

THE UNEASY BORDER BETWEEN FIRST AMENDMENT PROTECTIONS AND NATIONAL SECURITY

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If men were angels, no government would be necessary
In framing a government which is to be administered by men
over men, the great difficulty lies in this: You must first
enable the government to control the governed; and in the
next place oblige it to control itself.

—James Madison, *The Federalist Papers*¹

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¹ THE FEDERALIST NO. 51 (James Madison).

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INTRODUCTION

In recent years, concerns have grown about whether and how the freedoms of speech and association in the First Amendment apply in the face of national security claims. The Executive Branch of the United States has invoked national security interests as a justification for several high-profile actions that appear to limit individuals' freedoms of speech and association. Four of these high-profile actions are illustrative.

In the spring of 2025, Mr. Kilmar Abrego Garcia was arrested, deported to El Salvador, and incarcerated there in a maximum-security prison under an agreement between the presidents of the United States and El Salvador.² According to the Department of Homeland Security ("DHS"), "When arrested, he was wearing a sweatshirt with roles [*sic*] of money covering the ears, mouth, and eyes of presidents on various currency denominations. This is a known MS-13 gang symbol of see no evil, hear no evil, say no evil."³ DHS also claimed that Abrego

² Josh Gerstein & Kyle Cheney, *Kilmar Abrego Garcia Describes 'Severe Beatings' and 'Psychological Torture' in Salvadoran Prison*, POLITICO (July 2, 2025, at 20:24 ET), <https://www.politico.com/news/2025/07/02/kilmar-abrego-garcia-salvadoran-prison-account-00438153> [<https://perma.cc/MRR8-BXPE>]; Nick Penzendstadler & Eduardo Cuevas, *Trump Administration's \$4.7M Contract for El Salvador Prison Revealed*, USA TODAY (Sep. 10, 2025, at 20:51 ET), <https://www.usatoday.com/story/news/nation/2025/09/09/trump-el-salvador-prison-cecot-agreement-revealed/86063219007/> [<https://perma.cc/H5ZX-9XXL>].

³ *The Real Story: Kilmar Abrego Garcia Is an MS-13 Gang Member with a History of Violence*, DEP'T OF HOMELAND SEC. (Apr. 16, 2025),

Garcia, "is an illegal alien from El Salvador."⁴ The government did not claim that Abrego Garcia was eligible for immediate deportation without due process.⁵ Instead, the DHS Secretary, Kristi Noem, stated: "We hear far too much in the mainstream media about sob stories of gang members and criminal illegals and not enough about their victims."⁶ Subsequently, a high-ranking member of DHS, in the Immigration and Customs Enforcement ("ICE") division,⁷ conceded Mr. Abrego Garcia was deported based on an "administrative error."⁸ While this error was adjudicated in the courts, Mr. Abrego Garcia remained in prison in a foreign country.⁹

<https://www.dhs.gov/news/2025/04/16/kilmar-abrego-garcia-ms-13-gang-member-history-violence> [<https://perma.cc/Z8EY-3FX4>].

⁴ *Id.*

⁵ *See, e.g.*, Order at 2, 5, *Abrego Garcia v. Noem*, No. 8:25-cv-00951-PX (4th Cir. Apr. 17, 2025), 2025 WL 1135112, at *1-2 ("The government is asserting a right to stash away residents of this country in foreign prisons without the semblance of due process that is the foundation of our constitutional order. . . . If today the Executive claims the right to deport without due process and in disregard of court orders, what assurance will there be tomorrow that it will not deport American citizens and then disclaim responsibility to bring them home?").

⁶ *Id.*; DEPT OF HOMELAND SEC., *supra* note 3.

⁷ Robert L. Cerna, Acting Field Office Director Enforcement and Removal Operations ("ERO") at U.S. Immigration and Customs Enforcement.

⁸ Declaration of Robert L. Cerna at 1, 4, *Abrego Garcia v. Noem*, 777 F. Supp. 3d 501 (D. Md. 2025) (No. 8:25-cv-00951-PX), Dkt. No. 26-1. The declaration reads: I, Robert L. Cerna, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am an Acting Field Office Director Enforcement and Removal Operations ("ERO") at U.S. Immigration and Customs Enforcement ("ICE") within the U.S. Department of Homeland Security ("DHS").

....

15. Through administrative error, Abrego-Garcia was removed from the United States to El Salvador. This was an oversight, and the removal was carried out in good faith based on the existence of a final order of removal and Abrego-Garcia's purported membership in MS-13.

Id.

⁹ Now that Mr. Abrego Garcia has been returned to the United States, he is facing criminal prosecution in what some judges suspect is a retaliatory move against his successful challenge to his deportation. DHS is also attempting to deport him to Africa to avoid restrictions on deporting him to his home country. Gary Grumbach & Dareh Gregorian, *Judge Orders Hearing on Whether Kilmar Abrego Garcia Was the Target of a 'Vindictive Prosecution,'* NBC NEWS (Oct. 3, 2025, at 19:33 CT), <https://www.nbcnews.com/politics/immigration/judge-hearing-kilmar-abrego-garcia-vindictive-prosecution-rcna235552> [<https://perma.cc/89K6-A7EL>].

Also in the spring of 2025, Immigration and Customs Enforcement (“ICE”), which is part of the Executive Branch of the U.S. government, arrested Mahmoud Kahlil and initiated deportation proceedings against him.¹⁰ Mr. Kahlil completed a master’s degree at Columbia University in 2024.¹¹ He was also a student negotiator for Palestinian protests on campus.¹² He held a lawful permanent resident card, commonly known as a “green card.”¹³ The presidential Press Secretary stated, “This administration is not going to tolerate individuals having the privilege of studying in our country and then siding with pro-terrorist organizations that have killed Americans.”¹⁴

President Trump then issued several Executive Orders stating that specific law firms, through their representation of clients, impacted “critical” American interests.¹⁵ For example, Executive Order 14250¹⁶ claimed that WilmerHale and other law firms used pro bono activities to engage in “destructive causes.”¹⁷ The order then imposed limitations on accessing federal buildings, clearances, and contracts as the law allowed.¹⁸ While the order

¹⁰ Philip Marcelo, *What to Know About Mahmoud Khalil, the Columbia Protester Arrested by ICE and Facing Deportation*, ASSOCIATED PRESS (Mar. 11, 2025, at 17:07 CT), <https://apnews.com/article/columbia-university-mahmoud-khalil-ice-440828980a4ee7bf4ddcf3d123e02b3e> [https://perma.cc/FQF8-X4V4].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Exec. Order No. 14230, 90 Fed. Reg. 11781 (Mar. 11, 2025); Exec. Order No. 14237, 90 Fed. Reg. 13039 (Mar. 20, 2025); Exec. Order No. 14246, 90 Fed. Reg. 13997 (Mar. 28, 2025); Exec. Order No. 14250, 90 Fed. Reg. 14549 (Apr. 3, 2025).

