

The Problems of Security and Freedom: Procedural Due Process and The Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Death Penalty Act

by
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INTRODUCTION

“The problems of security are real. So are the problems of freedom. The paramount issue of the age is to reconcile the two.”¹ Although Justice Douglas wrote those words at the onset of the Cold War, his words still have resonance more than half a century later as the United States confronts the threat of international terrorism. The dilemma of how to ensure the national security of the United States while preserving the constitutional liberties of Americans is not new, but it is pressing. The great powers of Congress and the President in the arena of foreign relations and national security are subject to the limits set by the Constitution.² Yet “while the Constitution protects against invasions of individual rights, it is not a suicide pact.”³ Unless the United States “has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning.”⁴

Long before the terrorist attacks of September 11, 2001, Congress determined that international terrorism was a grave threat to the national security of the United States, passing the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”).⁵ Pursuant to AEDPA, the Secretary of State has the authority to designate certain foreign entities as terrorist organizations.⁶ The designation al-

1. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 174 (1951) (Douglas, J., concurring).
 2. As Justice Goldberg stated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963):

It is fundamental that the great powers of Congress to conduct war and to regulate the Nation’s foreign relations are subject to the constitutional requirements of due process. The imperative necessary for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with the fundamental constitutional guarantees which, it is feared, will inhibit government action.

See also *United States v. Robel*, 389 U.S. 258, 264 (1967) (“Yet, this concept of ‘national defense’ cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart.”).

3. *Mendoza-Martinez*, 372 U.S. at 160.

4. *Wayte v. United States*, 470 U.S. 598, 612 (1985).

5. *See* AEDPA, Pub. L. No. 104-132, § 301(a)(1), 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S.C.) (“[I]nternational terrorism is a serious and deadly problem that threatens the vital interests of the United States.”); § 301(a)(4) (“[I]nternational terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States.”); H.R. REP. No. 104-383, pt. 2, at 45 (1995) (“The foreign organizations designated as terrorist are criminal enterprises.”).

6. *See* 8 U.S.C. § 1189(a)(1) (2000 & Supp. I. 2001).

lows the government to freeze an organization's assets and prohibits any person's knowing provision of material support to it.⁷ After the terrorist attacks, Congress amended AEDPA through the USA PATRIOT Act.⁸ The PATRIOT Act amendments broadened the statutory criteria governing designations, extended the Secretary of State's ability to redesignate terrorist organizations, and increased the penalty for providing material support to such organizations.⁹

These designations implicate the Due Process Clause of the Fifth Amendment, which requires that the government provide persons whom it has deprived of life, liberty, or property with notice of the deprivation and an opportunity to be heard.¹⁰ This article asks whether the means chosen by Congress to fight terrorism comport with procedural due process. Specifically, this article examines whether designated organizations are entitled to notice and hearings before or after their designations, as well as what type of notice and hearings they must receive under the Fifth Amendment.

In part I, this article reviews title 8, section 1189 of the United States Code, which outlines the procedures for designating foreign terrorist organizations. Part II gives a brief summary of procedural due process law. Part III describes the different approaches taken by courts in determining when and what due process must be afforded to designated organizations. Part IV discusses how the Supreme Court handled procedural due process issues in *Joint Anti-Fascist Refugee Committee v. McGrath*, which dealt with the designation of communist organizations. Part V examines whether designated organizations should receive their procedural due process rights before or after their designation as terrorist organizations. Part VI inquires into the type of notice and hearing to which designated organizations are entitled under section 1189.

I.

OVERVIEW OF SECTION 1189

AEDPA, as amended by the USA PATRIOT Act, gives the Secretary of State, in consultation with the Attorney General and Secretary of the Treasury, the power to designate foreign terrorist organizations.¹¹ To designate an organization as terrorist, the Secretary of State must find that (1) the organization is foreign; (2) the organization engages in terrorist activity¹² or terrorism,¹³ or

7. See § 1189(a)(2)(C); 18 U.S.C. § 2339B (2000 & Supp. I 2001).

8. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

9. §§ 411(a), 411(c), 809(d).

10. See *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (“[D]ue process of law signifies a right to be heard in one’s defence.”) (quoting *Hovey v. Elliott*, 167 U.S. 409, 417 (1897)); *Morgan v. United States*, 304 U.S. 1, 18 (1938) (“The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.”).

