the Secretary did not indicate whether she accepted or discredited the reports and we do not know whether the PMOI can rebut the reports.").

¹¹² *Id.* at 225–26. ("After reviewing an administrative record consisting of both classified and unclassified information, the Secretary denied the PMOI's petition and . . . provided the PMOI with a heavily redacted 20-page administrative summary of State's review of the record, which summary referred to 33 exhibits, many of which were also heavily or entirely redacted.").

¹¹³ Scott Shane, *For Obscure Iranian Exile Group, Broad Support in U.S.*, N.Y. TIMES, Nov. 26, 2011, <http://www.nytimes.com/2011/11/27/us/politics/lobbying-support-for-iranian-exile-group-crosses-party-lines.html?pagewanted=all> (noting the high cost of speaking fees for former American politicians); Glenn Greenwald, *Likely Victory for MeK Shills*, SALON, May 15, 2012, http://www.salon.com/2012/05/15/likely_victory_for_mek_shills/ ("[F]ormer officials have been paid large sums of money to speak at MeK events and meet with its leaders, thus developing far more extensive relations with this Terror group than many marginalized Muslims who have been prosecuted and punished with lengthy prison terms for 'materially supporting a Terrorist organization.'").

¹¹⁴ Scott Shane, *Iranian Dissidents Convince U.S. to Drop Terror Label*, N.Y. TIMES, Sept. 21, 2012, <http://www.nytimes.com/2012/09/22/world/middleeast/iranian-opposition-group-mek-wins-removal-from-us-terrorist-list.html?pagewanted=all> ("Presumably it did not hurt the group's case that among the dozens of prominent American supporters were R. James Woolsey and Porter J. Goss, former C.I.A. directors; Louis J. Freeh, the former F.B.I. director; President George W. Bush's homeland security secretary, Tom Ridge, and attorney general, Michael B. Mukasey; and President Obama's first national security adviser, Gen. James L. Jones.").

backed assassinations of Iranian nuclear scientists,¹¹⁵ leading some commentators to conclude that the United States does not oppose terrorism in line with American interests.¹¹⁶ At least one analyst suggested that the MEK's successful de-listing campaign will encourage FTOs to engage in lobbying.¹¹⁷

B. Al-Bahlul—Silencing Propagandists

The government has taken steps to silence terrorist propagandists on the grounds that their speech is incitement. However, the production of these propaganda videos provides the American military with vital information, and the government's efforts to dilute the incitement standard will likely have spill over effects in cases involving individuals who are not deemed enemy combatants.

Ali Hamza Ahmed Suliman Al-Bahlul ("Al-Bahlul") is an admitted member of al-Qaeda. He was captured by Pakistani forces and turned over to U.S. custody in December 2001.¹¹⁸ He has been detained in Guantanamo Bay since January 2002. Roughly seven years after his capture,¹¹⁹ Al-Bahlul was tried before a military commission.

¹¹⁵ Richard Engel & Robert Windrem, *Israel Teams with Terror Group to Kill Iran's Nuclear Scientists*, U.S. Officials Tell NBC News, NBC NEWS, Feb. 9, 2012, http://rockcenter.nbcnews.com/_news/2012/02/08/10354553-israel-teams-with-terror-group-to-kill-irans-nuclear-scientists-us-officials-tell-nbc-news.

¹¹⁶ Glenn Greenwald, *Five lessons from the De-Listing of MEK as a Terrorist Group*, GUARDIAN, Sept. 23, 2012, <http://www.guardian.co.uk/commentisfree/2012/sep/23/iran-usa> ("Violence used by the US and its allies (including stateless groups) can never be terrorism, no matter how heinous and criminal.").

¹¹⁷ Spencer Ackerman, *Iranian Cult Is No Longer Officially a Terrorist Group*, WIRED, Sept. 21, 2012, <http://www.wired.com/dangerroom/2012/09/mek-terrorists/> (quoting Mila Johns of the University of Maryland's National Consortium for the Study of Terrorism and Responses to Terrorism, "The delisting of the MEK, following a well-funded political lobby campaign, creates the dangerous impression that it is possible for terrorist organizations to buy their way off the [terrorism] list."); *Analysts React to MEK Terror Delisting*, PROJECT ON MIDDLE EAST DEMOCRACY (Sept. 25, 2012), <http://pomed.org/blog/2012/09/analysts-react-to-mek-terror-delisting.html>.

¹¹⁸ *Bahlul Reply*, *supra* note 100, at *9.

¹¹⁹ *Id.* at *3. This delay comprised numerous aborted adjudications and arraignments, as the Supreme Court ordered significant changes to the military commission system. In February 2004, the Deputy Appointing Authority charged Al-Bahlul with a single charge of Conspiracy, comprising Al-Bahlul's alleged membership in and support of the terrorist organization al Qaeda. A military commission was set to adjudicate this charge but in

In February 2008, the Government brought three charges against Al-Bahlul: Conspiracy¹²⁰ (for membership in al-Qaeda); Solicitation¹²¹ (for the production of a video *State of the Ummah* advocating membership in al-Qaeda); and Material Support for Terrorism¹²² (for the acts allegedly taken in furtherance of the aforementioned conspiracy). In September 2008, Al-Bahlul entered a plea of not guilty, but stated his intention to boycott the trial and to provide no legal defense.¹²³ Accordingly, the defense remained silent during the course of the trial.¹²⁴

Al-Bahlul produced a video called *State of the Ummah*.¹²⁵ The video is also known as the “Cole Video” because it contains several scenes of the aftermath of the bombing of the U.S.S. Cole. The Government bases the great majority of its case against Al-Bahlul on his production of this video; it serves as the basis for the solicitation charge. *The State of the Ummah* is a documentary that is largely made up of news footage and speeches from Osama Bin Laden.¹²⁶

Courts have long recognized the preeminent importance of the freedom of expression.¹²⁷ The State may not simply condemn or prohibit the transmission of unpopular, offensive, or even destabilizing ideas. Accordingly, the United States Supreme Court in *Brandenburg v. Ohio*,¹²⁸ held per curiam that a State may not bring a charge of incitement or solicitation of violence, “except where such advocacy is directed to inciting or

November 2004, Judge James Robertson’s stay in *Hamdan v. Rumsfeld*, effectively halted proceedings in all military commissions. The Supreme Court’s decision in *Hamdan v. Rumsfeld*, and the passage of the Military Commissions Act of 2006 overhauled the military commission system. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) *rev’d*, 415 F.3d 33 (D.C. Cir. 2005) *rev’d and remanded*, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006).

¹²⁰ *Bahlul Reply*, *supra* note 100, at *3; 10 U.S.C. § 950V(b)(28) (2006).

¹²¹ *Bahlul Reply*, *supra* note 100, at *3; 10 U.S.C. § 950V(b)(1) (“Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, . . . be punished . . .”).

¹²² *Bahlul Reply*, *supra* note 100, at *3; 10 U.S.C. § 950V(b)(25).

¹²³ *Bahlul Reply*, *supra* note 100, at *4.

¹²⁴ *Id.*

¹²⁵ *Id.* at *5.

¹²⁶ *Id.* at *5–7.

¹²⁷ See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

¹²⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

producing imminent lawless action and is likely to incite or produce such action.”¹²⁹ In *Brandenburg*, the Court held that a KKK rally, in which hooded figures brandished weapons, shouted “Bury the niggers” and promised “revengeance [sic] . . . [against] our President, our Congress, [and] our Supreme Court,” was “mere advocacy.”¹³⁰ First Amendment protections require the implementation of *Brandenburg*’s narrow definition of incitement.¹³¹

Typically, a court would employ a *Brandenburg* analysis for the crime of solicitation or incitement, which differentiates protected advocacy from proscribable incitement. However, the presiding military judge in *Bahlul* conducted neither a *Brandenburg* analysis, nor offered a *Brandenburg* limiting instruction requiring the advocacy be delivered to specific individuals who are likely to act,¹³² or that there be an unambiguous causal link between the advocacy and violence that has already occurred.¹³³ Indeed, the judge failed to provide a limiting instruction of any kind in relation to the solicitation charge.¹³⁴

On November 3, 2008, the commission returned a verdict of guilty on all charges, except on one overt act alleged in Counts I and III.¹³⁵ On

¹²⁹ *Id.*

¹³⁰ *Id.* at 447 n.1; *id.* at 449. Subsequent cases have clarified the *Brandenburg* standard: the speaker must address specific individuals, *Hess v. Indiana*, 414 U.S. 105, 108–109 (1973) and must actually authorize the violence to be held liable. *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 930 (1982).

¹³¹ *Cf.* *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (internal citations omitted) (discussing the true threats doctrine and defining true threat for purposes of legal prosecution); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1079–80, 1085 (9th Cir. 2002) (en banc) (holding that “Wanted” posters and listing of abortion doctors’ home and work addresses went “well beyond the political message” that “abortionists are killers who deserve death” and were true threats that suggested message “You’re Wanted or You’re Guilty; You’ll be shot or killed” in light of the prior murders of physicians who appeared on Wanted posters).

¹³² *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

¹³³ *See* *NAACP v. Claiborne Hardware*, 458 U.S. 886, 918 (1982).

¹³⁴ *Bahlul Reply*, *supra* note 100, at *19. While the record is unclear as to whether counsel for Al-Bahlul requested any limiting instruction, such a request is unnecessary when limiting instructions are constitutionally required. The presiding military judge has an “independent duty to determine and deliver appropriate instructions.” *United States v. Westmoreland*, 31 M.J. 160, 164 (C.M.A. 1990).

¹³⁵ *Bahlul Reply*, *supra* note 100, at *4.

that same day, the commission sentenced Al-Bahlul to life imprisonment.¹³⁶ The case was scheduled for reargument before the commission and was affirmed.¹³⁷ In response to Al-Bahlul's appeal, the Government took the position that no part of the First Amendment reaches foreign speakers, even those tried in American courtrooms under American statutes.¹³⁸ Al-Bahlul appealed to the D.C. Circuit, which upheld the conviction with minimal First Amendment analysis.

Members of the intelligence community have pointed out the potential damage of the Government's position. Besides the fact that *State of Ummah* appears to have actually had consequences that ran counter to al-Qaeda's intent,¹³⁹ these types of videos provide the American military with vital information. The Government's intention to chill production of these videos, however ineffectual, remains a matter of grave concern for the intelligence community.¹⁴⁰

C. Al-Haj – Chilling Foreign Reporters

Faced with governmental harassment and possible interminable detention, foreign reporters may be wary of covering stories related to FTOs. This would represent a great blow against the liberty and safety of American citizens. A dearth of coverage will weaken the marketplace of ideas and further deprive our intelligence services of valuable information.

¹³⁶ *Id.*

¹³⁷ *See, e.g.,* United States v. Al-Bahlul, 820 F. Supp. 2d 1141 (USCMCR 2011).

¹³⁸ *Bahlul Reply*, *supra* note 100, at *5–*11. Members of the intelligence community have pointed out that Bahlul's video was valuable open source intelligence. "Recognizing the value of open source intelligence, Congress created the National Open Source Center under the Central Intelligence Agency for the collection and analysis of open source intelligence. Contrary to public policy however, Petitioner, Ali Hamza Ahmad Suliman al Bahlul ("al Bahlul" or "Petitioner"), is being punished for speech that is and should be protected under the First Amendment. Al Bahlul has been sentenced to life imprisonment for creating in Afghanistan in early 2001 a propaganda video directed towards and widely seen by a U.S. audience, titled *State of the Ummah*. The video was compiled from already publicly available information. It expresses the motivations of and identifies key figures in al Qaeda. Such information is valuable open source intelligence. The future dissemination of valuable information such as this should be encouraged and, at the very least, not prevented." *Amicus Intelligence Brief*, *supra* note 43, at 2.

¹³⁹ *Amicus Intelligence Brief*, *supra* note 43, at 7.

¹⁴⁰ *Id.* at 6.

It is little comfort that the statutes at issue in *Al-Bahlul* only apply to individuals deemed enemy combatants.¹⁴¹ The United States has previously deemed a foreign journalist an enemy combatant, largely on the basis of travel taken while in the employ of Al-Jazeera and his alleged interviews of terrorist leaders.¹⁴² Sami Mohy El Din Muhammed Al Haj, a Sudanese journalist for Al-Jazeera, was detained by the United States for over six years.¹⁴³ Though the Government reviewed Al Haj's enemy combatant status twice, the Government declined to release Al Haj in either instance. Among the "factors favor[ing] continued detention" listed in the Administrative Review of Detention of the Enemy were Al Haj's experience as a reporter for Al-Jazeera, and the fact that he had interviewed several Taliban officials.¹⁴⁴ Al Haj claims that during detention, his interrogators asked "How much does bin Laden pay Al Jazeera for all the propaganda that Al Jazeera supplies?"¹⁴⁵ It appears that the Government viewed the chilling effect of detention as a positive development. In "primary factors favor[ing] release or transfer" of Haj, "the detainee noted that he would exercise caution in future assignment with Al-Jazeera."¹⁴⁶

The threat to Al-Jazeera did not go unnoticed. Wadah Khanfar, managing director of Al-Jazeera's Arabic service, noted that, "[w]e are concerned about the way the Americans dealt with Sami, and we are concerned about the way they could deal with others as well."¹⁴⁷ The news organization may have been especially sensitive to this incident, as there had been a number of strained interactions between American troops and Al-Jazeera employees. There are credible accounts that Salah Hassan, an Al-Jazeera camera man, and his colleague Suheib Badr Darwish, were tortured

¹⁴¹ 10 U.S.C. § 950(v) (2006).

¹⁴² *Haj Review Board*, *supra* note 3, at 33–35.

¹⁴³ *Freed Guantanamo Prisoner is Home*, BBC.COM, May 2, 2008, <http://news.bbc.co.uk/2/hi/americas/7378828.stm> ("His detention for six years, without the most basic due process, is a grave injustice and represents a threat to all journalists working in conflict areas," said Joel Simon, executive director of the New York-based Committee to Protect Journalists.).

¹⁴⁴ *Haj Review Board*, *supra* note 3, at 33–35.

¹⁴⁵ Brian Stelter, *From Guantánamo to Desk at Al Jazeera*, N.Y. TIMES, Dec. 22, 2009, <https://www.nytimes.com/2009/12/23/world/middleeast/23jazeera.html>.