¹⁶ The order, titled “Addressing Risks from WilmerHale,” begins with the following: My Administration is committed to addressing the significant risks associated with law firms, particularly so-called “Big Law” firms, that engage in conduct detrimental to critical American interests. Many firms take actions that threaten public safety and national security, limit constitutional freedoms, degrade the quality of American elections, or undermine bedrock American principles. Moreover, law firms regularly conduct this harmful activity through their powerful pro bono practices, earmarking hundreds of millions of their clients’ dollars for destructive causes, that often directly or indirectly harm their own clients. Lawyers and law firms that engage in such egregious conduct should not have access to our Nation’s secrets, nor should such conduct be subsidized by Federal taxpayer funds or contracts. Exec. Order No. 14250, 90 Fed. Reg. 14549 (Apr. 3, 2025).

¹⁷ *Id.*

¹⁸ *Id.*

was struck down by a federal judge as unconstitutional,¹⁹ it illustrated how damage can occur at the border of speech and national interests.

In the spring of 2024, President Joe Biden signed the Protecting Americans from Foreign Adversary Controlled Applications Act (“FACAA”).²⁰ FACAA was an act passed by a bipartisan group of Congress that sought to deprive the Chinese company, ByteDance, of ownership of TikTok in early 2025 if it was not then sold to new non-adversary owners.²¹ Lawmakers were motivated by a fear that adversary-controlled ownership would be a threat to national security, particularly in light of overtures by China about invading Taiwan.²² The law raised speech concerns, but the Supreme Court issued an opinion in early 2025 permitting the law despite freedom of speech and other challenges.²³ Even with its approval, President Trump has for the second time signed an executive order delaying the requirement that ByteDance sell TikTok or go dark.²⁴

These four events raise several questions: when do constitutional protections end—especially as articulated in foundational cases, such as last century’s *Brandenburg*²⁵ test—and foreign policy concerns in the current year begin? Do traditional constitutional protections interfere with government efforts to combat terrorism and maintain national security, or is there some way to preserve both?

¹⁹ See, e.g., Kathryn Watson & Jacob Rosen, *Federal Judge Strikes Down Trump Executive Order Targeting Law Firm WilmerHale, Calling It ‘Unconstitutional,’* CBS NEWS (May 27, 2025, at 17:19 ET), <https://www.cbsnews.com/news/federal-judge-strikes-down-trump-executive-order-wilmerhale/> [<https://perma.cc/GHB7-TJB7>].

²⁰ 15 U.S.C. 9901.

²¹ See *id.*

²² John R. Vile, *TikTok v. Garland (2025)*, FREE SPEECH CTR. (Feb. 28, 2025), <https://firstamendment.mtsu.edu/article/tiktok-v-garland/> [<https://perma.cc/FMZ4-9XHQ>].

²³ *TikTok v. Garland*, 604 U.S. 64 (2025). The Court considered whether the law violated the free speech rights of ByteDance and its users, and whether the potential threat of a foreign-owned popular social media site warranted congressional intervention. The Supreme Court found that while the First Amendment applied to the law’s forced sale of the social media site, strict scrutiny was not applicable. Instead, the Court considered the law’s function as equivalent to a time, place, and manner inquiry.

²⁴ Note that TikTok did go dark for one day before a reprieve was granted.

²⁵ 395 U.S. 444 (1969). See *infra* section II.A.2. for a discussion of *Brandenburg*.

This Article contends there should be a clearer line between First Amendment claims and assertions of national security interests. Further, it argues for a more limited understanding of the Supreme Court decision and important precedent, *Holder v. Humanitarian Law Project*,²⁶ such that transparency and dissent will not be automatically sacrificed at the first mention of an alleged interest in foreign policy.²⁷ Lastly, this Article advocates the use of due process in the face of claims of national security and foreign policy, even if due process must be contoured to fit the circumstances.

I. BACKGROUND

A. *Traditional Freedom of Speech Boundaries*

The Supreme Court has sculpted the contours of freedom of speech through a series of cases, most of them decided in the twentieth century. These cases help weave the tapestry of the current doctrine.

1. *Scales v. United States*: Laying the Foundation in 1961

The Alien Registration Act, also known as the Smith Act, was enacted in 1940, making it a felony to be a member of an organization advocating the overthrow of the U.S. government by force or violence.²⁸ In 1961, the Supreme Court evaluated the constitutionality of the Smith Act's membership clause in *Scales v. United States*.²⁹ The prosecution at issue in *Scales* was of a Communist Party member. The Court stated that the prosecution was not about mere membership, but rather specific intent to further the purposes of the organization to engage in violent

²⁶ *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010).

²⁷ Specifically, "material support" of a terrorist organization can be direct or indirect and raise issues as inscrutable as those with proximate cause in torts. The Supreme Court recognized the slippery slope that attaches in this type of situation. As Chief Justice Roberts noted in his decision for the Court in *Holder*: "We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future." *See Holder*, 561 U.S. 1 (2010).

²⁸ 8 U.S.C. § 2385.

²⁹ *Scales v. United States*, 367 U.S. 203 (1961).

overthrow of the government, which could be proscribed.³⁰ Mere membership constituted protected association.