11. AEDPA § 302 (codified at 8 U.S.C. § 1189); USA PATRIOT Act § 411(c).

12. The term “terrorist activity” means

any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the

retains the capability and intent to engage in terrorist activity or terrorism; and (3) the organization's terrorist activity or terrorism threatens the national security¹⁴ of the United States or the security of its nationals.¹⁵ In making this finding, the Secretary must create an administrative record, which can contain

laws of the United States or any State) and which involves any of the following: (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a government organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; (III) A violent attack upon an internationally protected person . . . or upon the liberty of such a person; (IV) An assassination; (V) The use of (a) any biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; and (VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182(a)(3)(B)(iii) (2000 & Supp. I 2001).

To "engage in terrorist activity" means

in an individual capacity or as a member of an organization: (I) to commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (II) to prepare or plan a terrorist activity; (III) to gather information on potential targets for terrorist activity; (IV) to solicit funds or other things of value for (aa) a terrorist activity, (bb) a terrorist organization described in clause (vi)(I) or (vi)(II), or (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; (V) to solicit any individual (aa) to engage in conduct described in this clause, (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II), or (cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training (aa) for the commission of terrorist activity, (bb) to any individual who the actors knows, or reasonably should know, has committed or plans to commit a terrorist activity, (cc) to a terrorist organization described in clause (vi)(I) or (vi)(II), or (dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity.

§ 1182(a)(3)(B)(iv).

As used in § 1182(a)(3)(B)(iv), the term "terrorist organization" means

an organization (I) designated under section 1189 of this title; (II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General, as a terrorist organization, after finding that the organization engages in the activities described in subclause (I), (II), or (III) of clause (iv), or that the organization provides material support to further terrorist activity; or (III) that is a group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I), (II), or (III) of clause (iv).

§ 1182(a)(3)(B)(vi). The USA PATRIOT Act amended the definition of "engage in terrorist activity" and added the definition of the term "terrorist organization." USA PATRIOT Act § 411(a).

13. The term "terrorism" means "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d)(2) (2000).

14. The term "national security" is defined as "the national defense, foreign relations, or economic interests of the United States." § 1189(c)(2).

classified information subject only to *ex parte* and *in camera* disclosure to a court during judicial review.¹⁶ The Secretary of State must publish all designations in the Federal Register,¹⁷ notifying specified members of Congress a week beforehand.¹⁸ Publication in the Federal Register constitutes constructive notice of the designation to the designated organization. Section 1189 does not provide the designated organization with any direct notice¹⁹ either before or after publication in the Federal Register, and the organization does not receive notice of the materials used by the Secretary of State in making the designation.²⁰ Section 1189 does not provide for any hearing before or after the designation at which the organization could submit evidence to rebut the Secretary's findings.²¹

Designations are effective for two years, but the Secretary of State may renew them every two years if he or she finds that the organization still meets the statutory criteria.²² The Secretary of State may also revoke the designation if "the circumstances that were the basis for the designation" change or "the national security of the United States warrants a revocation of the designation."²³ In addition, an act of Congress can block or revoke a designation.²⁴ Within thirty days of publication in the Federal Register, a designated organization can seek judicial review of the designation in the D.C. Circuit.²⁵ This re-

15. § 1189(a)(1)(A)-(C). Under AEDPA, the Secretary of State could designate foreign organizations that engaged in terrorist activity threatening national security or American nationals, but the USA PATRIOT Act amendments expanded § 1189(a)(1)(B) to include organizations engaged in terrorism and organizations retaining the capability and intent to engage in terrorist activity or terrorism. USA PATRIOT Act § 411(c).

16. § 1189(a)(3)(A), (B).

17. § 1189(a)(2)(A)(ii).

18. § 1189(a)(2)(A)(i) (requiring the Secretary of State to notify the Speaker and Minority Leader of the House of Representatives, the Majority Leader, Minority Leader, and President pro tempore of the Senate, and any relevant congressional committees through a classified written communication seven days prior to a designation).

19. In this article, "direct notice" means notice sent directly to the involved party, as opposed to the constructive notice of publication in the Federal Register. Unless otherwise specified, "notice" refers to "direct notice."