¹⁴⁶ *Haj Review Board*, *supra* note 3, at 35.

¹⁴⁷ *Freed Guantanamo Prisoner is Home*, *supra* note 143.

while held at Abu Ghraib in November 2003. Both men were eventually released when Iraqi courts found a lack of evidence.¹⁴⁸

Al-Jazeera employees might be likely to perceive American actions as direct and deliberate threats. The United States has twice bombed an Al-Jazeera headquarters, once in Kabul in 2001,¹⁴⁹ and again in a Baghdad missile strike in 2003.¹⁵⁰ The latter attack killed reporter Tareq Ayyoub.¹⁵¹ Al-Jazeera reports that it had previously made the United States aware of its coordinates.¹⁵² Ayyoub's widow and the International Federation of Journalists claimed this attack was deliberate.¹⁵³ The Daily Mirror later published a piece claiming to have in their possession a leaked memo that records an April 2004 meeting between President Bush and Prime Minister Blair, in which President Bush discussed a potential bombing run against Al-Jazeera's Qatari headquarters.¹⁵⁴ While both governments denied the report, David Keogh and Leo O'Connor were charged under the Official Secrets Act of 1989 for the unauthorized leak of the memo.¹⁵⁵ The subsequent gag order banning any U.K. reporter from connecting the trial to Al-Jazeera in any medium was widely decried by international reporting agencies, including Reporters without Borders.¹⁵⁶ The Al-Jazeera Iraq

¹⁴⁸ Christian Parenti, *Al Jazeera Goes to Jail*, THE NATION, Mar. 29, 2004, <http://www.thenation.com/article/al-jazeera-goes-jail?page=full>.

¹⁴⁹ *Al-Jazeera Kabul Offices Hit in US Raid*, BBC NEWS, Nov. 13, 2001, http://news.bbc.co.uk/2/hi/south_asia/1653887.stm.

¹⁵⁰ *U.S. Bombing Raid Kills Three Journalists in Baghdad*, FOX NEWS, Apr. 8, 2003, <http://www.foxnews.com/story/0,2933,83503,00.html>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ IFJ Accuses US Over Killing of Al-Jazeera Journalist in Baghdad: "It Could be Murder," INT'L FED'N OF JOURNALISTS, Nov. 23, 2005, <http://mena.ifj.org/en/articles/ifj-accuses-us-over-killing-of-al-jazeera-journalist-in-baghdad-it-could-be-murder->.

¹⁵⁴ John Plunkett, *Memo Warning 'Attack on Press Freedom'*, THE GUARDIAN, Nov. 23, 2005, <http://www.guardian.co.uk/media/2005/nov/23/nationalunionofjournalists.broadcasting>.

¹⁵⁵ *U.K. Charges Official with Leaking Blair Memo*, MSNBC, Nov. 22, 2005, http://www.msnbc.msn.com/id/10153489/ns/world_news-europe/t/uk-charges-official-leaking-blair-memo/. Subsequently, Attorney General Lord Goldsmith forbade any publication of information from the leaked memo. Keogh was found guilty of revealing the memo and sentenced to six months in jail.

¹⁵⁶ *Unacceptable Meddling in News Media By Bush-Blair Memo Trial Judge*, REPORTERS WITHOUT BORDERS, May 21, 2007, <http://en.rsf.org/united-kingdom-unacceptable-meddling-in-news-21-05-2007,22223.html>. Lord Chief Justice Phillips partially lifted this

bombing and the later memo controversy furthered the perception amongst foreign reporters that America was targeting unfriendly media.

Al-Haj is hardly the only foreign journalist who has been detained by American forces. Abdul Ameer Younis Hussein, a freelance cameraman then employed by CBS, was detained for over a year without charge after he filmed clashes in Mosul. He was later acquitted by an Iraqi criminal court.¹⁵⁷ Bilal Hussein, an AP photographer, was detained for two years on the basis of photos he took in Fallujah, and was finally released in April 2008.¹⁵⁸ Ibrahim Jassam, a freelance journalist, was held for seventeen months without charge and was released February 2010.¹⁵⁹

D. Humanitarian Law Project—Punishing Those Who Associate with Terrorists

While the Government's actions in *Bahlul* and its treatment of foreign reporters are of serious concern, proponents of these actions may argue that the impact of these positions is limited; the disregard of *Brandenberg* in *Bahlul* ought not implicate Americans or lawful residents. Even if this were true, the recent Government and Supreme Court position with regard to expansive interpretation of material support statutes clearly implicates the speech rights of individuals entitled to First Amendment protection. This result demands special attention for several reasons. First, by chilling the speech of Americans and American residents, it removes valuable sources of OSINT that are most easily integrated in the intelligence cycle—items written in English, prepared for Western consumption. Second, it represents the clearest failure by the judiciary to restrain the Government in its ultimately self-damaging quest to silence speech related to terrorism. Third, the broad scope of the Court's ultimate conclusion that

ban, allowing U.K. media to repeat accusations that were previously published. However, these groups may not suggest that these allegations were accurate.

¹⁵⁷ Joel Roberts, *CBS Cameraman Acquitted In Iraq*, CBS NEWS, Apr. 5, 2006, <http://www.cbsnews.com/stories/2006/04/05/iraq/main1472263.shtml>.

¹⁵⁸ Tim Arango, *Case Lays Bare the Media's Reliance on Iraqi Journalists*, N.Y. TIMES, Dec. 17, 2007,

http://www.nytimes.com/2007/12/17/business/media/17apee.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1198184561-4Ss0Q98pNRov6DzbujkKLA.

¹⁵⁹ Caesar Ahmed and Liz Sly, *Iraqi Journalist Freed after 17 Months*, L.A. TIMES, Feb. 11, 2010, <http://articles.latimes.com/2010/feb/11/world/la-fg-iraq-photographer11-2010feb11>.

speech “coordinated with” foreign terrorist organizations may be criminalized threatens to undermine humanitarian information sharing efforts.

1. Expanding the Material Support Statute to Encompass Speech

In *Holder v. Humanitarian Law Project*, the Supreme Court upheld 18 U.S.C. § 2339B.¹⁶⁰ The statute prohibits “knowingly provid[ing] material support or resources to a foreign terrorist organization (FTO).”¹⁶¹ Material support or resources are broadly defined as:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.¹⁶²

The Humanitarian Law Project (HLP), an organization that aims to reduce global terrorism by educating terrorist organizations on legal means to address grievances, argued that the statute was impermissibly vague, in violation of the Fifth Amendment, and would unconstitutionally restrict actions protected by the First Amendment.¹⁶³ Specifically, HLP and other aid groups argued that the “training,” “expert advice or assistance,” “service,” and “personnel” definitions under the law would restrict non-

¹⁶⁰ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

¹⁶¹ *Id.* at n.2 (quoting 18 U.S.C. § 2338B (2006 & Supp. III 2009)).

¹⁶² 18 U.S.C. § 2339A(b)(1) (Supp. III 2009).

¹⁶³ *HLP*, 130 S. Ct. at 2713–14. (“Plaintiffs claimed they wished to provide support for the humanitarian and political activities of the PKK and the LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution.”). The PKK, (Partiya Karkerên Kurdistanê or Kurdish Workers’ Party), is an organization that seeks to establish an independent Kurdish state. The LTTE, the Liberation Tigers of Tamil Eelam, more popularly known as the Tamil Tigers, was seeking to establish an independent Tamil state in Sri Lanka. Both groups are designated FTOs. *See* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997). The LTTE conceded defeat to the Sri Lankan government in May 2009. Niel A. Smith, *Understanding Sri Lanka’s Defeat of the Tamil Tigers*, 59 JOINT FORCE QUART 4 (2010), <http://www.ndu.edu/press/understanding-sri-lanka.html>.

threatening activities: “train[ing] members of [an FTO] on how to use humanitarian and international law to peacefully resolve disputes”; “engag[ing] in political advocacy on behalf of Kurds who live in Turkey”; and “teach[ing FTO] members how to petition various representative bodies such as the United Nations for relief.”¹⁶⁴ HLP asked that the Court interpret the statute’s use of “knowingly” to impose a *mens rea* requirement that the individual knows or intends to assist with unlawful terrorist actions.

The Court first held the law was not unconstitutionally vague¹⁶⁵ and that an offender need not intend to further a terrorist organization’s illegal activities¹⁶⁶ in order to trigger liability under the statute. The Court then distinguished the statute from a restriction on individual speech. Under the statute, individuals “may speak and write freely about” terrorist organizations.¹⁶⁷ The Court repeatedly stressed that the law would not reach independent advocacy.¹⁶⁸ However, the statute does criminalize “a narrow category of speech” that is made “to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”¹⁶⁹

The Court held that this prohibition was constitutional in light of the danger posed by terrorist organizations.¹⁷⁰ Positing that support is fungible, the Court reasoned that providing expertise on non-violent advocacy could

¹⁶⁴ *HLP*, 130 S. Ct. at 2716.

¹⁶⁵ *Id.* at 2720.

¹⁶⁶ *Id.* at 2721. The Court in *HLP* did not address questions involving journalistic or electoral “support.” However, offering legal representation before the UN would run afoul of the law.

¹⁶⁷ *Id.* at 2723. The perception of legitimacy of FTOs’ causes played a large role in the *HLP* decision. The Court noted that advising or advocating for FTOs may increase the legitimacy of terrorist groups. However, the Breyer dissent points out that this assertion has no factual support. The legitimacy of a group’s terrorism may have little to do with the support it receives for nonviolent activities.

¹⁶⁸ See *HLP*, 130 S. Ct. at 2721. (“The statute makes it clear that ‘personnel’ does not cover *independent* advocacy: ‘Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.’”).

¹⁶⁹ *HLP*, 130 S. Ct. at 2730–31.

¹⁷⁰ *Id.* at 2725–27 (“Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations.”).

allow terrorist groups to refocus resources on violent terrorist activities.¹⁷¹ Furthermore, such advocacy might lend legitimacy to terrorist groups and allow these groups to use the international legal system to threaten, manipulate, and disrupt.¹⁷²

HLP, then, essentially stands for the notion that the involvement of terrorist aliens transmutes protected political speech to actionable material support.¹⁷³ It is unclear what constitutional principles support this transformation. Writing in dissent, Justice Breyer argued that “[c]oordination’ with a group that engages in unlawful activity does not deprive the plaintiffs of the First Amendment’s protection under any traditional ‘categorical’ exception to its protection. . . . Not even the ‘serious and deadly problem’ of international terrorism can require automatic forfeiture of First Amendment rights.”¹⁷⁴

While the Court provided little constitutional reasoning for its holding in *HLP*, the Justices in the majority believed that interpreting the statute to cover coordinated speech activity would serve a compelling Government interest in combating terrorism.¹⁷⁵ As a content-specific criminal restriction on speech, the statute should have received “strict scrutiny”—the Court’s most searching type of review.¹⁷⁶ Although the

¹⁷¹ *Id.* at 2729. The Court explained that because money is fungible “‘foreign terrorist organizations that have a dual structure raise funds . . . highlight the . . . humanitarian ends to which such moneys could be put . . .’ but ‘there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent terrorist operations.’” *Id.* at 2725–26 (quoting Declaration of Kenneth R. McKune, App. 135, ¶ 12).

¹⁷² *Id.* In this way, the statute appears to be a manner restriction, limiting whom the speaker may address, in addition to a content restriction.

¹⁷³ See e.g., Erwin Chemerinsky, *Not A Free Speech Court*, 53 ARIZ. L. REV. 723, 729–30 (2011) (“The court allowed the government to prohibit speech that in no way advocated terrorism or taught how to engage in terrorism solely because the government felt that the speech assisted terrorist organizations. The restriction on speech was allowed even without any evidence that the speech would have the slightest effect on increasing the likelihood of terrorist activity. The deference that the Court gave to the government was tremendous and the restrictions it placed on speech were great.”).

¹⁷⁴ *HLP*, 130 S. Ct. at 2733 (Breyer, J., dissenting).

¹⁷⁵ *Id.* at 2724.

¹⁷⁶ See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (“Since [the law] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.”); *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). Though it is not relevant to the statute at issue here, it is interesting to note that the current Court does not seem to

Court claimed that its review amounted to strict scrutiny,¹⁷⁷ in practice the majority applied an analysis that bore few of the hallmarks of that high standard: narrow tailoring and least restrictive means.¹⁷⁸ Instead, the Court returned to an ignominious tradition of deferring to the military in wartime, even in matters of fundamental rights.

The Government, surely aware of the oft-fatal touch of strict scrutiny, had argued that the restriction merited only intermediate scrutiny.¹⁷⁹ The Government argued that the Court should apply the intermediate scrutiny set out in *United States v. O'Brien*,¹⁸⁰ under the theory that § 2339B was a facially neutral regulation of conduct that only incidentally burdened speech.¹⁸¹ Under this less exacting standard, the law need only be substantially related to an important government interest.¹⁸²

The majority rejected the Government's suggestion that the Court apply a weaker First Amendment standard for conduct.¹⁸³ However, it is unclear what level of scrutiny the Court actually applied. To be sure, the Court adopted *some* of the language of the strict scrutiny standard when it considered whether there was a compelling Government interest in

agree if all content-based restrictions trigger strict scrutiny, with limited historical exceptions, provided that the targeted speech involves false statements about easily verifiable facts. *Compare* *United States v. Alvarez*, 132 S.Ct. 2537, 2548 (2012) (Kennedy, J.) (plurality opinion) (noting that “[i]n assessing content-based restrictions on protected speech, the Court . . . has applied the ‘most exacting scrutiny’ and applying strict scrutiny to the Stolen Valor Act) *with Alvarez*, 132 S.Ct. at 2552–53 (Kagan, J., concurring) (applying intermediate scrutiny to same Act due to “the regulation[] concern[ing] false statements about easily verifiable facts” unrelated to “statements about philosophy, religion, history, the social sciences, [and] the arts”).

¹⁷⁷ Analogizing to its decision in *Cohen v. California*, 403 U.S. 15 (1971), the Court wrote, “[W]e recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied a more rigorous scrutiny and reversed his conviction. . . . This suit falls into the same category.” *HLP*, 130 S. Ct. at 2724.

¹⁷⁸ The Court did, however, determine that the statute served a compelling state interest. *Id.* (“Everyone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order.”).

¹⁷⁹ *Id.*

¹⁸⁰ 391 U. S. 367 (1968).