Yet context mattered. When the same act was applied to non-citizens, the Court upheld the deportation of several Communist Party members based solely on their membership in the party, despite their disavowal of the party's violent goals.³¹ Similarly, in *Kleindienst v. Mandel*,³² the Supreme Court found that the Attorney General had the power to refuse admission to a non-immigrant visitor to the country based on their speech. When Congress delegates some of its plenary power to the executive branch to exclude visitors from the country, even if they have been invited for academic conferences or discussions by U.S. citizens, the Court generally will not look behind the decision or balance it against the First Amendment.³³

2. *Brandenburg v. Ohio*

The seminal 1969 case of *Brandenburg v. Ohio*³⁴ built on *Scales* and other predecessor cases to create a long-term boundary between protected speech and subversive speech, namely speech “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁵ This boundary has become entrenched over the decades, surviving the transition to the digital age and internet speech, although not without some modifications and clarifications.

³⁰ *Id.* at 208-09 (“But the membership clause of the Smith Act, on its face, much less as we construe it in this case, does not do this, for it neither proscribes membership in Communist organizations, as such, but only in organizations engaging in advocacy of violent overthrow, nor punishes membership in that kind of organization except as to one ‘knowing the purposes thereof,’ and, as we have interpreted the clause, with a specific intent to further those purposes. We have also held that the proscribed membership must be active, and not nominal, passive, or theoretical.” (citation omitted)).

³¹ *Harisiades v. Shaughnessy*, 342 U.S. 580, 583 (1952) (upholding deportation of former communists under the Alien Registration Act, despite First Amendment claims, because the communist party advocated for the overthrow of the government by force).

³² *Kleindienst v. Mandel*, 408 U.S. 753, 774 (1972).

³³ *Id.*

³⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³⁵ *Id.* at 444.

One such clarification was in *Hess v. Indiana* in 1973.³⁶ There, the Supreme Court found that a protestor's threat to "take the [expletive] street later" did not fall within the narrowly framed limits on protected speech, including that of *Brandenburg*.³⁷ The Court found that the protestor's words were not directed to any person or group and, therefore, was not advocating any imminent action. His conviction for disorderly conduct was thus overturned.³⁸

In 1982, in *NAACP v. Claiborne Hardware*,³⁹ the Supreme Court further analyzed the *Brandenburg* test by distinguishing advocacy protected by the First Amendment from incitement to imminent lawless action.⁴⁰ The context was a boycott campaign of white businesses, organized by the NAACP, which featured NAACP members standing outside a boycotted business and heckling and threatening Black people who entered.⁴¹ The Court found that intimidation and threats of "social ostracism, [and] vilification" were not sufficient to deny the NAACP their First Amendment rights.⁴² To this end, the Court found that many activities showing association with the boycotts and threats could not serve as the basis for liability.⁴³

Other cases elaborating on when speech is unprotected include another early case, *Chaplinsky v. New Hampshire*⁴⁴ from 1942, which set forth the "fighting words" test, and *Cohen v.*

³⁶ *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 921. ("To the extent that the Mississippi Supreme Court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and extradition,' it is flatly inconsistent with the First Amendment. The court's ambiguous findings are inadequate to assure the 'precision of regulation' demanded by that constitutional provision.").

⁴³ *Id.* ("Regular attendance and participation at the meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability on the individual petitioners. Nor can liability be imposed on such individuals simply because they were either 'store watchers' who stood outside the boycotted merchants' stores to record the names of black citizens who patronized the stores or members of a special group of boycott 'enforcers.'").

⁴⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). The fighting words test allows for the government to limit speech designed to provoke violence or retaliation from the listener.

California,⁴⁵ in 1971, which emphasized that offensive speech is protected under the First Amendment.

While these are “last century” cases, they are still good law. However, in this digital century, more clarification has been needed to delineate the border between protected and unprotected speech drawn by these cases.

3. A Central Case: *Holder v. Humanitarian Law Project*⁴⁶

In 1996, a federal statute was enacted to make it a crime to “knowingly provid[e] material support or resources to a foreign terrorist organization.”⁴⁷ Subsequent statutes have provided explanations and information relevant to the law. First, the decision to make a group a terrorist organization lies with the Secretary of State, who may consult with other secretaries.⁴⁸ The Secretary may make such a designation when finding that a foreign group engages in terrorist activity or terrorism that then “threatens the security of United States nationals or the national security of the United States.”⁴⁹ What constitutes “national security” is defined as “the national defense, foreign relations, or economic interests of the United States.”⁵⁰ Second, the term “material support or resources” encompasses a broad range of activities, including providing monetary assistance, helping house individuals in the group, training group members, and more.⁵¹

⁴⁵ *Cohen v. California*, 403 U.S. 15, 26 (1971).

⁴⁶ *See Holder*, 561 U.S. 1.

⁴⁷ 18 U.S.C. § 2339B(a)(1). The statute stated:

[T]he term ‘material support or resources’ means 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[.]

Id. § 2339A(b)(1).

⁴⁸ 8 U.S.C. § 1189(a)(1), (d)(4).

⁴⁹ *Id.*; *Holder*, 561 U.S. at 9 (“The authority to designate an entity a ‘foreign terrorist organization’ rests with the Secretary of State. She may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in ‘terrorist activity’ or ‘terrorism,’ and thereby ‘threatens the security of United States nationals or the national security of the United States.’” (citations omitted)).

⁵⁰ 8 U.S.C. § 1189(d)(2).

⁵¹ 18 U.S.C. § 2339A(b)(1); *see also* 18 U.S.C. § 2339B(g)(4).

The nonprofit organization Humanitarian Law Project and several other organizations filed suit, seeking to have the law struck down. The Petitioners contended that the support provided to the two organizations considered foreign terrorist organizations was only to promote the lawful and nonviolent purposes of the group. Consequently, applying the “material support” law to conduct facilitating lawful goals was unconstitutional, particularly when applied to their freedom of speech rights as well as because the law was excessively vague.⁵²

The plaintiffs wanted the burden of proof to be on the government when speech is involved with this law. The Court disagreed:

We reject plaintiffs’ interpretation of §2339B because it is inconsistent with the text of the statute. . . . Congress plainly spoke to the necessary mental state for a violation of §2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.⁵³

The Court also emphasized Congress’ finding that any support to terrorist groups inherently undermines the United States’ efforts to curb terrorist activities and its cooperation with other nations in these efforts.⁵⁴ The Court found that foreign policy goals, in addition to national security goals, were legitimate reasons for preventing the kind of material support provided by the Humanitarian Law Project in the case:

The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the

⁵² *Holder*, 561 U.S. at 8.