20. See § 1189(a)(2); *Nat'l Council of Resistance of Iran v. Dept. of State* ("NCRI"), 251 F.3d 192, 196 (D.C. Cir. 2001); see also Joshua A. Ellis, Note, *Designation of Foreign Terrorist Organizations Under the AEDPA: The National Council Court Erred In Requiring Pre-Designation Process*, 2002 B.Y.U. L. REV. 675, 714 (2002) ("When the Secretary publishes notice of designations in the Federal Register, she merely lists the name of each foreign terrorist organization and the names of its aliases. Nowhere does the document state the factual basis for designating each organization.").

21. See generally § 1189; *NCRI*, 251 F.3d at 196.

22. § 1189(a)(4). An organization cannot be redesignated sooner than 60 days prior to the termination of its last designation. *Id.* Redesignations are effective immediately following the end of the prior two-year designation period. *Id.* Although AEDPA originally provided for only one redesignation after the initial designation, the USA PATRIOT Act amendments allow for perpetual redesignations. USA PATRIOT Act § 411(c).

23. § 1189(a)(6). Revocations take effect on the date provided or, if no date is provided, upon publication of the revocation in the Federal Register. § 1189(a)(6)(B). The revocation of a designation does not affect any action based on conduct committed prior to the effective date of the revocation. § 1189(a)(7).

24. § 1189(a)(5).

25. § 1189(b)(1).

view is based solely on the administrative record and any classified information submitted by the Secretary of State for *ex parte* and *in camera* review.²⁶ If the court finds that the designation is arbitrary and capricious, it must vacate the designation.²⁷

Designation as a terrorist organization entails serious consequences.²⁸ First, the Secretary of the Treasury can freeze all of the organization's assets held by American financial institutions.²⁹ Second, members of the organization cannot enter the United States.³⁰ Third, any person who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so," faces up to fifteen years in prison (or life imprisonment if death results from such activity).³¹ The term "material support or resources" includes "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, transportation, and other physical assets, except medicine or religious materials."³² Those accused of providing such support or resources are forbidden from challenging the validity of the underlying designation of the terrorist organization during their trial.³³

26. § 1189(b)(2).

27. AEDPA provides:

The Court shall hold unlawful and set aside a designation the court finds to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), [sic] or (E) not in accord with the procedures required by law.

§ 1189(b)(3).

28. Or, as the Ninth Circuit put it in *Humanitarian Law Project v. Reno* ("Humanitarian Law Project I"), 205 F.3d 1130, 1132 (9th Cir. 2000), "[t]his provision has teeth."

29. § 1189(a)(2)(C); 18 U.S.C. § 2339B(a)(2).

30. 8 U.S.C. § 1182(a)(3)(B)(i). Additionally, aliens who engage in terrorist activity could be deported. See 8 U.S.C. § 1227(a)(4)(B) (2000 & Supp. I 2001) ("Any alien who has engaged, is engaged, or at any time after admission engages in terrorist activity (as defined in section [1182(a)(3)(B)(iv) of this title]) is deportable.").

31. 18 U.S.C. § 2339B(a)(1). Congress created this crime because it found that "some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations." AEDPA § 301(a)(6). The USA PATRIOT Act amendments increased the usual maximum penalty from 10 years to 15 years imprisonment and inserted the penalty of any term of years or life imprisonment if death resulted. USA PATRIOT Act § 810(d). The Ninth Circuit recently construed § 2339B to require that before a defendant may be convicted, he must be proven to have had "knowledge, either of an organization's designation or of the unlawful activities that caused it to be so designated." *Humanitarian Law Project v. DOJ* ("Humanitarian Law Project II"), 352 F.3d 382, 402-03 (9th Cir. 2003).

32. 18 U.S.C. § 2339A(b) (2000 & Supp. I 2001). The Ninth Circuit has held that the terms "training" and "personnel" as used in this definition are void for vagueness. *Humanitarian Law Project I*, 205 F.3d at 1137-38, *aff'd Humanitarian Law Project II*, 352 F.3d at 404.

33. § 1189(a)(8).