¹⁸¹ *HLP*, 130 S. Ct. at 2723 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

¹⁸² *O'Brien*, 391 U.S. at 377.

¹⁸³ *HLP*, 130 S. Ct. at 2724.

combating terrorism.¹⁸⁴ But the Court failed to mention the test's other half, which is to ensure that the statute is narrowly tailored to further that interest.¹⁸⁵ Similarly, the Court never determined if the statute represented the least restrictive means of achieving the Government's compelling interest. Indeed, it appears that the Court did not engage in any independent analysis as to whether the statute would even further the Government's interest. The majority, though occasionally paying lip service to strict scrutiny, did not hide its deference to the Government.¹⁸⁶ The Court repeatedly noted "respect for the Government's conclusions is appropriate," especially in a field "where information can be difficult to obtain."¹⁸⁷

Even if the Court were justified in applying a standard of review that is less exacting than strict scrutiny, there is little independent analysis in the opinion to suggest that the statute would clear the hurdle presented by intermediate scrutiny. Justice Breyer, writing in dissent, says as much, noting that the statute would fail even this lower standard.¹⁸⁸ The dissent rightly points out that in balancing a compelling interest, "the means adopted . . . and the specific prohibitions of the First Amendment," the Government must not only show the importance of the claimed interest, but

¹⁸⁴ *Id.* (comparing the speech at issue in the case to that of the speech in *Cohen*, the Court said: "The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to the plaintiffs the conduct triggering coverage under the statute consists of communicating a message. . . . we are outside of *O'Brien's* test, and we must [apply] a more demanding standard.") (internal citations omitted).

¹⁸⁵ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

¹⁸⁶ *See, e.g., HLP*, 130 S. Ct. 2727–30; *id.* at 2727 ("[E]valuation of the facts by the Executive, like Congress's assessment, is entitled to deference.").

¹⁸⁷ *Id.* at 2727. The Court placed "significant weight" on "the considered judgment of Congress and the Executive that providing material support to a . . . terrorist organization . . . bolsters [its] terrorist activities" and cautioned that demanding "'detail,' 'specific facts,' and 'specific evidence'" was "dangerous." *Id.* at 2728. The majority scolded the dissent for "simply disagree[ing] with the considered judgment of Congress and the Executive." *Id.*

¹⁸⁸ *Id.* at 2732–34 (Breyer, J., dissenting) ("[E]ven if we assume for argument's sake that 'strict scrutiny' does not apply, no one can deny that we must at the very least 'measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment'. . . . I doubt that the statute, as the Government would interpret it, can survive any reasonably applicable First Amendment standard.").

also explain how the means help achieve that interest.¹⁸⁹ In particular, Justice Breyer characterized the majority's fears as speculative, based largely on hypotheticals from the Government's brief.¹⁹⁰

In effect, the Court found that the statute furthered a compelling Government interest because the Government claimed the statute would further a compelling interest.¹⁹¹ After making this determination, the Court then failed to examine the methods used to achieve this interest. Justices have previously warned of accepting bald assertions in the name of security.¹⁹² The Court, in agreeing with the Government's position that non-violent advocacy would further the terrorist agenda, seemed to reject the notion that the First Amendment, by allowing for the free discussion of grievances, furthers peaceful resolution of conflict.¹⁹³ It strains belief to conclude that the teaching of non-violence may be banned on the basis that such knowledge may be misused.¹⁹⁴ Instead, the Court followed the dubious tradition of overcriminalizing speech during national security crises.¹⁹⁵

¹⁸⁹ *Id.* at 2734.

¹⁹⁰ *Id.* at 2739. In fact, it was clear that Justice Breyer was suspicious of the Government's arguments: "I would reemphasize that neither the Government nor the majority points to any specific facts that show that the speech-related activities before us are fungible in some *special way* or confer some *special* legitimacy upon the PKK. Rather, their arguments in this respect are general and speculative." *Id.*

¹⁹¹ The majority spent most of the opinion attempting to bolster the justification for the statute in the first place; focusing primarily on the danger of FTO's and the fungibility of support. *See id.* at 2724–27.

¹⁹² *Id.* at 2727 ("Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake."); *see, e.g., Korematsu v. United States*, 323 U.S. 214, 234–40 (1944) (Murphy, J., dissenting).

¹⁹³ *See Whitney v. California*, 274 U.S. 357, 378–79 (1927) (Brandies, J., concurring) ("[The Framers] knew . . . that fear breeds repression; that repression breeds hate; that hate menaces stable government; [and] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.").

¹⁹⁴ *See HLP*, 130 S. Ct. at 2738 (Breyer, J., dissenting) ("I am not aware of any case in this Court—not *Gitlow v. New York*, 268 U. S. 652 (1925), not *Schenck v. United States*, 249 U. S. 47 (1919), not *Abrams*, 250 U. S. 616, not the later Communist Party cases decided during the heat of the Cold War—in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, *e.g.*, buy negotiating time for an opponent who would put that time to bad use.).

¹⁹⁵ *See, e.g., Dennis v. United States*, 341 U.S. 494 (1951); *Whitney*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Schenck v. United States* 249 U.S. 47 (1919); *see generally* David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1329 (2008) (reviewing ERIC A. POSNER & ADRIAN

2. The Court's Tradition of War Time Deference

The most glaring case of deference, *Korematsu v. United States*,¹⁹⁶ deserves special attention. It provides a particularly embarrassing example¹⁹⁷ of how military deference¹⁹⁸ may override even the most exacting legal standard. The case concerned the constitutionality of Executive Order 9066, the internment order for persons of Japanese ancestry. The Court, in a 6–3 opinion, upheld the constitutionality of the Order in the face of strict scrutiny, largely relying on the claims of military necessity,¹⁹⁹ as in the earlier unanimously upheld *Hirabayashi v. United States*,²⁰⁰ enforcing a night curfew on persons of Japanese ancestry in the

VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 3–10 (2007)) (“Most observers of American history look back with regret and shame on our nation’s record of respecting civil liberties in times of crisis.”).

¹⁹⁶ 323 U.S. 214 (1944).

¹⁹⁷ See Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (likening *Korematsu* to *Dred Scott*); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995) (noting that *Korematsu* was a “fail[ure] to detect an illegitimate racial classification”); Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983 (2011); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 400 (2011) (“[I]t appears that at no time since September 11 has any U.S. government lawyer publicly used the *Korematsu* decision as precedent in defending executive detention decisions.”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2077 (2007) (noting that *Korematsu* is particularly odious precedent); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 531–32 (1945) (criticizing *Korematsu*).

¹⁹⁸ Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States’ Constitutional Approach to Rights During Wartime*, 2 INT’L J. CONST. L. 296, 311 (2004) (using *Korematsu* to comment on the “inability of courts during wartime to provide any check on political excesses, particularly those jointly endorsed by the executive and legislature”); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1000 (1999) (discussing the Japanese curfew and interment cases in the context of judicial deference).

¹⁹⁹ *Korematsu*, 323 U.S. at 223 (“*Korematsu* was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.”)

²⁰⁰ *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (“The war power of the national government is ‘the power to wage war successfully’ Where as they did here, the

aftermath of the Pearl Harbor attacks.²⁰¹ The Court accepted on faith the government's claims that both of these exclusionary orders were the only method to safeguard the national interest.²⁰² While *Korematsu* clearly reflects racist undercurrents of the period,²⁰³ close analysis of the opinion indicates that executive and congressional prerogative coupled with judicial deference was the main divide between the majority and the three dissents.²⁰⁴ While

conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.”).

²⁰¹ Both orders were supported by General DeWitt, who noted the absolute military necessity of segregating possible saboteurs. See Memorandum from Burling to Solicitor General (Apr. 13, 1944) (File 146-42-7, Department of Justice), cited in TETSUDEN KASHIMA, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 382, n. 175 (1996) (However there is “substantially incontrovertible evidence that the most important statements of fact advanced by General DeWitt to justify the evacuation and detention [of the Japanese] were incorrect, and furthermore that General DeWitt had cause to know, and in all probability did know, that they were incorrect at the time he embodied them in his final report . . .”).

²⁰² *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting) (“This exclusion of all persons of Japanese ancestry, both alien and non-alien, from the Pacific Coast area on a plea of military necessity . . . goes over the very brink of constitutional power and falls into the ugly abyss of racism.” (internal quotation marks omitted)).

²⁰³ *Id.* at 243 (Jackson, J., dissenting) (“[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.”); J.L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, 34 (1943) (“The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become ‘Americanized’, the racial strains are undiluted.”), available at <http://ia600506.us.archive.org/1/items/japaneseevacuati00dewi/japaneseevacuati00dewi.pdf>; JOHN W. DOWER, WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 81 (1993) (“‘A Jap’s a Jap,’ [DeWitt] reiterated in public testimony in April 1943. ‘You can’t change him by giving him a piece of paper.’ Indeed in General DeWitt’s view, the menace posed by the Japanese could only be eliminated by destroying the Japanese as a race.”); Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 133–40 (2006) (noting that the military reasoning was explicitly racist).

²⁰⁴ Green, *supra* note 197, at 996 (“Simple vote counting shows that the *Korematsu* Court itself did not view the case as involving straightforward racial discrimination. Several Justices who were sensitive to racial issues in other cases—including Douglas, Rutledge, Black, and Stone—were majority votes for the government in *Korematsu*. And two Justices with far less progressive records on race—Roberts and Jackson—were among *Korematsu*’s

there is great political pressure to accede to the demands of the executive, Congress, and the military, especially in times of war, the notion of deference becomes harder to support when the Government's claims are simply not credible.²⁰⁵

Though the Court often defers to the Government in military matters,²⁰⁶ in the context of the First Amendment this deference cannot rightly be characterized as strict scrutiny.²⁰⁷ One of the main purposes of strict scrutiny is rooted in the fact that restrictive laws may reflect possible illicit motivations on the part of the Government. If the Court simply defers to the Government as to whether the means actually further the ends in the least restrictive manner, the standard ceases to serve a function. After all, it was this very deference that led the Court to approve the internment of Japanese-Americans in *Korematsu v. United States*. The Court, to its credit, has not engaged in this sort of widespread deference to the Government during the war on terror. However, the *HLP* decision, with its reliance on deference even in the face of strict scrutiny perhaps signals that the Court's willingness to oppose the executive and congress in military matters is waning.

It is unsurprising that the Court would feel pressure to affirm government actions during times of war. However, the deep embarrassment of the Court for such decisions,²⁰⁸ including *Korematsu*, a member of the so-called "Anti-Canon,"²⁰⁹ could be considered a buffer. The war-speech cases

dissenters. This indicates that these Justices did not find the cases' racial elements to be decisive; other doctrinal factors were driving their determinations.").

²⁰⁵ *Id.* at 998 ("The uniquely decisive question in *Hirabayashi* and *Korematsu* was how much the Court should defer to the President's assertions of military necessity. Such military judgments had been explicitly supported by Congress and were hard to falsify, but they were also increasingly hard to believe.").

²⁰⁶ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

²⁰⁷ See Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 456–57 (2005) ("In *Korematsu*, the Court's adoption of this level of factual deference rendered its ostensibly stringent legal scrutiny a virtual nullity."); Bill Araiza, *Posting of Bill Araiza*, PRAWFSBLOG.COM, Dec. 21, 2010, <http://prawfsblawg.blogs.com/prawfsblawg/2010/12/first-amendment-rules-and-standards.html> ("I wonder whether anything is gained by a court pretending to do some form of heightened scrutiny when it more or less just defers to Congress on these issues?").

²⁰⁸ Constitutional scholars have interpreted that the embarrassment of the court over *Korematsu* is reflected in recent decisions opposing executive overreach in the detainee cases. See Green, *supra* note 197, at 990.

²⁰⁹ Greene, *supra* note 197, at 380–81 ("We know these cases by their petitioners: Dred Scott, Plessy, Lochner, and *Korematsu*. They are the American anticanon. Each case

above were decided before the advent of strict scrutiny or its solidification (of course, *Korematsu*, a particularly odious case, announced strict scrutiny in the racial context).

Even after the advent of strict scrutiny, there is little doubt that the Supreme Court has a long history of deference to the military when confronted with a justification of military necessity or other national security concerns. However, in 1971, the Pentagon Papers case²¹⁰ marked a rather shocking departure from this trajectory. The crux of the case was an injunction issued by the Second Circuit, preventing the New York Times and the Washington Post from publishing portions of classified Defense Department study on its policies in Vietnam.²¹¹ The government argued that the publication would prolong the War by revealing sensitive information, though concededly not any future plans, that would embarrass the war effort.²¹² In a *per curiam* decision with nine different opinions, the majority determined that the Government's justifications were insufficient to justify the prior restraint on speech.²¹³

With each of the nine justices writing separate opinions, the boundaries of the case are relatively unclear;²¹⁴ yet, the overall effect of the decision is clear. Following cases like *Korematsu*, and the war-time speech cases, the determination that a military necessity justification was insufficient is remarkable. Faced with the one-of-a-kind abrogation of a fundamental

embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute. Together they map out the land mines of the American constitutional order, and thereby help to constitute that order: we are what we are not.”).

²¹⁰ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

²¹¹ *Id.* at 714.

²¹² *Id.* at 731–32 (White, J., concurring).

²¹³ *Id.* at 714. Encouraged by this decision in favor of free speech and subject to the demands of the 24/7 news cycle, reporters are no longer hesitant to publicize the mistakes of Presidents' administrations. Nixon's term was brought to an end through the Watergate scandal, Reagan's was tarnished by the Iran-Contra affair, Clinton's extracurricular activities led to his impeachment, and George W. Bush was held accountable for Iraqi weapons of mass destruction that were never located. Charles Bierbauer, *When Everything is Classified, Nothing is Classified*, 1 WAKE FOREST J.L. & PUB. POL'Y 21, 23 (2011).