⁵³ *Id.* at 14-17. One can find this understanding of material support emphasized again in immigration law, where bans on immigration status due to “material support of a terrorist organization” are enforced against people in a variety of situations where immigrants had no choice but to support a terrorist organization. *See, e.g.*, Jenna Krajeski, *A Victim of Terrorism Faces Deportation for Helping Terrorists*, NEW YORKER (June 12, 2019), <https://www.newyorker.com/news/news-desk/a-victim-of-terrorism-faces-deportation-for-helping-terrorists> [<https://perma.cc/E42K-K9AX>] (noting that the terrorist bar was applied in the cases of “a Pakistani shop owner whose fruit was stolen by the Taliban” and “a Colombian woman who was forced under threat of violence to provide food to rebels”).

⁵⁴ *Id.* at 31. (“Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States’ relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks.”).

United States' partners abroad: "A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations," and those attacks "threaten [the] social, economic and political stability" of such governments. "[O]ther foreign terrorist organizations attack our NATO allies, thereby implicating important and sensitive multilateral security arrangements."⁵⁵

Despite these justifications, the ruling was controversial. Former President Jimmy Carter observed:

The "material support law"—which is aimed at putting an end to terrorism—actually threatens [The Carter Center's] work and the work of many other peacemaking organizations that must interact directly with groups that have engaged in violence. The vague language of the law leaves us wondering if we will be prosecuted for our work to promote peace and freedom.⁵⁶

4. *Al Haramain Islamic Foundation v. U.S. Department of the Treasury* (OFAC)⁵⁷

One year after *Humanitarian Law Project* was decided, the Al Haramain Islamic Foundation, a non-profit organization in Oregon, found its assets frozen after it was named a global terrorist organization.⁵⁸ The organization stated that its purpose was to promote a greater understanding of Islam, but the U.S. Department of Treasury alleged that the organization had donated to Al-Qaida.⁵⁹

The Ninth Circuit Court of Appeals first found that the record supported the conclusion that the group could be labeled a

⁵⁵ *Id.* at 32.

⁵⁶ See *Supreme Court Rules "Material Support" Law Can Stand*, ACLU (June 21, 2010, at 00:00 ET) <https://www.aclu.org/press-releases/supreme-court-rules-material-support-law-can-stand> [<https://perma.cc/9GJ9-NG4J>].

⁵⁷ 686 F.3d 965 (9th Cir. 2012).

⁵⁸ *Id.* at 965 ("Plaintiff Al Haramain Islamic Foundation, Oregon ("AHIF-Oregon"), is a non-profit organization, incorporated in Oregon, whose stated purpose is to promote greater understanding of Islam. The United States government suspected AHIF-Oregon of supporting terrorism. In 2004, the Office of Foreign Assets Control ("OFAC"), a part of the United States Department of the Treasury, froze AHIF-Oregon's assets and designated AHIF-Oregon as a 'specially designated global terrorist' pursuant to Executive Order ("EO") No. 13,224.").

⁵⁹ *Id.* at 974-75.

terrorist organization.⁶⁰ The court then weighed the tension between the organization's due process rights and the government's interest in national security. The Court noted that a terrorist designation renders an organization "financially defunct."⁶¹ On the other hand, the Court, citing *Humanitarian Law Project*, recognized the significance of national security: "We owe unique deference to the executive branch's determination that we face 'an unusual and extraordinary threat to the national security' of the United States. It is beyond dispute that 'the Government's interest in combating terrorism is an urgent objective of the highest order.'"⁶²

The Court recognized the importance of government secrecy,⁶³ but still looked closely at the due process claims.⁶⁴ The Court found that due process could be served commensurate with national security. It was not an either/or duality, and allowing for unclassified summaries or lawyers with appropriate security clearance to view the material could serve both interests.⁶⁵

⁶⁰ *Id.* at 979 ("In light of all the evidence in the record, we conclude confidently that substantial evidence supports OFAC's conclusion that AHIF-Oregon supported designated persons as a branch office of AHIF-Saudi Arabia.). See Exec. Order No. 13,224 § 1(d)(i) (permitting designation of an entity that provides "financial, material, or technological support for, or financial or other services to or in support of" designated persons).

⁶¹ *Id.* at 980.

⁶² *Id.* (citation omitted) (citing *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010)).

⁶³ *Id.* "Given the extreme importance of maintaining national security, we cannot accept AHIF-Oregon's most sweeping argument—that OFAC is not entitled to use classified information in making its designation determination. See generally *Gen. Dynamics Corp. v. United States*, 563 U.S. 478 (2011) ("[P]rotecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret.").

⁶⁴ *Id.* at 982 (conducting a *Mathews* balancing test to weigh "the value of additional safeguards' against the risk of error and 'the burdens of additional procedural requirements'" with regard to AHIF-Oregon's assertion that the government must take reasonable measures to mitigate the unfairness to AHIF-Oregon, such as providing unclassified summaries of relevant classified information or allowing a lawyer to view the classified documents confidentially).

⁶⁵ *Id.* at 983 ("We find significant that there may be means of providing information to the potential designee that do not implicate national security. For example, an unclassified summary, by definition, does not implicate national security because it is unclassified. Similarly, a lawyer for the designated entity who has the appropriate security clearance also does not implicate national security when viewing

Finally, the Court found that the lack of notice or right to be heard also violated the nonprofit's due process rights. The Court reviewed the factors in the Mathews test and concluded that all three showed OFAC violated AHIF-Oregon's due process rights. The Court stated:

First, OFAC's blocking notice deprived AHIF-Oregon of its ability to use any funds whatsoever, for any purpose. Second, because AHIF-Oregon could only guess (partly incorrectly) as to the reasons for the investigation, the risk of erroneous deprivation was high. Finally, and perhaps most importantly, although national security might justify keeping AHIF-Oregon in the dark, OFAC makes no effort to demonstrate that its failure to provide AHIF-Oregon with reasons for its investigation promoted national security.⁶⁶

In effect, the Ninth Circuit Court of Appeals tried to cabin *Humanitarian Law Project's* potential slippery slope. *Al Haramain Islamic Foundation* ("AHIF") refused to extend *Holder* in a situation where groups were placed on lists as Specially Designated Global Terrorists without due process of law under the Fifth Amendment. In essence, the court protected advocacy in a domestic setting.