The Secretary of State made the first designations under section 1189 in October of 1997, releasing a list of thirty foreign terrorist organizations.³⁴ In October of 1999, the Secretary redesignated twenty-seven of those organizations, dropped three from the list, and added al Qaeda because of its involvement in the bombings of American embassies in Kenya and Tanzania.³⁵ As of October 2003, the list included thirty-six foreign terrorist organizations.³⁶

II.

SUMMARY OF PROCEDURAL DUE PROCESS LAW

The Due Process Clause of the Fifth Amendment imposes certain procedural restraints on government actions that deprive a person of life, liberty, or property.³⁷ In accordance with this procedural due process, the government must provide a person subject to a deprivation with notice of the deprivation and a right to be heard "at a meaningful time and in a meaningful manner."³⁸ The two main issues in procedural due process law are when process is due (that is, whether a person receives notice and a hearing before or after the deprivation) and what process is due (that is, the type of notice and hearing required).

Procedural due process normally requires notice and a hearing prior to a governmental deprivation.³⁹ Courts have recognized, however, that due process is not a fixed technical concept; instead, the level of procedural protection depends on the particular situation.⁴⁰ Some "emergency" situations may warrant the postponement of notice and hearings until after the deprivation.⁴¹ To deter-

34. AUDREY KURTH CRONIN, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORISTS 6 (October 21, 2003), available at <http://www.fas.org/irp/crs/RL32120.pdf>.

35. The Secretary of State dropped the Democratic Front for the Liberation of Palestine (DFLP) and the Manuel Rodriguez Patriotic Front Dissidents (FPMR/D) because they had not committed terrorist activity within the two-year designation period. *Id.* at 6 n.18. The Secretary of State also dropped the Khmer Rouge because it no longer existed. *Id.*

36. *Id.* For the complete list as of October 21, 2003, see the appendix to Cronin's report. The Secretary of State's list is not the federal government's only list of terrorist organizations. *Id.* For a discussion of these other lists, see *id.* at 3-5. See also *infra* note 339.

37. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"). The Fifth Amendment, which applies to the federal government, Pub. Util. Comm'n of the Dist. of Columbia v. Pollak, 343 U.S. 451, 461 (1952), is the source of the procedural rights here. The Due Process Clause has both procedural and substantive components. United States v. Salerno, 481 U.S. 739, 746 (1987). Procedural due process ensures that government deprivations of an individual's life, liberty, or property are "implemented in a fair manner." *Id.* By contrast, substantive due process protects individuals from government conduct that "shocks the conscience," *id.* (quoting Rochin v. California, 342 U.S. 165, 172 (1952)), or "interferes with rights 'implicit in the concept of ordered liberty.'" *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

38. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

39. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

40. Gilbert v. Homar, 520 U.S. 924, 930 (1997).

41. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 299-300 (1981).

mine when process is due, the Supreme Court uses the balancing test articulated in *Mathews v. Eldridge*.⁴² The *Mathews* test weighs the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴³

Like the timing of due process, the type of notice and hearing required by due process depends on the circumstances of the deprivation. Essentially, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections."⁴⁴ The purpose of the hearing requirement is "to minimize substantively unfair or mistaken deprivations."⁴⁵ Due process requires a meaningful hearing in which the person subject to a deprivation can present evidence on his or her behalf, but the form of the hearing may vary.⁴⁶ While due process sometimes requires a full trial-type hearing, other times the presentation of evidence through oral argument, or even written submissions, is sufficient.⁴⁷

III.

CASE LAW ON PROCEDURAL DUE PROCESS IN THE CONTEXT OF TERRORISM

Although only a few courts have addressed the issue of procedural due process as it relates to the designation of foreign terrorist organizations, different approaches to the issue have emerged. The cases described below provide a good starting point from which to discuss the "when" and "what" of procedural due process in the terrorism context.

A. *The D.C. Circuit Approach*

The D.C. Circuit crafted its approach to designations under section 1189 in three cases. In *People's Mojahedin Organization of Iran v. Department of State* ("PMOI I"), the court reviewed the Secretary of State's 1997 designation of the People's Mojahedin Organization of Iran ("PMOI") and the Liberation Tigers of

42. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Supreme Court originally created the *Mathews* test to determine what due process the Fifth Amendment requires under given circumstances. *See id.* Since then, the Court has repeatedly used the *Mathews* test to determine when process is due as well. *See, e.g., Gilbert*, 520 U.S. at 931-36; *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-56 (1993); *Connecticut v. Doehr*, 501 U.S. 1, 10-17 (1991). *But see infra* part V.C. (discussing the Court's recent use of the *Mullane* test instead of the *Mathews* test to examine the sufficiency of notice).