²¹⁴ The majority essentially falls into two categories: Justices Black and Douglas did not think prior restraints were ever justified. See *New York Times Co. v. United States*, at 714–24 (1971). Justices Brennan, White, and Stewart left open the possibility of prior restraints in extreme instances where the government could allege and prove that publication would “inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport at sea.” *Id.* at 726–27.

constitutional guarantee,²¹⁵ the court seemed willing to challenge the Government's understanding of security threats: "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."²¹⁶

In the more recent past, the Court signaled a similar reticence to swallow the Government's military necessity justifications in two cases: *Boumediene v. Bush*²¹⁷ and *Hamdi v. Rumsfeld*.²¹⁸ In *Hamdi*, an individual detained in Afghanistan as an enemy combatant petitioned for writ of habeas corpus, challenging the evidence the United States used to label him an enemy combatant.²¹⁹ In a plurality opinion, the Court concluded that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention."²²⁰ As part of the demands of due process, the Court rejected the Government's argument that "courts should review its determination that a citizen is an enemy combatant under a very deferential 'some evidence' standard."²²¹

In *Boumediene*, individuals detained as enemy combatants and held at Guantanamo petitioned for writ of habeas corpus. In granting the petitioners writ, the Court went beyond merely rejecting the Government's desired low evidence standard, as it did in *Hamdi*.²²² In fact, the Court held that section 7 of the Military Commissions Act was an unconstitutional suspension of habeas corpus.²²³ In doing so, the Court performed its legitimate and necessary "responsibility to hear challenges to the authority of the Executive to imprison a person."²²⁴

²¹⁵ *Id.* at 725 (Brennan, J., concurring) ("So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession.").

²¹⁶ *Id.* at 719 (Black, J., concurring).

²¹⁷ 553 U.S. 723 (2008).

²¹⁸ 542 U.S. 507 (2004).

²¹⁹ *Id.* at 511.

²²⁰ *Id.* at 509.

²²¹ *Id.* at 527.

²²² *Id.*

²²³ *Boumediene v. Bush*, 553 U.S. 723, 728 (2008).

²²⁴ *Id.* at 797.

Boumediene and *Hamdi* are all the more remarkable given the National Security climate post-9/11. Yet, despite security justifications that seem sufficient to allow other courts to abrogate certain rights, the Court in these cases applied a strict scrutiny that lives up to its reputation.²²⁵

What is significant from these decisions is not that they compel courts to challenge the military justifications offered by the Government to justify policies or actions that restrict constitutional rights; indeed, there are many more cases subsequent to the Pentagon Papers case, which suggest the Court cannot shake its habit of assuming the “necessity” of military necessity justifications.²²⁶ But, these decisions do show that the Court does not have to give absolute deference to the Government in matters of national security. They represent bright spots in the Court’s application of a strict(er) scrutiny standard in light of a Government policy or action to address security concerns. More than that though, these cases show that deference to the Government where security concerns are relevant is not a foregone conclusion—neither political nor judicial prudence mandates the deference evident in *HLP*.

3. HLP’s Strange Scrutiny

In *HLP* the material support statute survived the Court’s purported application of strict scrutiny. The survival of the statute should astound. Very few laws survive strict scrutiny in the speech context, though the standard is not always fatal. Professor Volokh takes the position that the standard is near-fatal, noting that, as of 1997, the Court had upheld three speech restrictions under strict scrutiny—*Buckley v. Valeo*,²²⁷ *Austin v. Michigan*

²²⁵ Strict in theory, fatal in fact.

²²⁶ See e.g., *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–74 (1990) (noting that enforcing the Fourth Amendment abroad would have “significant and deleterious consequences for the United States in conducting activities beyond its boundaries The United States frequently employs Armed Forces outside this country . . . for the protection of American citizens or national security. . . . Application of the Fourth Amendment to those circumstances could significantly disrupt the ability . . . to respond to foreign situations involving our national interest.”).

²²⁷ *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court struck down the Federal Election Campaign Act of 1971 in part, upholding individual contribution limits, disclosure and reporting provisions, and a public financing section; while striking down limits on campaign expenditures, limits on independent expenditures, and expenditures by a candidate’s personal funds. The opinion has been heavily criticized by both sides, with some arguing

Chamber of Commerce,²²⁸ and *Burson v. Freeman*²²⁹—all involving election speech.²³⁰ However, these cases have been either criticized or overruled. For example, *Austin v. Michigan Chamber of Commerce*,²³¹ was overruled in *Citizens United v. FEC*.²³² While other commentators insist that strict scrutiny is not always fatal, it is “most fatal” in the context of speech restrictions.²³³ Over a thirteen-year period, 1990–2003, the entirety of the federal courts applied strict scrutiny in the speech context 222 times, upholding the law only 22% of the time.²³⁴

The reader is then left with a puzzling picture: the Court went out of its way to announce that it viewed the statute as content-based.²³⁵ The Court then announced that it must, therefore, apply the most rigorous standard, strict scrutiny.²³⁶ However, the Court then proceeded to apply none of the hallmarks of that standard. There is little discussion of the means to achieve a compelling goal. There is no examination of less intrusive means. In the face of this strict in-name-only scrutiny, the statute survives.

It seems unlikely that § 2339B, even as interpreted by the Court, could have survived strict scrutiny.²³⁷ The Court’s attempts to address the clear overinclusive nature of the ban are unconvincing. In order to justify banning all aid, the Court must first accept that all aid, even political or

that the decision allowed the rich to have a disproportionate influence on elections and others arguing that any contribution limitation is an infringement of free speech. Of particular interest is the dissent of Justice White, which engages in extreme deference (strangely reminiscent of the Court in *HLP*) in arguing that the entire law should be upheld due to the expertise of Congress.

²²⁸ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

²²⁹ *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality).

²³⁰ Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2426–27 (1997).

²³¹ 494 U.S. 652 (1990).

²³² 130 S. Ct. 876 (2010).

²³³ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006). Strict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent, lower than in any other right. *Id.*

²³⁴ *Id.*

²³⁵ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010).

²³⁶ *Id.*

²³⁷ Recall that the Court has found nearly all content-based restrictions to be unconstitutional.

legal training, is inherently fungible. The dissent rightly points out the absurdity of this argument.

The reinterpreted § 2339B now suffers from underinclusion. The majority surely realized that by stressing the danger of any aid to terrorist groups, the Court could be seen endorsing a speech ban on any thought critical of the war effort or supportive of terrorist goals. Indeed, any such speech might contribute to the legitimacy of a terrorist group, a specific concern of the majority.²³⁸ Instead, the Court noted that § 2339B would not reach independent advocacy.²³⁹ The statute would only reach those individuals whose speech was “coordinated” with terrorist groups.²⁴⁰ But it should be obvious that independent advocacy would likely have a greater legitimating effect than coordinated speech.²⁴¹

It would seem, then, that the Court damaged established First Amendment doctrine in order to arrive at a possible military advantage. But this sacrifice of jurisprudential clarity for some imagined military necessity is counterproductive. The great irony of the majority’s action is that by willfully deviating from strict scrutiny, the Court managed to protect a statute likely to chill OSINT and harm the war effort. The chilling of valuable OSINT will hamper intelligence efforts.

Supporters of the *HLP* decision may claim that the Court’s affirmance was compelled by Congress’s finding 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.”²⁴² However, this defense is seriously undermined by the fact that Congress made a nearly identical finding regarding the Communist Party, yet the Court repeatedly struck down statutes criminalizing membership or participation with the Party. Under the Communist cases of the 1950s,²⁴³ as

²³⁸ *HLP*, 130 S. Ct at 2724–30.

²³⁹ *Id.* at 2728.

²⁴⁰ *Id.*

²⁴¹ See *id.* at 2737–38 (Breyer, J., dissenting) (“And, as for the Government’s willingness to distinguish *independent* advocacy from *coordinated* advocacy, the former is *more* likely, and not *less* likely, to confer legitimacy than the latter.”).

²⁴² Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a) 110 Stat. 1214, 110 Stat. 1214, 1247 (codified at 18 U.S.C. § 2339B note).

²⁴³ See *De Jonge v. United States*, 299 U.S. 353 (1937). In reversing a conviction for syndicalism for participating in a meeting of the Communist Party, the Court specifically

well as the “clear and present danger” test set out in *Brandenburg v. Ohio*,²⁴⁴ mere advocacy of membership in or aid to an organization with both dangerous and peaceful goals is not subject to punishment under the First Amendment.²⁴⁵

The opinion is additionally concerning because it does not comport with recent case law. Constitutional scholars have noted that the Supreme Court, in upholding § 2339B, essentially created a new category of unprotected speech,²⁴⁶ “terrorist coordinated speech,” ignoring the general principle that discouraged the establishment of new categories after *United States v. Stevens*.²⁴⁷ In *Stevens*, the Court declined to recognize a new category of unprotected speech: depictions of animal cruelty. The Court noted that “historic and traditional categories long familiar to the bar”²⁴⁸—including obscenity,²⁴⁹ defamation,²⁵⁰ fraud,²⁵¹ incitement,²⁵² and speech integral to criminal conduct²⁵³—are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”²⁵⁴

noted that “peaceable assembly for lawful discussion cannot be made a crime. . . . Those who assist in the conduct of such meetings cannot be branded as criminals on that score.” *Id.* at 365.

²⁴⁴ 395 U.S. 444, 449 (1969).

²⁴⁵ See *Scales v. United States*, 367 U.S. 203 (1967) (finding that though the Soviet Union was a violent terrorist state, membership in the domestic communist party could not be criminalized, absent defendant’s specific intent to engage in illegal activity).

²⁴⁶ Carrie O’Neill, *Holder v. Humanitarian Law Project*, HARV. NEGOT. & MEDIATION CLINICAL PROGRAM BLOG, July 3, 2011, <http://blogs.law.harvard.edu/hnmcp/newsletters/holder-vs-humanitarian-law-project/> (noting that Professor Martha Field argued that the Court’s decision in *HLP* “is not in keeping with First Amendment jurisprudence, possibly creating a new category of speech outside First Amendment standards”).

²⁴⁷ 130 S. Ct. 1577 (2010).

²⁴⁸ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U. S. 105, 127 (1991) (Kennedy, J., concurring in judgment).

²⁴⁹ See *Roth v. United States*, 354 U. S. 476, 483 (1957).

²⁵⁰ See *Beauharnais v. Illinois*, 343 U. S. 250, 254–55 (1952).

²⁵¹ See *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976).

²⁵² *Brandenburg v. Ohio*, 395 U. S. 444, 447–49 (1969) (per curiam).

²⁵³ *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949).

²⁵⁴ *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571–72 (1942).

The Court concluded that depictions of animal cruelty were not historically unprotected.²⁵⁵ While acknowledging the possibility that “[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law,” the Court noted the difficulty of establishing a new categories: “Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”²⁵⁶

4. The Potential Impact of *HLP* on Congress and Lower Courts

Regardless of the motivations for diluting strict scrutiny in *HLP*, the Court has sent the signal to both Congress and lower courts that content-based speech restrictions related to the war on terror may survive the most exacting legal standard. Congress demonstrated an awareness of the potential invalidation of § 2339B in drafting § 2339B(i) before the decision in *HLP*: “Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.” Such saving paragraphs may now be unnecessary. Armed with the knowledge that the Court, and thus lower courts, may be reluctant to strike down content-based restrictions, Congress may continue to restrict speech related to terrorist activities. While Congress surely means to aid in the fight against terror, indulging the Government’s desires for more tools to combat terror-related speech might paradoxically lessen the country’s ability to detect and prevent terrorist activities.

Congress’s decision to criminalize speech “coordinated” with terrorist groups allowed members to simultaneously appear tough on crime, tough on national security, and tough on terrorists. It is hardly surprising that Congress, even after having stressed the importance of OSINT in other findings, has taken and will continue to take such a hardened stance.²⁵⁷ The Court’s approach in *HLP* will surely encourage this impulse.

²⁵⁵ *United States v. Stevens*, 130 S. Ct. 1577 (2009).

²⁵⁶ *Id.* at 1586. The Court makes clear that First Amendment protection of speech is more than a simple cost-benefit analysis; for a category of speech to receive no protection, it must be “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* at 1585 (internal quotation marks omitted).

²⁵⁷ The near constant (re)election cycle forces members of congress to focus on advertising, credit claiming, and position taking. *See* DAVID MAYHEW, CONGRESS: THE ELECTORAL

IV. The New Legal Doctrine of Terrorist-Related Speech

The Court and the Government have taken positions that will chill speech of advocates of terrorism. But these positions will go much further, criminalizing otherwise protected speech and stemming the flow of ideas. If the Government may prosecute individuals who have interacted with terrorists and produced “coordinated” speech, then the Government may threaten journalists, academics, and humanitarian workers. In effect, the Government has announced a new restrictive approach to speech related to terrorism in the name of security, while simultaneously ignoring the intelligence value of that speech. This Part will first discuss the danger to domestic speech, then explore the impact on speech related to the production of OSINT.

A. HLP’s Unclear Coordination Requirement will Chill Speech

In its decision, the Court sought to minimize the risk that its interpretation of the statute would chill speech, noting that only speech “directed to, coordinated with, or controlled by” a terrorist organization would qualify as material support.²⁵⁸ Unfortunately, however, it is not obvious what level of foreign involvement will strip speech of its First Amendment protection.²⁵⁹ It is true that in order for speech to lose First Amendment protection the law requires more than simply having contact with a terrorist organization. On the other hand, the vagueness surrounding

CONNECTION, 49–55, 60–62, 130–36 (2d ed. 2004). There is little chance that a member would either willingly advertise a “soft on crime” stance or claim credit for a bill stating the same. Taking a “tough” stance on crime is often a path to political success. *Prosecutor or Politician?*, THE ECONOMIST BLOG, Jan. 13th, 2010, http://www.economist.com/blogs/democracyinamerica/2010/01/prosecutor_or_politician.

²⁵⁸ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010) (noting that the statute only reaches speech “directed to, coordinated with, or controlled by foreign terrorist groups”).

²⁵⁹ Steve Vladeck, *What Counts as Abetting Terrorists*, N.Y. TIMES, June 21, 2010, <http://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/> (“[T]he majority’s sweeping reading of the statute’s scope blurs th[e] line [between criminalizing association and criminalizing support] almost to the point of invisibility. In its view, the material support statute doesn’t impose guilt by association; the defendant had to do something to support the group. But almost anything can be that something.”).

precisely what more is required may well cause many individuals to avoid speaking on the subject of terror. As a result, the Court's decision in *HLP* will likely chill the speech of any aid organizations, academics, or journalists that have had contact with foreign terrorist organizations.