II. RELEVANT DISTINCTIONS

A. Constitutional Rights for Citizens and Non-Citizens

Many constitutional rights apply to non-citizens in the United States, but sometimes to a lesser degree than U.S. citizens.⁶⁷ The rights most relevant to this Article are First Amendment rights—including speech, association, religion,

the classified material because, by definition, he or she has the appropriate security clearance.”).

⁶⁶ *Id.* at 986.

⁶⁷ See, e.g., Jonathan Swan, *Trump Says “I Don’t Know” When Asked About Due Process and Upholding Constitution*, N.Y. TIMES (May 5, 2025), <https://www.nytimes.com/2025/05/04/us/politics/trump-meet-the-press-interview-due-process.html> [<https://perma.cc/GC74-UYCE>] (“President Trump said in an interview that aired on Sunday that he did not know whether every person on American soil was entitled to due process, despite constitutional guarantees, and complained that adhering to that principle would result in an unmanageable slowdown of his mass deportation program.”).

assembly, and petitioning—and due process rights. In evaluating the applicability of these rights, some courts and scholars focus on the immigration status of the person—such as whether the person is a lawful, permanent resident, a student, an asylum seeker, a tourist, or an undocumented immigrant. Even naturalized citizens are not completely free from scrutiny, as some cases have targeted new citizens for speech that occurred before they were citizens, leading to a potential revocation of citizenship.⁶⁸ This possibility is particularly troubling when considered alongside the government's push for de-naturalization.⁶⁹

Historically, the most prominent form of speech discrimination against immigrants was for immigrants who were affiliated with, or otherwise in support of, the Communist party, which was viewed as a national security threat.⁷⁰ There are still questions about the Communist party on the application for a green card (Lawful Permanent Resident card)⁷¹ and the application for citizenship.⁷² Now, however, the speech focus has migrated toward more current issues, such as immigrant rights

⁶⁸ See, e.g., *Baumgartner v. United States*, 322 U.S. 665, 671-72, 677-78 (1944) (rejecting the government's attempt to revoke a German man's citizenship on charges of illegal procurement, after the man had praised the German government and stated that, by comparison, it was run better than the American government); *Schneiderman v. United States*, 320 U.S. 118 (1943).

⁶⁹ Ernesto Londoño & Hamed Aleaziz, *Justice Dept. Targets Hundreds of Citizens in New Push for De-Naturalization*, N.Y. TIMES (Apr. 23, 2026), <https://www.nytimes.com/2026/04/23/us/politics/justice-dept-citizens-denaturalization.html> [<https://perma.cc/8BFM-H2QM>].

⁷⁰ See, e.g., *Schneiderman*, 320 U.S. at 129 (1943); *Bridges v. Wixon*, 326 U.S. 135, 139-41 (1945); *Harisiades v. Shaughnessy* 342 U.S. 580, 592 (1952); *Scales v. United States*, 367 U.S. 203, 228-29 (1961); *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

⁷¹ *Application to Register Permanent Residence or Adjust Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 20, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-485.pdf> [<https://perma.cc/4FKH-3D32>] (Form I-485, pt. 9, q. 52) ("Have you EVER been a member of, or in any way affiliated with, the Communist Party or any totalitarian party (in the United States or abroad)?").

⁷² *Application for Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 20, 2025), <https://www.uscis.gov/sites/default/files/document/forms/n-400.pdf> [<https://perma.cc/2PPQ-F5ZP>] (Form N-400, pt. 9, q. 5.a., 5.b) ("Have you EVER [b]een a member of, involved in, or in any way associated with any Communist or totalitarian party anywhere in the world? Advocated (supported and promoted) any of the following, or been a member of, involved in, or in any way associated with any group anywhere in the world that advocated any of the following: [o]pposition to all organized government; [w]orld communism . . . ?").

activists,⁷³ presumed gang members,⁷⁴ and pro-Palestine and/or anti-Israel protestors.⁷⁵ Congress delegated power to the executive to initiate deportation proceedings when foreign policy concerns are present, which is a power currently being used to target pro-Palestinian protesters.⁷⁶

Throughout the visa and immigration processes, non-citizens have received close scrutiny of their speech and associations. For example, in April 2025, DHS announced that it would begin searching for antisemitic content on non-citizens' social media accounts.⁷⁷ In August 2025, United States Citizenship and Immigration Services ("USCIS"), the agency who processes work permits, citizenship applications, and a variety of visas, shared that it will begin "to consider anti-Americanism in immigrant benefit requests."⁷⁸ USCIS also announced that it will conduct

⁷³ See, e.g., Joel Rose, *Immigrant Activists Say ICE Is Purposefully Targeting Them. They're Urging Biden to Help*, NPR (Aug. 4, 2021), <https://www.npr.org/2021/08/04/1024348198/immigrant-activists-ask-biden-administration-to-ban-ice-from-retaliating-against> [https://perma.cc/97R5-GY3S]; *Ninth Circuit Court Allows Jose Bello Immigrants' Rights Case to Continue: Order Overturns a District Court Decision in the First Amendment Case*, AM. C.L. UNION OF S. CAL. (Jan. 14, 2021), <https://www.aclusocal.org/en/press-releases/ninth-circuit-court-allows-jose-bello-immigrants-rights-case-continue> [https://perma.cc/3F4A-B6DY]; Rozina Ali, *In Arresting an Immigrant-Rights Activist, ICE Shows Its New Power*, NEW YORKER (Jan. 17, 2018), <https://www.newyorker.com/news/news-desk/in-arresting-an-immigrant-rights-activist-ice-shows-its-new-power> [https://perma.cc/T86Z-JUY7].

⁷⁴ See *supra* Part I (discussing Mr. Kilmar Abrego Garcia, a man who was "mistakenly" deported because of presumed gang membership).

⁷⁵ See *supra* Part I (discussing Mr. Mahmoud Khalil, who was detained for his protests at Columbia University); see also Kimmy Yam & Chloe Atkins, *DHS Used Anonymous Pro-Israel Site to Target Activists for Deportation, Agency Says in Court*, NBC NEWS (July 9, 2025), <https://www.nbcnews.com/news/us-news/dhs-used-anonymous-israel-site-target-activists-deportation-agency-say-rcna217814> [https://perma.cc/GU3S-6ML7].