43. *Mathews*, 424 U.S. at 335. The Court has also referred to the second *Mathews* factor as "a cost-benefit analysis of the risks of an erroneous deprivation versus the probable value of additional safeguards." *Dusenbery v. United States*, 534 U.S. 161, 167 (2002).

44. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

45. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

46. *Boddie*, 401 U.S. at 378-79.

47. *Compare Goldberg*, 397 U.S. at 266-70, with *Mathews*, 424 U.S. at 345, 348-49.

Tamil Eelam ("LTTE") as terrorist organizations.⁴⁸ The Secretary of State found that the LTTE, which seeks an independent Tamil homeland in Sri Lanka, and the PMOI, which seeks the overthrow of the Iranian government, had committed various terrorist activities, including some against Westerners and Americans.⁴⁹ The LTTE and PMOI argued that their designations violated their procedural due process rights because they had not received pre-designation notice and hearings.⁵⁰

The court upheld the designations and made two important holdings. First, the court held that the Due Process Clause did not apply to the LTTE and the PMOI because they had no property or presence in the United States.⁵¹ Only designated organizations that had voluntary, substantial connections with the United States could mount a procedural due process challenge to their designations, although organizations with no substantial connections could still contest their designations as arbitrary and capricious.⁵² Second, the court held that it could not review the Secretary of State's finding that the terrorist activity of a designated organization threatened the national security of the United States or the security of its nationals.⁵³ The court reasoned that "it is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch."⁵⁴ Thus, the court decided that it could only review whether a designated organization was a foreign organization engaged in terrorist activity.⁵⁵ The court then found that there was substantial support in the record for the finding that the PMOI and LTTE were foreign organizations engaged in terrorist activity.⁵⁶

Despite its holdings, however, the court was clearly frustrated with the lack of procedural safeguards to ensure the truth of the Secretary of State's findings. Before describing the facts of the case, the court offered a disclaimer:

At this point in a judicial opinion, appellate courts often lay out the "facts." We will not, cannot, do so in these cases. What follows in the next two subsections may or may not be facts. The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.⁵⁷

48. 182 F.3d 17 (D.C. Cir. 1999). In denying certiorari, the Supreme Court also granted the "motion of the Solicitor General for leave to lodge under seal a copy of the sealed version of the brief for appellees filed in the United States Court of Appeals." 529 U.S. 1104 (2000).

49. 182 F.3d at 19-21.

50. *Id.* at 22.

51. *Id.*

52. *Id.* In other words, even designated organizations without voluntary, substantial connections to the United States are entitled to the statutory procedures created by Congress in section 1189.

53. *Id.* at 23.

54. *See also id.* ("These are political judgments, 'decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'") (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

55. *Id.* at 24.

56. *Id.* at 24-25.

57. *Id.* at 19.

The court also noted that “[b]ecause nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization’s activities, the ‘administrative record’ may consist of little else.”⁵⁸ At the end of its opinion, the court revealed just how uncomfortable it was with section 1189:

We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. . . . Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging.⁵⁹

These concerns colored the court’s decision in *National Council of Resistance of Iran v. Department of State* (“NCRP”).⁶⁰ In that case, the court reviewed the designation of the National Council of Resistance of Iran (“NCRI”), which the Secretary of State found to be an alias of the PMOI during its 1999 redesignation as a terrorist organization.⁶¹ The court held that the Secretary of State had substantial support for her finding that the NCRI was an alias of the PMOI and, therefore, the NCRI was a terrorist organization because the PMOI had been so designated.⁶² Unlike in *PMOI I*, however, the court addressed the NCRI’s procedural due process claim. Since the NCRI had a small bank account in the United States, the court held that the NCRI had developed a substantial enough connection in the country to receive procedural due process rights.⁶³ Moreover, since the NCRI and the PMOI were the same organization, the court held that the PMOI had also established a substantial connection in the United States.⁶⁴ Next, the court held that the NCRI’s small bank account was a cognizable property interest under the Due Process Clause.⁶⁵

The court then applied the *Mathews* test to determine when process was due to the NCRI. First, the court examined the private interest that would be affected by the designation. Relying on *United States v. James Daniel Good Real Property*,⁶⁶ in which the Supreme Court required notice and a hearing before the civil forfeiture of a home allegedly involved in a drug crime, the Secretary of State argued that, comparatively, the NCRI’s bank account was not a weighty property interest.⁶⁷ The court rejected this argument, finding that

58. *Id.*

59. *Id.* at 25.