Furthermore, the Court does not define any of the three speech conditions that trigger material support liability. While "directed to" seems fairly straightforward, the vagueness inherent in "coordinated" is likely to chill speech. Justice Breyer noted that he was "not aware of any form of words that might be used to describe 'coordination' that would not, at a minimum, seriously chill not only the kind of activities the plaintiffs raise before us, but also the 'independent advocacy' the Government purports to permit."²⁶⁰

The term coordination is not defined as part of any criminal statute in 18 U.S.C. Although the term "coordinated communication" is defined in 11 C.F.R. § 109.21,²⁶¹ the definition is couched in the rather dissimilar electioneering context. Disregarding the language of a communication's financial sponsorship, the term is defined in terms of speech content²⁶² and speaker conduct.²⁶³ There, speech is considered coordinated if "the communication is created, produced, or distributed at the request . . . of a candidate."²⁶⁴

At least one plausible interpretation of "coordination" would be that the terrorist organization approves of the content of the speech and requests that another party disseminate that speech; a surrogate speaker, in a sense. While we do not know the exact contours of "coordination," we do know that the speaker need not share the same goals as the terrorist organization.²⁶⁵ It seems, therefore, that a coincidence of wants between the speaker and the terrorist group—that is, a desire that the message be published—would likely qualify as coordination even if there was no coincidence of motive. This renders the restriction distinctly content-based and overinclusive. It would not be surprising if an FTO coincidentally

²⁶⁰ *HLP*, 130 S. Ct. at 2737 (Breyer, J., dissenting).

²⁶¹ Answering, "What is a 'coordinated communication?'" for the purposes of federal election law. 11 C.F.R. § 109.21 (2010).

²⁶² *Id.* § 109.21(c).

²⁶³ *Id.* § 109.21(d).

²⁶⁴ *Id.*

²⁶⁵ *HLP*, 130 S. Ct. at 2717–18.

endorsed the views expressed in this Article, and under such an expansive and elusive coordination requirement, this author may have seemingly provided material support.

Chilling the speech of journalists, aid workers, and academics does not merely impact a few select professionals; the American public suffers an intangible loss of intellectual freedom. The speech protections of the First Amendment allow for a flourishing marketplace of ideas, where individuals gain exposure to a variety of “social, political, esthetic, [and] moral” views.²⁶⁶ The Court has noted the importance of this “open marketplace where ideas, most especially political ideas”²⁶⁷ inform the populace and enrich the national character. The America-centered notion that these ideas can only emanate from within the borders of the United States is, at best, outdated. Those who might have communicated to us views that are critical of our foreign policy, might out of an abundance of caution, keep them to themselves. We lose out on these ideas, and the republic suffers as a result. The Government should be wary of disrupting the flow of ideas, especially those ideas that relate to the global war on terror.

It is clear that the positions of the Government and the Court will also chill foreign speech. While chilling foreign speech is typically of less concern, the depletion of foreign material concerning the war on terror implicates the constitutional rights of Americans. The Court has repeatedly confirmed “that the Constitution protects the right to receive information and ideas . . . regardless of their social worth.”²⁶⁸ The Court has applied this

²⁶⁶ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”).

²⁶⁷ *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 128 S. Ct. 791, 801 (2008) (“The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference.” (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919))).

²⁶⁸ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); *see Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (“[F]reedom [of speech] embraces the right to distribute literature, and necessarily protects the right to receive it.”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of

doctrine to protect the right to possess obscene material in the home, to receive uncensored mail, and to receive religious literature.²⁶⁹ The First Amendment serves not only the interests of individual authors, but also the collective interest of a society enriched by a vibrant marketplace of ideas. Far from individualized harm, chilling the flow of foreign ideas would hurt the entirety of the American people by damaging this marketplace of ideas.

B. HLP's Chilling Effects will reach Speakers with the Greatest Exposure to Terrorist Activities and Vital Intelligence

The Court's holding in *HLP* not only threatens to chill domestic speech and the reception of foreign speech, it also greatly hampers the ability of NGOs and other third-parties to facilitate the production of valuable OSINT. Academic papers comprising interviews with a terror organization would provide intelligence agencies with a better understanding of the organization's goals and grievances. Similarly, NGO reports, prepared with the cooperation of members of a terror organization, might yield valuable group demographics and thus, information on current fighting strength. Civilian communication that might indirectly reveal terrorist whereabouts or plans would be driven underground. Academics who have collected information on terrorist organizations are also likely to refrain from publishing their findings. Editorials following the decision noted, "it hardly seems farfetched that a zealous prosecutor could pursue people for lending 'legitimacy' to terrorist groups by publishing academic papers on their history and aims or their reasons for fighting."²⁷⁰

There is good evidence that the Court's holding will chill the production of these valuable documents. Several concrete examples of academic/terrorist group collaborations are provided in an *HLP* amicus

thought, and freedom to teach—indeed, the freedom of the entire university community.”); *Lamont v. Postmaster General*, 381 U.S. 301, 307–08 (1965) (Brennan, J., concurring) (“The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688–89 (“Yet the First Amendment's basic guarantee is of freedom to advocate ideas.”).

²⁶⁹ *Stanley*, 394 U.S. at 564; *Procunier v. Martinez*, 416 U.S. 396, 408 (1974); *Martin*, 319 U.S. at 143, 149.

²⁷⁰ Editorial, *Court Chills Free Speech*, USA TODAY, June 22, 2010, http://www.usatoday.com/news/opinion/editorials/2010-06-23-editorial23_ST2_N.htm.

brief prepared by the Brennan Center.²⁷¹ One anthropologist feared that he could no longer take part in and thus directly observe and report on Hamas funeral marches for terrorist “martyrs.”²⁷² By walking in the parade, the anthropologist is able to hear the intimate conversations of terrorist members, but his presence also increases the size of protest directed by a terrorist group.²⁷³ Furthermore, the anthropologist presents the views of his subjects in academic papers, a valuable service that might legitimate terrorist causes and aggravate U.S. Allies.²⁷⁴

HLP is especially worrisome for those individuals who seek to collect data from a terrorist group or interview its members, as they would seem to be engaging in something that might approach criminal coordination. Indeed, under the Court’s theory of fungible material support, a journalist who interviews a terrorist and shares those views in a story has provided a valuable service in coordination with a prohibited group.²⁷⁵ By providing a medium for communication, the journalist allows the group to redirect resources from propaganda to plotting violent attacks.²⁷⁶ Several

²⁷¹ Brief for the Academic Researchers and the Citizen Media Law Project as Amici Curiae in Support of Respondents/Cross-Petitioners at *12–*19, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 4271309 [hereinafter *CMLP Brief*].

²⁷² *Id.* at *18–19.

²⁷³ *Id.*

²⁷⁴ *Id.* It is deeply troubling that the Court in *HLP* felt that censoring American speech activities was necessary to avoid upsetting our allies in the war on terror. There is a non-trivial argument that denying speech protections in both the Domestic and Foreign sphere will antagonize allies. The Executive has repeatedly warned our allies and enemies alike to respect the freedom of speech in the Internet domain. *See, e.g.*, Paul Colgan & Geoff Elliott, *Stephen Conroy and US at Odds on Net Filter*, THE AUSTRALIAN.COM, Mar. 29, 2010, <http://www.theaustralian.com.au/business/media/stephen-conroy-and-us-at-odds-on-net-filter/story-e6frg996-1225846614780> (expressing concern with Australia’s use of extensive Internet filtering); *see also*, Andrew Moshirnia, *The Persian Version: Why Support for ACTA Undermines U.S. Promotion of Internet Freedom*, DIGITALMEDIALAWPROJECT.ORG, Mar. 10, 2010, <http://www.dmlp.org/blog/2010/persian-version-why-support-acta-undermines-us-promotion-internet-freedom>. These actions would ring hollow if the United States did not offer steadfast protection of foreign content and foreign authors.

²⁷⁵ *CMLP Brief*, *supra* note 271 at *15–*17.

²⁷⁶ *Id.* at *18. (specifically mentioning the al-Bahlul prosecution as cause for journalist concern: “In light of the fact that the government has successfully prosecuted at least one Al Qaeda member under the material support statute for creating and disseminating a propagandist videotape [referring to Al-Bahlul] can journalists be confident that they may broadcast clips of such videos or otherwise provide a forum in which terrorist groups air their views without risking criminal prosecution?”).

newspapers published editorials immediately following the *HLP* decision citing this same fear.²⁷⁷ The *New York Times* editorial noted that “[t]he FBI has [already] questioned people it suspected as being sources for a New York Times article about terrorism, and threatened to arrest them for providing material support.”²⁷⁸

C. Side Stepping Brandenburg in Targeting Domestic Speech

HLP is already being used to convert speech that falls far below the solicitation threshold into criminally actionable offenses. That is, the government is criminalizing conduct by American residents that would not satisfy the *Brandenburg* standard for intent, imminence, and likelihood.

Jubair Ahmad, a 24-year-old immigrant, was charged with violating 18 U.S.C. § 2339B for the production of a YouTube video that fell well below the *Brandenburg* standard.²⁷⁹ Ahmad, who was born in Pakistan and was a lawful permanent resident of Virginia, created a five-minute YouTube video. He did so at the behest of Talha Saeed, the son of the leader of Lashkar-e-Tayyiba (LeT), a foreign terrorist organization active primarily in the Kashmir. Ahmad pleaded guilty to the single count.

The five-minute video was made up of pictures and video clips, with the background audio of a prayer from Hafiz Saeed, the leader of LeT. The video begins with pictures of the arrest of Hafiz by Pakistani authorities, and continues on to show the LeT logo, images of abuse against Muslims at Abu Ghraib, armored trucks exploding when struck by improvised explosive devices, and pictures of dead men. The audio prayer consists of several refrains: “O God, support Jihad and the Mujahideen,” “O God give us the glory of Jihad,” and “O God, lead the Mujahideen to victory, who fight for

²⁷⁷ Editorial, *Court Chills Free Speech*, USA TODAY, June 22, 2010, http://www.usatoday.com/news/opinion/editorials/2010-06-23-editorial23_ST2_N.htm. (“[A] sharp and troubling turn, the court has denied free speech rights to humanitarian groups— and potentially to academics and journalists.”).

²⁷⁸ Editorial, *A Bruise on the First Amendment*, N.Y. TIMES, June 21, 2010, at A26.

²⁷⁹ Affidavit in Support of Criminal Complaint, Arrest Warrant, and Search Warrant Jubair, Criminal No. 1:11 MJ 742 *available at* <http://www.scribd.com/doc/63816237/Jubair-Ahmad-Affidavit>; Position of the United States with Respect to Sentencing, Criminal No 1:11 CR 554, *available at* <http://www.scribd.com/doc/89282160/Ahmad-gov-Sentencing-Memo>.

your sake.” Hafiz calls on Allah to protect the Mujahideen and grant them victory in Kashmir, Afghanistan, Iraq, Chechnya, and Palestine.

This video almost certainly falls below the requirements of *Brandenburg*—mere requests for viewers to join a group or asking for victory (however violent that victory may be) simply do not reach the imminence and likelihood requirements of *Brandenburg*. If anything, this video appears to be “pure speech,” as specifically protected in *HLP*.²⁸⁰

Upon review of the video, the district court reasoned that the production of a video encouraging jihad was a violent act and sentenced Ahmad to twelve years imprisonment.

The import of the Ahmad case is fairly clear: even if the underlying speech would be non-criminal, if it is made in coordination with an FTO it becomes criminal. Interestingly, in this way the logic of the prosecution of Ahmad, a lawful American resident, merges with the prosecution of al-Bahlul: no *Brandenburg* instruction need be given because the First Amendment does not apply. Though *Brandenburg*²⁸¹ was not overruled by *HLP*, an analysis of imminence and likelihood of criminal response to speech is no longer necessary—provided that the speaker has interacted with terrorists.

It should be obvious that these cases undermine *Brandenburg* generally. There is no constitutional basis for stripping First Amendment protection merely on the basis of association. It is for perhaps this reason that the Government has begun to bring solicitation charges against individuals who have not associated with terrorists for conduct that would fall below *Brandenburg*. Emerson Winfield Begolly, a 21-year-old Pennsylvanian man, was charged with soliciting terrorism for his online comments praising terrorist attacks and urging Jihad.²⁸² Deputy Assistant Attorney General in

²⁸⁰ Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2710 (2010).

²⁸¹ Marty Lederman, *The Begolly Indictment and the First Amendment*, BALKINIZATION (July 15, 2011), <http://balkin.blogspot.com/2011/07/begolly-indictment-and-first-amendment.html>; *Brandenburg v. Ohio*, 395 U. S. 444 (1969) (per curiam).

²⁸² Grand Jury Indictment of Emerson Winfield Begolly, Criminal No 1:11 CR 326, available at <http://www.lawfareblog.com/wp-content/uploads/2011/07/Begolly-Indictment.pdf>. His comments included:

the Department of Justice's Office of Legal Counsel, Marty Lederman, noted that Begolly's indictment raised serious First Amendment concerns, because his speech:

does not at first glance appear to be different from the sort of advocacy of unlawful conduct that is entitled to substantial First Amendment protection under the *Brandenburg* line of cases. . . . The *Begolly* indictment does not allege either an intent to incite imminent lawless action, or a likelihood that the speech would produce such imminent lawlessness. Assuming the government could not prove such *Brandenburg* intent and likelihood beyond a reasonable

"Peaceful protests do not work. The kuffar [infidels] see war as solution to their problems, so we must see war as the solution to our[s]. No peace. But bullets, bombs and martyrdom operations";

"There is only one life, let it be spend in the service of Allah. And there is only one death, let it be for the sake of Allah";

"Who are the best targets? Off duty police, off duty soldiers, gang member, family members of soldiers, government agents, workers at ammunition factory, white supremacists or black supremacists. It is best if targeting soldiers or police that they are off duty and out of uniform simply because they investigations will look usually for 'robbery gone wrong' or 'revenge' then as act of terrorism of revolt";

"A successful lone-wolf attack, when even kills 1 or 2 or 3 of the kuffar [infidels] is BETTER THAN an[] UNSUCCESSFUL massive attack which also results in your own arrest";

"Allah commands us to fight the kuffar as they have fought us. Remember 9/11, 7/7, Madrid and Beslan";

"Let your voice speak forever, write your autobiography with blood";

"Why terrorize the average Americans? BECAUSE ALLAH COMMANDS US TO TERRORIZE THEM. They terrorize us. Let the[m] wake up to the horrors of war and the reality of death that they would otherwise not ever know just sitting at home stuffing their fat faces watching TV";

"Our religion tells us, and example has shown to us, YES to is halal [permissible] to deliberately target civilians in Jihadi operations carried out in Dar-ul-Kuffar [land of the infidels]."