⁷⁶ Charlie Savage, *Congress Wrote a Deportation Law to Be Used 'Sparingly.' Trump Has Other Ideas*, N.Y. TIMES (Apr. 1, 2025), <https://www.nytimes.com/2025/04/01/us/trump-deportations-students-campus-protests.html> [https://perma.cc/XHY5-MN3X].

⁷⁷ *DHS to Begin Screening Aliens' Social Media Activity for Antisemitism*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 8, 2025), <https://www.uscis.gov/newsroom/news-releases/dhs-to-begin-screening-aliens-social-media-activity-for-antisemitism> [https://perma.cc/8PA8-JEM4]; see also Exec. Order No. 14188, 90 Fed. Reg. 8847 (Jan. 29, 2025); Exec. Order No. 14161, 90 Fed. Reg. 8451 (Jan. 20, 2025).

⁷⁸ Press Release, U.S. Citizenship and Immigration Services, USCIS to Consider Anti-Americanism in Immigrant Benefit Requests (Aug. 19, 2025), <https://www.uscis.gov/newsroom/news-releases/uscis-to-consider-anti-americanism-in->

“personal investigations” of citizenship applicants, to scrutinize their “attachment to the U.S. Constitution, and disposition to the good order and happiness of the United States.”⁷⁹ Many commentators have expressed concerns that new guidelines about social media monitoring will threaten free speech.⁸⁰ Towards the end of 2025, the State Department also announced it had revoked visas from non-citizens who talked positively about the murder of right-wing activist Charlie Kirk.⁸¹

Despite the various ways that non-citizens have been accorded reduced protections in practice, First Amendment principles still apply. In 2021, several men who had been deported for speaking out against ICE were allowed to re-enter the country, a rare occurrence, after First Amendment concerns were raised.⁸² Similarly, in 2025, Judge Young of the District of Massachusetts emphasized “unequivocally” that lawfully-present non-citizens share the same First Amendment rights as Americans.⁸³

immigrant-benefit-requests [https://perma.cc/RJ5J-YFKA] (“America’s benefits should not be given to those who despise this country and promote anti-American ideologies.”)

⁷⁹ Policy Memorandum from U.S. Citizenship and Immigration Services on Resumption of Personal Investigations of Aliens Applying for Naturalization (Aug. 22, 2025), https://www.uscis.gov/sites/default/files/document/policy-manual/PM-602-0189_INA335.pdf [https://perma.cc/D6J5-T9NG].

⁸⁰ See, e.g., *How DHS’s New Social Media Vetting Policies Threaten Free Speech*, JUST SEC. (June 17, 2025), <https://www.justsecurity.org/114607/how-dhss-new-social-media-vetting-policies-threaten-free-speech/> [https://perma.cc/A42W-72LN].

⁸¹ See Matthew Lee, *US Revokes Visas for 6 Foreigners Over Charlie Kirk-Related Speech*, ASSOCIATED PRESS (Oct. 14, 2025), <https://apnews.com/article/trump-charlie-kirk-visas-revoked-455f43467c0c50e84d3857c1e9c81458> [https://perma.cc/W74G-2K73] (“Trump and Secretary of State Marco Rubio ‘will defend our borders, our culture, and our citizens by enforcing our immigration laws,’ the State Department said. ‘Aliens who take advantage of America’s hospitality while celebrating the assassination of our citizens will be removed.’”); Department of State (@StateDept), X, *The United States has no obligation to host foreigners who wish death on Americans. The State Department continues to identify visa holders who celebrated the heinous assassination of Charlie Kirk. . . A Paraguayan national charged that “Charlie Kirk was a son of a b**** and he died by his own rules.” Visa revoked.* (Oct. 14, 2025, at 16:55 CT), <https://x.com/StateDept/status/1978218112882266594> [https://perma.cc/8TF6-CX7P].

⁸² Joel Rose, *An Immigrant Activist Says ICE Deported Him in Retaliation. Now He’s Back in the U.S.*, NPR (Dec. 15, 2021), <https://www.npr.org/2021/12/15/1064224812/immigrant-activist-deported-ice-retaliation-rojas> [https://perma.cc/4J9G-CJ93].

⁸³ Findings of Fact and Rulings of Law Pursuant to Fed. R. Civ. P. 52(A), *AAUP v. Rubio*, No. 1:25-cv-10685-WGY, (D. Mass. Sep. 30, 2025), Dkt. No. 261 (“‘No law’ means ‘no law.’ The First Amendment does not draw President Trump’s invidious distinction [between citizens and non-citizens] and it is not to be found in our history or

B. Speech vs. Threats

Speech protections do not extend to threats or the inducement of imminent violence. The line between protected speech and unprotected threats can be blurry, as intention and practicality are considered when deciding what a “threat” is.⁸⁴ Only “true threats” of violence fall outside of constitutional protections.⁸⁵ States can ban certain types of intimidation and threats, such as cross burning, but the intent to intimidate, rather than to just show support for one’s own views, must be clear.⁸⁶

C. Protest vs. Disruption

The Supreme Court has drawn a distinction between certain types of protests, labeling some as disruptive (and thus not meriting First Amendment protections). In *Snyder v. Phelps*, a father sued the Westboro Baptist Church after they protested at his son’s funeral in a Catholic cemetery, chanting things such as “Thank God for Dead Soldiers” and “You’re Going to Hell.”⁸⁷ The son, Corporal Matthew Snyder, had died in military service in Iraq.⁸⁸ Although the Court found the speech to be alarming and somewhat “outrageous,” it nonetheless found that the question of LGBTQ+ service in the military was a “matter of public concern” that was entitled to speech protection.

jurisprudence. . . No one’s freedom of speech is unlimited, of course, but these limits are the same for both citizens and non-citizens alike.”).

⁸⁴ See, e.g., *Counterman v. Colorado*, 600 U.S. 66, 78-82 (2023) (holding that in order to criminally prosecute someone for a “true threat,” the defendant must, at the very least, be reckless as to the threatening nature of their speech); *Watts v. United States*, 394 U.S. 705, 708 (1969) (overturning the conviction of a man who said he would want to kill the president if he were forced into the army, noting that the comments were “political hyperbole”).

⁸⁵ *Watts*, 394 U.S. at 708.