Id.

doubt, Count One would appear to be very vulnerable to a First Amendment challenge.²⁸³

Begolly pleaded guilty and so this First Amendment question was never explored.

Of course, there is some evidence that the Government will not bring criminal charges when a clearly materially supportive speaker is non-muslim and well respected. There was a concerted effort to remove MEK from the FTO list.²⁸⁴ In the course of this campaign, MEK spent millions of dollars to gain the support of former politicians, such as former mayor Rudolph Giuliani, former Homeland Security Advisor Fran Townsend, and former Pennsylvania Governor Ed Rendell. In the case of Rendell, the MEK paid him \$20,000 for a ten-minute speech he made on their behalf. He is currently under investigation by the Treasury Department for taking such fees. However, he appears to be the only member of a large support group including Rudy Giuliani, Howard Dean, Michael Mukasey, Andy Card, Lee Hamilton, Tom Ridge, Bill Richardson, Wesley Clark, Michael Hayden, John Bolton, Louis Freeh and Fran Townsend, to be investigated. And none of these individuals has been charged with material support.²⁸⁵

D. HLP and Bahlul threaten to further Chill Speech in Combination

It is axiomatic that broadening the scope of a criminal speech sanction will chill speech at the boundary of that sanction. It is clear the Government intends to prosecute not only advocacy directed towards imminent lawless action, but also offensive propaganda and political argument.²⁸⁶ By expanding the sanction, the Government may chill the

²⁸³ Lederman, *supra* note 281.

²⁸⁴ Scott Peterson, *Iranian Group's Big-Money Push to get off US Terrorist List*, THE CHRISTIAN SCIENCE MONITOR, Aug. 8, 2011, <http://www.csmonitor.com/World/Middle-East/2011/0808/Iranian-group-s-big-money-push-to-get-off-US-terrorist-list>.

²⁸⁵ These efforts eventually succeeded in the de-listing of MEK, but commentators have pointed out that this does not retroactively immunize individuals who provided material support to the organization. See *Greenwald*, *supra* note 116.

²⁸⁶ See Brief for Appellant at 9, *Al Bahlul v. United States*, CMCR (No. 09-001), available at [http://www.defense.gov/news/6%20%20United%20States%20v%20al%20Bahlul%20-%20Brief%20for%20Appellant%20\(1%20September%202009\).pdf](http://www.defense.gov/news/6%20%20United%20States%20v%20al%20Bahlul%20-%20Brief%20for%20Appellant%20(1%20September%202009).pdf). Several intelligence officers have argued that this propaganda is itself valuable OSINT. Brief for the United States Intelligence Community Amicus Curiae in applying First Amendment protected speech rights in Support of Appellant, *Al Bahlul v. United States*, CMCR (No.

speech of regional media expressing “offensive arguments.” *HLP* alone exacts a significant toll on nonconforming speech. Section 2339B will likely have a chilling effect on American and foreign researchers by threatening them with prison time. Worse still, the solicitation offense at issue in *Bahlul*, 10 U.S.C. § 950, creates an expansive crime of solicitation of material support.²⁸⁷ A solicitation charge, freed from any *Brandenburg* constraints, would encompass an even larger field of conduct for individuals labeled enemy combatants.²⁸⁸

Like *HLP*, the Government’s position in *Bahlul* and Al-Haj’s case unjustifiably and unnecessarily curtails free speech rights. Not only is this discussion complex and important, it is arguably the most powerful critique because it adopts the accepted values of proponents of my antipodes and shows how even *they* ought to favor a different approach. The material support statute, as interpreted in *HLP*, will limit terrorist group advocacy. It is also the explicit goal of the Government in Al-Bahlul’s trial to limit the production and distribution of al-Qaeda propaganda. The Government’s position, though intended to suppress terrorist efforts, will ultimately have a self-defeating effect because it will chill speech that has value as intelligence.

09-001), *available at*

<http://www.defense.gov/news/3d%20Motion%20and%20Brief%20from%20US%20Intelligence%2015%20Oct%2009.pdf>.

²⁸⁷ The language of 10 U.S.C. § 950v (2006) comprises 18 U.S.C. § 2339(a)–(b).

²⁸⁸ It should be noted that Government may bring a fairly broad charge of conspiracy to provide material support only against alien unprivileged enemy belligerents. 10 U.S.C. § 950v(28) (2006) (“Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, . . . shall be punished . . .”). It is not the position of this Article that § 950v will be used against citizens.

However, some lawmakers have demonstrated a desire to widen the definition of enemy combatants to include U.S. citizens held within the United States in response to domestic attacks. In response to the Boston Marathon Bombing, several prominent Republican senators requested that Dzhokhar Tsarnaev, a naturalized U.S. citizen, be labeled an enemy combatant. Press Release, Sen. Lindsey Graham, Graham, McCain, Ayotte and King Statement On Enemy Combatant Status For Boston Suspect (Apr. 20, 2013), *available at*

http://www.lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=283aeb5a-ffc4-7534-730b-b9df7e3a648f. The administration refused this request. *See* John R. Ellement, Milton J. Valencia & Martin Finucane, *Dzhokhar Tsarnaev, Marathon bombing suspect, charged in federal court with using a weapon of mass destruction*, BOSTON.COM, Apr. 23, 2013, <http://www.boston.com/metrodesk/2013/04/22/white-house-dzhokhar-tsarnaev-bombing-suspect-tried-federal-court/VvkTs5UtwmsuEnKMXMV/SXM/story.html>.

V. Crisis Mapping: Concrete Results from Data Mining Rich Open Source Intelligence

There is a well-understood rights-based argument that all individuals suffer when policies chill speech. But these policies will also severely impair our ability to explore and develop crucial new technologies in the field of human rights and humanitarian intervention. This is important not just because of OSINT and information we might capture from these new approaches, but also because it impedes our ability to more effectively deal with global crises. These crises, of course, relate to rises in terrorist activity, violence, and the radicalization of marginalized groups. As this Article has sought to demonstrate, there are robust security reasons for safeguarding the marketplace of ideas—content-rich analysis provides valuable intelligence in the war on terror. While previous models of the intelligence cycle assumed that data collection and analysis would occur primarily at the government level, in an age of social media and horizontal information sharing, actionable intelligence is being gathered and disseminated by civilian actors. Recent efforts by programmers and activists leverage SMS messaging and Google Maps (and corresponding application programming interfaces or APIs) as well as social media such as Twitter, Facebook, and YouTube in order to create useful intelligence to aid humanitarian efforts.

One of the most striking examples of the utilization of modern OSINT to create an empowered citizenry is Crisis Mapping. Crisis Mapping crowd sources the datamining of OSINT to visualize real-life crises. This Section explains Crisis Mapping, provides two case studies of the impact of Crisis Mapping on humanitarian responses to world events, and explores the possible effects of *HLP* on Crisis Mapping.

A. Crisis Mapping: Information Sourcing, Visualization, and Analysis

Crisis Mapping is the live mapping of crises.²⁸⁹ Crises may take the form of sudden disasters or long-term events.²⁹⁰ While the subject matter of

²⁸⁹Monica Hesse, *Crisis Mapping Brings Online Tool to Haitian Disaster Relief Effort*, THE WASHINGTON POST, Jan. 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/15/AR2010011502650.html?hpid=topnews>.

crisis maps varies, typical subjects include political, social, and environmental crises. Crisis Mapping comprises three separate elements: Information Sourcing, Visualization, and Analysis.²⁹¹ Each stage is either dependent on or generates further OSINT.

Information sourcing is the collection of data to inform the visual map.²⁹² Current crisis mappers use a variety of methods to obtain this information.²⁹³ These may be as simple as paper surveys or the scanning of hand-drawn maps from multiple observers.²⁹⁴ However, the most exciting developments within this field are the crowdsourcing²⁹⁵ of reports (typically through mobile phones) and the use of social media data. Traditional media, NGOs, and government sources may provide verification for this data, leading to the creation of actionable reports.²⁹⁶

Visualization translates the available data into a map, which provides maximal utility for the data and assists in the detection of patterns.²⁹⁷ Traditional cartography²⁹⁸ and Geographic Information

²⁹⁰ Patrick Meier, *What is Crisis Mapping? An Update on the Field and Looking Ahead*, IREVOOLUTION Jan. 20, 2011, <http://irevolution.net/2011/01/20/what-is-crisis-mapping/> [hereinafter *Meier Mapping*].

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ For more information on crowdsourcing, see Jeff Howe, *The Rise of CrowdSourcing*, WIRED (June 2006), <http://www.wired.com/wired/archive/14.06/crowds.html>. Crowdsourcing is commonly defined as “the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers.” *Crowdsourcing*, MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/crowdsourcing> (last visited Jan. 22, 2013).

²⁹⁶ See, e.g., John Crowley & Jennifer Chan, *Disaster Relief 2.0: The Future of Information Sharing in Humanitarian Emergencies*, UN FOUNDATION-VODAFONE FOUNDATION-UNOCHA (2011).

²⁹⁷ Patrick Meier & Jennifer Leaning, *Applied Technology to Crisis Mapping and Early Warning in Humanitarian Settings*, *Crisis Mapping Working Paper I of III*, HARVARD HUMANITARIAN INITIATIVE 3 (Sept. 2009), available at <http://fletcher.tufts.edu/~media/%20Fletcher/News%20and%20Media/2009/Sep/Op-Ed/Meier%2009%2009.pdf>.

²⁹⁸ See generally *The History of Cartography*, THE HISTORY OF CARTOGRAPHY PROJECT, <http://www.geography.wisc.edu/histcart/> (last visited Apr. 15, 2013).

Systems (GIS)²⁹⁹ will be familiar to most readers. However, each of these methods requires expertise, and is time consuming and often prohibitively expensive.³⁰⁰ Crisis Mapping Visualization differs significantly in that free and open source technology allows users to cheaply engage in the effort to visualize data without extensive training. By utilizing existing systems, such as Google Maps, a far greater number of individuals can utilize crisis mapping visualization.³⁰¹

Analysis involves the use of statistics to enable pattern detection. Again, the reader is no doubt familiar with the concept of pattern detection, perhaps envisioning a general making decisions while leaning over a map of the battlefield. However, crisis mapping enables real-time detection of patterns.³⁰² This immediacy in turn allows for rapid decision-making and further impact analysis.³⁰³ Just as information collection utilizes crowdsourcing, visualization and analysis allow crowdfeeding,³⁰⁴ that is, horizontal communication between members of the crowd, increasing the efficiency of first responders.³⁰⁵

²⁹⁹ See generally *What is GIS?*, ESRI.COM, <http://www.esri.com/what-is-gis/index.html>. (last visited Apr. 15, 2013).

³⁰⁰ See James Bennet, *Cost and Fee Structure Modeling for GIS*, ESRI.COM, <http://proceedings.esri.com/library/userconf/proc00/professional/papers/PAP775/p775.htm> (last visited Feb. 28, 2013).

³⁰¹ *Meier Mapping*, *supra* note 290.

³⁰² Patrick Meier, *Crisis Mapping Analytics and Pattern Recognition*, iREVOLUTION, June 23, 2008, <http://irevolution.net/2008/06/23/crisis-mapping-analytics-and-pattern-recognition/>.

³⁰³ *Meier Mapping*, *supra* note 290.

³⁰⁴ Patrick Meier, *Ushahidi: From Croud sourcing to Crowdfeeding*, iREVOLUTION, Mar. 27, 2009, <http://irevolution.net/2009/03/27/ushahidi-from-croud sourcing-to-crowdfeeding/>.

³⁰⁵ This principle springs largely from technological democracy and generativity literature. See ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* 121 (2005); see generally Carliss Baldwin & Eric von Hippel, *Modeling a Paradigm Shift: From Producer Innovation to User and Open Collaborative Innovation* (MIT Sloan Sch. of Mgmt., Working Paper No. 4764-09, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1502864; Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1980 (2006) (noting that the generativity of the “grid of PCs connected by the Internet” is what makes the internet so valuable). See generally LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2001). However, as established by Robert Steele, it aligns perfectly with the demands of OSINT, as “contributions of these varied sources must be then communicated to the masses, to create “citizen centered intelligence” by enabling citizens to not only participate, but to draw upon the pooled knowledge created.” BURKE, *supra* note 21, at 17.

B. Case Studies of Ushahidi: A Crisis Mapping Platform

This Section traces the development and deployment of a crisis mapping platform and network, Ushahidi. The Ushahidi platform has been deployed for several crises since its creation for the Kenyan Election Crisis of 2007-2008,³⁰⁶ including: in the aftermath of the earthquake that devastated Haiti³⁰⁷ in 2010; through development of the Syria Tracker Crisis Map³⁰⁸ in response to the ongoing political violence in Syria; and, most recently, in relation to Libya's revolution that ended the rule of Muammar Gaddafi. This Section explains the utility of crisis maps, the role of crisis maps in reducing violence, the possible utilization of crisis maps by U.S. governmental actors, and the critical role of volunteers who could be chilled by an expansive reading of the material support statute, § 2339B.

1. Kenya

The Ushahidi platform has its roots in the Kenyan Election Crisis of 2007–2008.³⁰⁹ On December 27, 2007, Kenya held a presidential election between incumbent Mwai Kibaki and Raila Odinga, of the Orange

³⁰⁶ Ushahidi has been used in a variety of contexts. Ushahidi platforms have been deployed frequently to aid election monitoring: in India, for the general elections of 2009—Vote Report India—and in Mexico for the federal elections of July 5, 2009—Cuidemos el voto. Ushahidi platforms have also assisted election monitoring in “Mozambique, Togo, Lebanon, Ethiopia, Burundi, Colombia, Guinea, Brazil, Sudan, and Afghanistan” Deployment has not been limited to elections. Ushahidi deployments have covered “[s]wine flu reports, consumer complaints about mobile phone companies in the Philippines, forest fires in Italy, medical supplies stock outs at pharmacies in Kenya, Uganda, Malawi and Zambia, wildlife tracking in Kenya, crime reports in the metro area of Atlanta (USA), snow problems during the 2010 blizzard in Washington (USA) and traffic accidents in Los Angeles.” Frans Staal, *Interaction Between Social Media and Democracy: A Case Study on the Societal Factors Influencing the Success of Ushahidi in Afghanistan* 17–19 (Mar. 21, 2011) (unpublished master thesis, Tilburg University) (on file with Tilburg School of Economics and Management).

³⁰⁷ *Ushahidi Aggregates, Disseminates Haiti Crisis Info: Q&A with Patrick Meier*, TED BLOG (Jan. 14, 2010), http://blog.ted.com/2010/01/14/ushahidi_brings/.

³⁰⁸ *Syria Tracker Crisis Map*, SYRIA TRACKER, <https://syriatracker.crowdmap.com/> (last visited Apr. 15 2013).

³⁰⁹ Simon Jeffery, *Ushahidi: Crowdmapping Collective that Exposed Kenyan Election Killings*, THE GUARDIAN NEWS BLOG, Apr. 7, 2011, <http://www.guardian.co.uk/news/blog/2011/apr/07/ushahidi-crowdmap-kenya-violence-hague>.

Democratic Movement (ODM).³¹⁰ The initial results gave Odinga a strong lead of several hundred thousand votes.³¹¹ However, as days passed and the tally continued, Odinga's lead disappeared.³¹² When the Election Commission indicated that Kibaki was now ahead by a small margin, the Odinga camp claimed this was the result of rampant electoral manipulation.³¹³ EU observers characterized the election as flawed³¹⁴ and noted that there was substantial evidence of fraud on both sides.³¹⁵ Tribal violence broke out almost immediately after the Electoral Commission's declaration of Kibaki's victory, with attacks focused on Kikuyus,³¹⁶ the ethnic group to which Kibaki belongs.³¹⁷ The ministry of security ordered a

³¹⁰ See Jeffrey Gettleman, *Election Rules Complicate Kenya Race*, N.Y. TIMES, Dec. 25, 2007, http://www.nytimes.com/2007/12/25/world/africa/25kenya.html?_r=1&ref=railaoding (predicting that the close election and vague election law would cause violence and quoting one western diplomat: "We just hope it's not close").

³¹¹ Nicholas Soi & Robyn Dixon, *Close Race Spurs Riots in Kenya: President Closes in on Opposition's Lead Both Claim Victory*, THE BALT. SUN, Dec. 30, 2007, http://articles.baltimoresun.com/2007-12-30/news/0712300076_1_kenya-president-mwai-kibaki-odinga.

³¹² *Id.*

³¹³ *ODM Claims Police Used in Election Fraud*, SOWETANLIVE.CO.ZA, (Dec. 27, 2007), <http://www.sowetanlive.co.za/sowetan/archive/2007/12/27/odm-claims-police-used-in-election-fraud>; see also ORANGE DEMOCRATIC MOVEMENT, REPORT BY THE ORANGE DEMOCRATIC MOVEMENT ON ELECTION FRAUD AND MALPRACTICES COMMITTED BY THE ELECTORAL COMMISSION OF KENYA IN FAVOUR OF MWAI KIBAKI IN THE PRESIDENTIAL ELECTIONS (Jan. 2, 2008), available at <http://www.pambazuka.org/actionalerts/images/uploads/ODMreport.pdf>.

³¹⁴ Mike Pflanz & Natalie Paris, *EU Calls for Inquiry into Kenya Election*, TELEGRAPH.CO.UK, Dec. 30, 2007, <http://www.telegraph.co.uk/news/worldnews/1574243/EU-calls-for-inquiry-into-Kenya-election.html>; Jeffrey Gettleman, *Disputed Vote Plunges Kenya Into Bloodshed*, N.Y. TIMES, Dec. 31, 2007, <http://www.nytimes.com/2007/12/31/world/africa/31kenya.html?pagewanted=all>.

³¹⁵ Jeffrey Gettleman, *Disputed Vote Plunges Kenya Into Bloodshed*, N.Y. TIMES, Jan. 7, 2007, http://www.nytimes.com/2007/12/31/world/africa/31kenya.html?pagewanted=all&_r=0.

³¹⁶ Jeffrey Gettleman, *Kenya's Kikuyus Are Now Target of Rival Tribes*, N.Y. TIMES, Jan. 7, 2008, <http://www.nytimes.com/2008/01/07/world/africa/07iht-07kenya.9047314.html?pagewanted=all>.

³¹⁷ There is good evidence that agitators helped exacerbate ethnic tension by sending mass text messages directing recipients to slaughter members of targeted ethnic groups: "Fellow Kenyans, the Kikuyu's have stolen our children's future . . . we must deal with them in a way they understand . . . violence," and "No more innocent Kikuyu blood will be shed. We will slaughter them right here in the capital city. For justice, compile a list of Luo's you know . . . we will give you numbers to text this information." Susan Benesch, *Words as Weapons*, WORLD POLICY INSTITUTE (Spring 2012),

suspension of all live broadcasts, further obscuring the already chaotic scene on the ground.

Ory Okolloh, a Kenyan lawyer and blogger, posted online a request for an Internet-based mapping tool to allow people to anonymously report attacks and abuse.³¹⁸ Programmers Erik Hersman and David Kobia took up the call.³¹⁹ The result was the Ushahidi platform (which means “Testimony” or “Witness” in Swahili), a site that gathered user-generated cellphone reports of deaths, rapes, riots, and refugees.³²⁰ These reports could be verified against information derived from the international media, government sources, NGOs, and members of the Kenyan media.³²¹ Harvard’s Kennedy School of Government analyzed the site’s effectiveness in relation to coverage by mainstream media and concluded that “Ushahidi had been better . . . at reporting acts of violence as they started, better at reporting acts of nonfatal violence (which are often a precursor to deaths), and better at reporting over a wide geographical area, including rural districts.”³²²

2. Haiti

On January 12, 2010, a 7.0 magnitude earthquake struck Haiti, approximately sixteen miles west of the capital, Port-au-Prince.³²³ Leogane,

<http://www.worldpolicy.org/journal/spring2012/words-weapons>; Neelam Verjee, *Will Kenya’s Elections Transform the Text Message from Deadly Weapon to Peace Offering?*, QUARTZ (Mar. 2, 2013) <http://qz.com/58510/will-kenyas-elections-transform-the-text-message-from-deadly-weapon-to-peace-offering/>.

³¹⁸ Ory Okolloh, *Update Jan 3 11:00 PM*, KENYAN PUNDIT, Jan. 3, 2008, <http://www.kenyanpundit.com/2008/01/03/update-jan-3-445-1100-pm/> (“Google Earth supposedly shows in great detail where the damage is being done on the ground. It occurs to me that it will be useful to keep a record of this, if one is thinking long-term. For the reconciliation process to occur at the local level the truth of what happened will first have to come out. Guys looking to do something—any techies out there willing to do a mashup of where the violence and destruction is occurring using Google Maps?”).

³¹⁹ Tom Masters, *Ushahidi—A Stroke of Social Genius*, THE DESMOND TUTU PEACE FOUNDATION, Oct. 6, 2011, <http://www.tutufoundationusa.org/2011/10/feature-story-2/>.

³²⁰ JESSICA HEINZELMAN & CAROL WATERS, CROWDSOURCING CRISIS INFORMATION IN DISASTER-AFFECTED HAITI 5 (2010).

³²¹ *Id.*

³²² Clay Shirky, *Tapping the Cognitive Surplus*, WORLD FUTURE SOCIETY (2010), <http://www.wfs.org/content/tapping-cognitive-surplus>.

³²³ HEINZELMAN & WATERS, *supra* note 320, at 2.

the town at the epicenter of the earthquake, was essentially obliterated, with ninety percent of its buildings collapsed.³²⁴ The infrastructure of Haiti was severely compromised, with the country's UN headquarters, presidential palace, parliament, and the great majority of ministries destroyed or otherwise heavily damaged.³²⁵ The human infrastructure was also tragically crippled, as the head of the UN peacekeeping mission in Haiti and 100 members of the UN staff were killed in the earthquake.³²⁶

The extent of the devastation engendered a rapid international commitment of aid.³²⁷ However, the traditional international aid system could not easily integrate data from the Haitians themselves. Existing aid information was inadequate; for example, there was a noted lack of accurate road maps and poor understanding of existing Haitian infrastructure.³²⁸ In a particularly telling example, local Haitians were unable to enter the UN logbase, the informational hub of the UN relief effort, without first registering and obtaining a security badge.³²⁹ Even if granted access, Haitians were not included in high-level action meetings.³³⁰ One prominent Haitian aid organizer noted, "International aid groups compare notes and discuss strategies for distributing aid at 'cluster meetings' from which

³²⁴ Christian Fraser, *Leogane: Haiti's 'Neglected' Quake-Hit Town*, BBC NEWS, Feb. 12, 2010, <http://news.bbc.co.uk/2/hi/americas/8511762.stm>.

³²⁵ HEINZELMAN & WATERS, *supra* note 320 at 5.

³²⁶ Neil MacFarquhar, *U.N. Honors the 101 Who Served and Died in Haiti*, N.Y. TIMES, Mar. 10, 2010, <http://www.nytimes.com/2010/03/10/world/americas/10nations.html> (noting that the loss was "the largest one-day toll in the history of the organization").

³²⁷ Sara Miller Llana, *Haiti Earthquake: With Aid Groups Already There, Relief Efforts Ramp up Quickly*, CHRISTIAN SCIENCE MONITOR, Jan. 13, 2010, <http://www.csmonitor.com/World/Americas/2010/0113/Haiti-earthquake-With-aid-groups-already-there-relief-efforts-ramp-up-quickly>. But there has been great criticism that much of this promised aid was never delivered. Tom Phillips & Claire Provost, *Haiti Earthquake: Two Years on, and Just Half of Promised Aid has Been Delivered*, THE GUARDIAN, Jan. 11, 2012, <http://www.guardian.co.uk/world/2012/jan/11/haiti-earthquake-promised-aid-not-delivered>; see also Sharyl Attkisson, *Haiti Earthquake Aid: Nearly \$15 Billion in Donations*, CBS NEWS, Apr. 22, 2010, http://www.cbsnews.com/8301-31727_162-20003180-10391695.html.

³²⁸ Another thing that has slowed down the relief effort is the lack of reliable maps of Haiti. See Clark Boyd, *Online Mapping Helps Haiti Relief Efforts*, THE WORLD, Jan. 22, 2010, <http://www.theworld.org/2010/01/online-mapping-helps-haiti-relief-efforts/>.

³²⁹ HEINZELMAN & WATERS, *supra* note 320, at 3.

³³⁰ *Id.*

ordinary Haitians are in effect banned. . . . Discrimination against Haitians in their own country seems more prevalent ever since the earthquake.”³³¹

The inability to incorporate data from local Haitians created an informational vacuum that increased the threat of violence on the ground. International media had reached some areas before the aid organizations and sensationalist reports of violence prevented the delivery of aid.³³² Several aid providers disputed the validity of these reports,³³³ but the delay in aid delivery served to create a frustrated populace, which in turn increased the likelihood of violence: “[o]ur team on the ground reaffirms that the reports of violence in the streets of Port-au-Prince have been grossly exaggerated and have become a major obstacle to mounted the response needed to save tens of thousands of lives each day.”³³⁴

The Ushahidi-Haiti map was deployed within two hours of the earthquake.³³⁵ The team drew on social media (Twitter, Facebook, blog posts) as well as traditional media in generating actionable reports.³³⁶ Critically, the team established a direct SMS text messaging system, which allowed Haitian households, approximately 85% of which have mobile phones, to submit alerts for analysis and mapping.³³⁷ Because of the large amount of information submitted, volunteers from the Fletcher School of Law and Diplomacy at Tufts University were asked to assist live mapping.³³⁸ The team eventually grew to over 1,000 volunteers (largely members of the Haitian diaspora) in the United States and Canada, who translated and geo-coordinated incoming messages.³³⁹ A report on the deployment noted the importance of volunteers:

³³¹ *Id.*

³³² *Id.*; Lucia Sepulveda, Haiti: Narrative Analysis of the 2010 Haiti Earthquake in the Conservative and Mainstream Media (Jun. 2, 2012) (unpublished Masters thesis, California State University Northridge) (on file with CSUN ScholarWorks) *available at* <http://scholarworks.csun.edu/handle/10211.2/1134?show=full>.

³³³ See HEINZELMAN & WATERS, *supra* note 320 at 6.

³³⁴ *Id.*

³³⁵ *Id.* at 6.

³³⁶ *Id.* at 6–7.

³³⁷ *Id.* at 7.

³³⁸ *Id.* at 6.

³³⁹ *Id.* at 7.

[T]he majority of the mapping, translating, and processing work for the Ushahidi platform was done purely by volunteers. In the spirit of the Ushahidi platform itself, the very large and daunting task of aggregating thousands of reports was manageable only because the body of work was crowdsourced to a dedicated international network of volunteers.³⁴⁰

Ultimately, the team translated 25,186 SMS messages, along with other media communications, creating 3,596 actionable reports.³⁴¹ Craig Fugate of the FEMA Task Force noted that “[t]he crisis map of Haiti represents the most comprehensive and up-to-date map available to the humanitarian community.”³⁴²

While the great majority of actionable reports collected and mapped in Ushahidi during the immediate aftermath of the earthquake concerned food, water, and shelter, a much smaller number dealt with violence.³⁴³ Of the 3,596 reports generated, only 54 were related to security.³⁴⁴ However, these reports, and the U.S. military’s response to them, provide key insight into the possible role of Crisis Mapping in addressing violent situations in foreign countries. As noted earlier, many aid workers felt that the delay in delivering supplies to areas perceived as dangerous due to exaggerated reports would increase the chance of violence on the part of a disaffected populace. This view was largely corroborated by reports of possible food riots posted on Ushahidi: “[r]esidents angry that they have not received aid have been reported to be building roadblocks between Carrefour and Port-au-Prince”³⁴⁵ and “Angry mobs are moving up route national no. 2 from the district of Merger. They have set up road blockades and are threatening to move up the road towards Port-au-Prince. They are angry because they have not received any food aid. They are also threatening to escalate violence.”³⁴⁶ On both occasions, the U.S. Marine Corps responded to the

³⁴⁰ *Id.* at 8.

³⁴¹ *Id.* at 9.