⁸⁶ *Virginia v. Black*, 538 U.S. 343, 347-48 (2003) (holding that cross-burning, in itself, is insufficient evidence of intent to intimidate, and thus that separate intent must be shown); see also *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 381 (1992) (responding to another cross-burning incident, the Court held that states cannot distinguish between the severity of certain fighting words based on the content or bias behind the action).

⁸⁷ 562 U.S. 443, 448 (2011).

⁸⁸ *Id.*

In *Carey v. Brown*,⁸⁹ the Supreme Court struck down an Illinois statute that banned picketing in front of residences but allowed it when the picketing was peaceful and part of a labor dispute.⁹⁰ The Court weighed the protection of residential privacy with unions' rights to protest labor issues, but emphasized that the residents would face the same intrusion regardless of the source.⁹¹ In addition, the Court found it concerning that the subject matter of the protest was what determined its legality.⁹²

D. Online vs. In-Person Speech

Online speech has different characteristics from in-person speech. Characteristics such as anonymity of source, velocity, resending, and more can impact the lines drawn around what counts as protected speech. It is now common for threats to come from social media websites such as X (formerly Twitter) or Facebook. An instructive case is *Elonis v. United States*.⁹³ In *Elonis*, the defendant used Facebook to post graphically violent language and images involving his wife, children, coworkers, and police.⁹⁴ The defendant interspersed his posts with disclaimers, saying the language and images were fictitious and simply part of his First Amendment rights.⁹⁵ As a consequence, the defendant was fired from his job, his wife obtained a protective order, and he was convicted under federal law, 18 U.S.C. 875(c) with making "any communication containing any threat . . . to injure the person of another."⁹⁶

⁸⁹ 447 U.S. 455, 458-59 (1980).

⁹⁰ *Id.*

⁹¹ *Id.* at 477-78.

⁹² *Id.*

⁹³ 575 U.S. 723 (2015).

⁹⁴ *Id.* at 728, 731. Defendant's statements included the following:

Hi, I'm Tone Elonis. Did you know that it's illegal for me to say I want to kill my wife? . . . It's one of the only sentences that I'm not allowed to say. . . . Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. . . . Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. . . . But not illegal to say with a mortar launcher. Because that's its own sentence

Id.

⁹⁵ *Id.*

⁹⁶ 18 U.S.C. 875(c).

The Supreme Court reversed the conviction, emphasizing that there was inadequate consideration of the defendant's mental state in making the threats.⁹⁷ The Court required that the individual making the threats have criminal intent or an otherwise guilty mental state to be criminally punished.⁹⁸ Such a mental state would make the statements a "true threat."⁹⁹

III. BETTER FIRST AMENDMENT-NATIONAL SECURITY BORDER OUTCOMES

There needs to be an exegesis of the strict rule put forth in *Humanitarian Law Project* so it can be sufficiently adapted and contoured to today's rapidly changing government power structure. The due process approach of *Al Haramain Islamic Foundation v. U.S. Department of the Treasury* should be adopted as a general framework. It provides a sensible approach for a difficult constitutional border, balancing transparency, the important power of the sovereign to protect national interests, and individual rights.

Based on the principles of *AHIF*¹⁰⁰ and disclosure regulations for specific contexts,¹⁰¹ an updated framework for conducting inquiries involving rights and national security could be adopted by courts. A sample framework follows.

A. A Proposed Framework

(B) In proceedings where classified national security information is considered in a decision against an individual (person or organization), the individual could be informed in

⁹⁷ 575 U.S. 723, 740 (2015).

⁹⁸ *Id.* at 746. Note that the Court did not answer the question of whether recklessness also suffices as specific intent, but Chief Justice Roberts stated unequivocally that negligence was insufficient.

⁹⁹ *Id.*

¹⁰⁰ *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2011). ("We find significant that there may be means of providing information to the potential designee that do not implicate national security. For example, an unclassified summary, by definition, does not implicate national security because it is unclassified. Similarly, a lawyer for the designated entity who has the appropriate security clearance also does not implicate national security when viewing the classified material because, by definition, he or she has the appropriate security clearance.").

¹⁰¹ *See, e.g.*, 8 C.F.R. 103.2(b)(16).

camera that classified information is being used. If appropriate, the general nature of the information could be disclosed to meet due process safeguards by notifying the individual of the issues in the case and affording the opportunity to meaningfully respond. However, the specific classified documents or information themselves presumptively would not be provided, in full or in part, unless an exception arises. Exceptions can include:

- a. If the classifying authority has agreed in writing to such disclosure.
- b. If the adjudicator determines an in-camera review of the classified information is necessary to provide due process in the case.
- c. An unclassified summary of the classified information could be offered in lieu of any classified disclosures if appropriate. Note that the government may request minimal standards to ensure the continued classification of the relevant information.

(C) If lawful speech, expression, association, or religion is limited, the Court should apply strict scrutiny, such that the government must show that its limits are narrowly tailored to a compelling government interest.

- a. When material support is provided to a foreign entity, a “willful blindness” standard should be applied, to ensure that individuals or organizations are not deliberately remaining ignorant about the nature of the entity.

B. Objectives of the Proposed Framework

This proposed framework serves several interests. The first is to promote an independent judiciary and protect the balance of power between the branches. While Alexander Hamilton argued in *The Federalist Papers* that the judiciary is the weakest branch,¹⁰² it is also important to have an independent arbiter to check

¹⁰² THE FEDERALIST NO. 78 (Alexander Hamilton). (describing the “natural feebleness of the judiciary”).

arbitrary exercises of power.¹⁰³ The second is to encourage government transparency, subsequently increasing trust in governmental institutions. The third, and most important, goal is to ensure that the government does not deny due process of law to individuals or organizations under the guise of a “national security” claim.