³⁴² *Id.*

³⁴³ See NATHAN MORROW ET AL, INDEPENDENT EVALUATION OF USHAHIDI HAITI PROJECT, DEVELOPMENT INFORMATION SYSTEMS INTERNATIONAL USHAHIDI HAITI PROJECT 21 (2011), *available at*, <http://www.alnap.org/pool/files/1282.pdf>.

³⁴⁴ HEINZELMAN & WATERS, *supra* note 329, at 9.

³⁴⁵ *Id.* at 10.

³⁴⁶ *Id.*

report and dispersed the crowds before violence erupted.³⁴⁷ The Crisis Map not only provided location data but also contextualized the violence, allowing other actors to assess the security threat and craft targeted solutions.³⁴⁸

While the above examples represent reactions to distinct threats, crisis map analysis also provides for the possibility of discerning society-wide attitudinal shifts. Sentiment analysis, which utilizes a word analysis to determine the emotional state of the populace, can be employed to predict imminent conflict.³⁴⁹ In the case of Haiti, the European Council's Joint Research Center conducted a sentiment analysis by identifying words and word combinations as either positive or negative and running the reports through this filter.³⁵⁰

3. Syria

The Ushahidi-Haiti deployment demonstrates the vital role of Crisis Mapping in organizing and assisting humanitarian aid. The current deployment of Syria Tracker³⁵¹ continues to demonstrate the importance of crisis mapping in assessing war and violence. Syria Tracker impressively integrates data mining and eyewitness reports.³⁵² Working off of a modification of the HealthMap software, Syria Tracker searches Google News for reports of violence and converts these to visualizations on the Syria Tracker Map.³⁵³ Due to the Assad government's monitoring of phone networks, Syria Tracker relies on Twitter, Facebook, and YouTube posts

³⁴⁷ *See id.*

³⁴⁸ *See generally* MORROW ET AL, *supra* note 343.

³⁴⁹ Cf. Patrick Philippe Meier, *Sentiment Analysis of Haiti Text Messages (Updated)*, IREVOLUTION, Mar. 3, 2008, <http://irevolution.net/2010/03/08/sentiment-analysis-sms/>.

³⁵⁰ HEINZELMAN & WATERS, *supra* note 320 at 5.

³⁵¹ *Syria Tracker: Crowdsourcing Crisis Information*, USHAHIDI.COM (May 24, 2011), <http://blog.ushahidi.com/index.php/2011/05/24/syria-tracker-crowdsourcing-crisis-information/>.

³⁵² *See* Jim Giles, *Mapping the human cost of Syria's uprising*, NEW SCIENTIST, Mar. 27, 2012, <http://www.newscientist.com/article/mg21328576.000>.

³⁵³ *Id.*

for eyewitness reports.³⁵⁴ The resulting list of killings and disappearances populate a live Crisis Map of Syria.³⁵⁵

4. Libya

Perhaps the most celebrated deployment of Crisis Mapping in the security context was the Libya Crisis Map. The Libya crisis began as a series of peaceful protests in February 2011 that quickly spread into a civil war, with rebels seeking to overthrow Muammar Gaddafi. The United Nations responded rapidly, authorizing member states to establish a no-fly zone over Libya. The Libyan military response, with collective reprisals and indiscriminate attacks, created an immense humanitarian crisis. There were few if any formal networks reporting on this crisis; the United Nations had not been a presence in Libya for several years and therefore had no Information Management Officers on the ground, and there were no independent media to speak of in Libya.³⁵⁶ However, information was making its way out of the country through social media. The United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), realizing that it faced a dearth of situational awareness, sent out a call for assistance to several crisis mapping groups.³⁵⁷ One such group that mobilized in response was the Standby Volunteer Task Force for Live Mapping (SBTF).³⁵⁸ The end product of this humanitarian UN collaboration was the Libya Crisis Map.³⁵⁹

SBTF ran the Libya Crisis map for twenty-three days before handing it over to OCHA.³⁶⁰ In that time, relying on verifiable reports, the group mapped 1430 reports, many including pictures or embedded video.³⁶¹

³⁵⁴ Patrick Meier, *Crisis Mapping Syria: Automated Data Mining and Crowdsourced Human Intelligence*, IREVOLUTION, Mar. 25, 2012, <http://irevolution.net/2012/03/25/crisis-mapping-syria/>.

³⁵⁵ *Id.*

³⁵⁶ *Libya Crisis Map Deployment: Standby Volunteer Task Force & UN OCHA March-April 2011*, 9 (Sept. 2011), available at <https://docs.google.com/file/d/0By08EjY3-T3RR0FqV1lzRldveE0/edit>.

³⁵⁷ *Id.* at 8–9.

³⁵⁸ *Id.* at 8.

³⁵⁹ Eight major humanitarian NGOs and agencies formally requested access to the password protected Libya Crisis Map: UNHCR, WFP, Save the Children, IOM, IRC, SAARA, ICRC, American Red Cross. *Id.* at 10.

³⁶⁰ *Id.* at 9–10.

³⁶¹ *Id.* at 10.

This required a massive effort, over 250 individuals participated in deployment, 200 new individuals joined the SBTF during Libya deployment and 100 United Nations Volunteers (UNVs) were trained and joined the deployment.³⁶² The resulting map was profoundly useful, so much so that a major concern of the project was to prevent Libyan military intelligence from seeing the map.³⁶³ While crisis mapping security concerns is still in its infancy, the utility of the technology is not in doubt. However, recent Government actions make the future of crisis mapping uncertain.

C. Consequences of Government Actions Threaten Crisis Mapping

The above examples can run afoul of the expansive material support statute in *HLP* (or the solicitation contemplated in *Bahlul*) with relatively little change. One need only imagine the crisis developing in an area controlled by an FTO. For example, suppose that the Turkish army launches a major offensive in an area controlled by the PKK, a main Kurdish political force,³⁶⁴ or severe droughts hit sections of Southern Somalia controlled by Al-Shabaab.³⁶⁵ In either scenario, several layers of

³⁶² *Id.*

³⁶³ Neal Ungerleider, *Here's a Map of the Humanitarian Crisis Hotspots in Libya (Don't Tell Gaddafi)*, FAST COMPANY (Mar. 9, 2011), <http://www.fastcompany.com/1736822/heres-map-humanitarian-crisis-hotspots-libya-dont-tell-gaddafi>.

³⁶⁴ Recall that the PKK, or Kurdish Workers' Party, operates in Eastern Turkey and Northern Iraq. Turkey has repeatedly attacked PKK positions in Northern Iraq. *See, e.g.*, Margaret Griffiths, *Turkey Shells PKK Targets in Northern Iraq*, ANTIWAR.COM (Feb. 12, 2012), <http://original.antiwar.com/updates/2012/02/12/turkey-shells-pkk-targets-in-northern-iraq/>; *Turkey Shells Northern Iraq: Kurdish Rebels*, AFP (Oct. 18, 2011), <http://www.google.com/hostednews/afp/article/ALeqM5ghhk-oPFVnRTTEZM-FYQgWiKfXA?docId=CNG.ed3fb8b4aaf6fe4065c6bbf0031f2bf4.3a1>. A Crisis Map visualizing these attacks might legitimize the PKK cause and annoy our ally Turkey, a concern specifically mentioned in *HLP*.

³⁶⁵ Harakat ash-Shabab al-Mujahideen, "Mujahideen Youth Movement" or "Movement of Striving Youth," commonly referred to as al-Shabaab ("The Youth" or "The Boys"). *See Terrorist Groups—Al Shabaab*, NAT'L COUNTERTERRORISM CENTER (2013), http://www.nctc.gov/site/groups/al_shabaab.html. On February 29, 2008, the group was designated an FTO. Vol. 73, No. 53, DEP'T OF STATE Pub. No. 6136., 73 Fed. Reg. 14,550 (Mar. 18, 2008). Al-Shabaab controls a large swath of Southern Somalia, one of the areas currently suffering from one of the worst droughts in the last 60 years. Jayshree Bajoria, *Al-Shabaab and Somalia's Spreading Famine*, COUNCIL ON FOREIGN REL. (Aug. 10, 2011), <http://www.cfr.org/somalia/al-shabaab-somalias-spreading-famine/p25630>.

the Crisis Mapping team could be accused of material support or directly inhibited by a dearth of NGOs or media members on the ground.

At the initial stage, the immediate reporters are likely to be FTO members or to be otherwise affiliated with them. These areas are under the control of FTO members, FTO members would likely have the greatest access to reporting tools, and FTO members would have good reason to report on crises so as to gain greater legitimacy. The receipt, translation, and visualization of these messages would generate a map that could be characterized as the result of “coordinated” speech. Indeed, the furnishing of the platform at all may be material support. After all, a Crisis Map is not merely a journalistic exercise. Team members translate, geolocate, and verify (thus lending more credibility to) submitted reports. The resulting Crisis Map is not simply a repetition of victim (in this scenario, members of an FTO) statements. It creates a guide for potential relief, provides a discussion platform, and generates a more easily accessible representation of facts to a wide audience. A Crisis Map may provide logistical support, early warning, and political legitimation, and surely an oppressed group may use it to harass or embarrass an aggressor. These, of course, are the very concerns addressed by the majority in *HLP*.³⁶⁶

One does not need to assume that a great number of the actions of crisis mappers would actually be prosecuted in order to conclude that *HLP* may still retard crisis mapping. This Article has already discussed the chilling effect on NGOs and reporters of the expansive material support statute.³⁶⁷ These actors are vital for verifying reports and creating actionable items.³⁶⁸ In this way, an expansive reading of the material support at worst threatens to prevent Crisis Map deployments or at best lessens the effectiveness of Crisis Maps by reducing the number of verifying sources, who may be worried that they will face prosecution for their efforts under the new *HLP* standard.³⁶⁹

³⁶⁶ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725–26 (2010).

³⁶⁷ See *supra* Part III.

³⁶⁸ See discussion *supra* Part II.

³⁶⁹ See chilled NGO discussion *supra* Part IV.

Conclusion

The Government's positions seem squarely aimed at chilling foreign speech and the speech of those who have interacted with foreign terrorist organizations. The Court has done little to stop the assault on speech; indeed, its interpretation of the material support statute will hamper domestic speakers and hamper the war effort. The Government's position in *Bahlul* will likely exacerbate *HLP*'s effects, and both will serve to undermine *Brandenburg*. While all branches of government are working with American safety in mind, these actions choke off intelligence and therefore make Americans less safe.

The simple solution to the *HLP* decision would be to establish a mens rea element, as suggested by the petitioning aid agencies and the dissent.³⁷⁰ This approach would comport with precedent, by requiring that the charged individual further criminal activity through his speech.³⁷¹ There is a non-trivial argument that such an approach was the actual intent of Congress, which seemed far more concerned with monetary support than speech, and specifically protected the freedom to associate.³⁷² Further, this approach would remove the confusing "coordinated speech" dichotomy, which seems unconstitutionally vague and likely to create a new category of

³⁷⁰ *HLP*, 130 S. Ct. at 2740 (Breyer, J., dissenting) ("I would read the statute as criminalizing First-Amendment protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions. Under this reading, the Government would have to show, at a minimum, that such defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims.").

³⁷¹ *Id.* at 2737 ("[T]he First Amendment protect[s] an American's right to belong to [the Communist] party—despite whatever 'legitimizing' effect membership might have had—as long as the person did not share the party's unlawful purposes.") See, e.g., *United States v. Robel*, 389 U.S. 258 (1967) (holding that national security interests did not justify overbroad criminal prohibition on members of Communist-affiliated organizations working in any defense-related facility); *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 605–610 (1967); *Elfbrandt v. Russell*, 384 U. S. 11, 17 (1966); *Scales v. United States*, 367 U. S. 203, 228–30 (1961); *De Jonge v. Oregon*, 299 U. S. 353 (1937).

³⁷² *HLP*, 130 S. Ct. at 2742 (Breyer, J., dissenting) (quoting 142 CONG. REC. S3354–S3360 (1994) (statement of Sen. Hatch)) (pointing out that the Chairman of the Senate Judiciary Committee believed that "[t]his bill also includes provisions making it a crime to knowingly provide material support to the terrorist functions of foreign groups designated by a Presidential finding to be engaged in terrorist activities. . . . I am convinced we have crafted a narrow but effective designation provision which meets these obligations while safeguarding the freedom to associate, which none of us would willingly give up." (emphasis added)).

barred speech. Finally, because this approach would not focus on FTO legitimatizing speech, it would not create the underinclusive problem of targeting coordinated speech and not the far more legitimizing category of independent advocacy.³⁷³ *HLP* is troubling not only for the Court's outcome but also for the strange means the Court used to arrive at that deleterious conclusion. The Court undermined strict scrutiny and demonstrated an alarming amount of deference to the Government in order to chill nonviolent speech.

Supported by the *HLP* decision, the Government continues to stretch the boundaries of criminalized speech related to terror, claiming that *Brandenburg* does not apply to individuals who have interacted with terrorists and ignoring *Brandenburg* when charging nonaffiliated domestic advocates of terrorism. The American people are less free and likely less safe as a result. More broadly, a military assertion that less speech will serve to protect more freedom should not be credited; it flies in the face of repeated congressional findings and a well-established doctrine encouraging more speech. Congress has repeatedly stressed the vital nature of open source intelligence and commented on the government's repeated failures to make proactive use of this resource. Civilian use of OSINT is flourishing through Crisis Mapping, but the Government's actions seek the removal of NGOs and other information sources from troubled areas, undermining the effectiveness and credibility of Crisis Maps. In light of the importance of OSINT and the dubious constitutionality of the government's positions, the Court should not deviate from traditional speech protections. While the Court may have considered a deliberate dilution of strict scrutiny a small price to pay for enhanced security, the possible damage of the Court's approach cannot be so easily cabined. Weakened respect for foreign and domestic speech has far reaching implications for how we approach the First Amendment, foreign policy, journalism, human rights, military intelligence, and national security. The Court must resist the temptation to blindly defer during times of crisis, lest we render ourselves ignorant and visionless behind a curtain of imagined safety.

³⁷³ *Id.* at 2737 (“And, as for the Government’s willingness to distinguish *independent* advocacy from *coordinated* advocacy, the former is *more* likely, not *less* likely, to confer legitimacy than the latter. Thus, other things being equal, the distinction ‘coordination’ makes is arbitrary in respect to furthering the statute’s purposes. And a rule of law that finds the ‘legitimacy’ argument adequate in respect to the latter would have a hard time distinguishing a statute that sought to attack the former.”).