1. Checks and Balances: Including Due Process as a Counterweight

The concept of checks and balances is more than a theoretical idea but rather a salient foundation underlying the Bill of Rights.¹⁰⁴ In the past thirty years, the cyclical growth and diminishment of the three branches of power has been trending toward expansion for the executive branch. While the last declared war was World War II, the Commander-in-Chief has entered non-declared actions in Korea, Vietnam, Iraq, Afghanistan, and more. In addition, the Chief Executive has infringed upon Congress’ spending powers, by taking actions such as limiting student debt payments to stopping existing federal contracts because of alleged conflicts with government policy. A significant underlying force for expansion of executive powers has been foreign policy and national security. Especially since 9/11, the legislative branch has granted the executive significant unchecked latitude to institute and enforce protective measures through foreign policies and national security actions.¹⁰⁵

¹⁰³ One relevant example of the power of the courts to push back against executive overreach is through writs of habeas corpus, which the U.S. government argues should not be available for protestors. See Colin Moynihan, *U.S. Argues That Detained Protesters Can’t Seek Release in Federal Court*, N.Y. TIMES (Sep. 30, 2025), <https://www.nytimes.com/2025/09/30/nyregion/habeas-corpus-deportation-appeal.html> [<https://perma.cc/9U3U-PQRL>].

¹⁰⁴ See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton). (“[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that ‘there is no liberty, if the power of judging be not separated from the legislative and executive powers.’”).

¹⁰⁵ See Russ Feingold, *It’s Time to Tear Up the Executive Branch’s Blank Check*, BRENNAN CTR. (July, 22, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/its-time-tear-executive-branchs-blank-check> [<https://perma.cc/25FS-F73U>]; Sarah Binder & Molly Reynolds, *20 Years Later: The Lasting Impact of 9/11 on*

The system of checks and balances is a pragmatic limit on untrammelled government power.¹⁰⁶ To uphold this framework, there must be some limits on the encroachment and expansion of the executive branch. It is designed as one of the co-equal branches, not one that is superior. Those co-equal branches are designed to be intertwined but distinctly separated, allowing each to make informed decisions to address the actions of the others. Given Congress is also not serving as an adequate check on executive power, intervention by the courts is especially imperative.¹⁰⁷

To that end, one must ensure that both procedural due process and basic due process are applied properly when faced with questions of national security or foreign affairs. The procedural due process doctrine ensures fair processes. This allows for each individual or group who is labeled as a terrorist or as supporting a terrorist organization to contest that label. Procedural due process was notably lacking in the case of Mr. Abrego Garcia, who was not afforded any process to contest his affiliation with MS-13 before being deported to El Salvador.¹⁰⁸ The basic fairness due process doctrine argues that the government must come forward with at least some sufficiency of evidence justifying labeling an organization's work as supporting a terrorist organization, an individual as a gang member, or any other form of national security threat. The justification of these labels is crucial, as the labels may lead to someone's incarceration, torture, deportation, ban from public benefits, etc.

A notable example of a lack of checks was President Roosevelt's Executive Order during WWII to forcibly remove Japanese Americans from the West coast and to detain them in camps.¹⁰⁹ The order claimed there were threats of espionage in favor of the Axis powers, but none were documented by Japanese

Congress, BROOKINGS INST. (Aug. 27, 2021), <https://www.brookings.edu/articles/20-years-later-the-lasting-impact-of-9-11-on-congress/> [<https://perma.cc/T6FD-TZTD>].

¹⁰⁶ See generally THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether few, or many . . . may justly be pronounced the very definition of tyranny.").

¹⁰⁷ See Feingold, *supra* note 105.

¹⁰⁸ See Declaration of Robert L. Cerna, *supra* note 8, at 2.

¹⁰⁹ Authorizing the Secretary of War to Prescribe Military Areas, 7 Fed. Reg. 1407 (Feb. 19, 1942).

Americans during the war, and even those who proved their loyalty to the United States were continuously held in detention.¹¹⁰ In *Korematsu v. United States*,¹¹¹ the Supreme Court found the order to be constitutional, following the “judgment of the military authorities and of Congress that there were disloyal members of [the Japanese] population, whose number and strength could not be precisely and quickly ascertained.”¹¹² Years later, it was discovered that the federal government had concealed information from the Supreme Court about the lack of threat posed by Japanese Americans.¹¹³ The case serves as an important reminder of how trust in the executive branch’s national security justifications can lead to severe violations of the U.S. Constitution and of human rights, and the importance of the courts in safeguarding due process.

¹¹⁰ See, e.g., *Ex parte Endo*, 323 U.S. 283, 302-04 (1944).

¹¹¹ 323 U.S. 214, 220, 223-24 (1944):

[W]hen under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

....

... [Korematsu] was excluded [from the West Coast] 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. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot – by availing ourselves of the calm perspective of hindsight – now say that, at that time, these actions were unjustified.

Id.

¹¹² *Id.* at 218 (quoting *Hirabayashi v. United States*, 320 U.S. 81 (1943)).

¹¹³ *Korematsu v. United States: 80 Years Later*, NAT’L WWII MUSEUM (Nov. 7, 2024), <https://www.nationalww2museum.org/war/articles/korematsu-v-united-states> [https://perma.cc/3UUA-CRVA].

2. Government Transparency and Clarity in the Rule of Law

The constitutional protections of due process promote several qualities of government that cannot be understated—transparency and clarity in the rule of law. Executive Orders are supposed to further these outcomes, not elide them. Yet, some Executive Orders, such as the ones condemning law firms,¹¹⁴ can appear to have secondary purposes in lieu of stated goals. While national security measures cannot be articulated with such transparency, it should not be an “all or nothing” proposition. As proposed in *Al Haramain Islamic Foundation* and in the model framework, alternative methods of disclosure, such as summaries based on unclassified information, could be offered without compromising security interests.

CONCLUSION

In recent years, the border between free speech protection and assertions of national security interests has become murkier and more opaque, particularly in the context of unilateral exercises of executive power. To avoid unlawful and unfounded government actions, a new approach that prioritizes due process and transparency is needed. The stories of Kilmar Abrego Garcia’s deportation and Mahmoud Khalil’s prolonged imprisonment speak to the importance of providing a check on executive power. The Ninth Circuit Court of Appeals decision in *Al Haramain Islamic Foundation v. U.S. Department of the Treasury*,¹¹⁵ is instructive of how to achieve national security protection while providing for fundamental due process rights. This type of process could ensure a fair balancing of interests and not a reflexive subjugation of rights in the face of a national interest claim.

¹¹⁴ Exec. Order No. 14230, 90 Fed. Reg. 11781 (Mar. 6, 2025); Exec. Order No. 14237, 90 Fed. Reg. 13039 (Mar. 14, 2025).

¹¹⁵ *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 983 (9th Cir. 2011).