60. 251 F.3d 192, 196 (D.C. Cir. 2001).

61. 251 F.3d at 198-99.

62. *Id.* at 199-200.

63. *Id.* at 202-05 (“[A] foreign organization that acquires or holds property in this country may invoke the protections of the Constitution when that property is placed in jeopardy by government intervention.”). Finding a sufficient property interest, the court did not address the NCRI’s arguments that the designation abridged its members’ right to travel and First Amendment rights of association and expression. *Id.* at 204-05.

64. *Id.*

65. *Id.*

66. 510 U.S. 43 (1993).

67. 251 F.3d at 206.

[t]he fact that the Supreme Court has held that the Fifth Amendment provides protection for a highly important property interest is at most neutral on the question of whether that Amendment provides protection to an arguably less important property interest, or even a concededly less important one. If anything, the [*James Daniel Good*] decision would seem to weigh in favor of affording due process protection to the interest asserted by petitioners—it being a property interest as was the interest before the Supreme Court in [that case].⁶⁸

Second, the court inquired into the risk of an erroneous deprivation stemming from the procedures set out in section 1189. The Secretary of State argued that the risk of an erroneous deprivation was low because she had to consult with the Attorney General and the Secretary of the Treasury before making the designation.⁶⁹ The court disagreed, finding that

[t]he involvement of more than one of the servants of that unitary executive in commencing a deprivation does not create an apparent substitute for the notice requirement inherent in the constitutional norm. Neither is it apparent how notice by the Article II branch of government to representatives of the Article I branch can substitute for notice to the person deprived.⁷⁰

Third, the court considered the government's interest. The Secretary of State argued that the government's compelling interest in national security warranted post-deprivation notice and hearing.⁷¹ The court found that the government's interest in national security clearly pertained to the what of due process, such as the use of classified information in a hearing, but that the government had not shown "how affording the organizations whatever process they are due before their designation as foreign terrorist organizations and the resulting deprivation of right would interfere with the Secretary's duty to carry out foreign policy."⁷² For the court, it was not clear "how the foreign policy goals of the government" would be "inherently impaired" by, for example, giving the following pre-designation notice to terrorist organizations: "We are considering designating you as a foreign terrorist organization, and in addition to classified information, we will be using the following summarized administrative record. You have the right to come forward with any other evidence you may have that you are not a foreign terrorist organization."⁷³ The court held that the NCRI must receive pre-designation due process, although the court mentioned that a showing of necessity could warrant post-designation notice and hearings in some situations.⁷⁴

Finally, the court turned to the what of due process. At this point, the court read a notice and hearing requirement into section 1189. The court decided that the Secretary of State must give a designated organization direct notice of its designation as soon as she reached the tentative decision to make the designation.⁷⁵ The notice "must include the action sought, but need not disclose the

68. *Id.*

69. *Id.* at 206-07.

70. *Id.* at 207.

71. *Id.*

72. *Id.* at 207-08.

73. *Id.* at 208.

74. *Id.*

75. *Id.* at 208-09.

classified information to be presented *in camera* and *ex parte* to the court.”⁷⁶ To fulfill the hearing requirement, the court held that the Secretary of State must “afford to entities considered for imminent designation the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations.”⁷⁷ Absent a record compiled pursuant to these requirements, the court found that it could not adequately review the designations. Accordingly, the court remanded the designations of the NCRI and PMOI back to the Secretary of State for compliance with its holdings.⁷⁸

After its redesignation as a terrorist organization in 2001, the PMOI again sought review in the D.C. Circuit. In *People’s Mojahedin Organization of Iran v. Department of State* (“PMOI II”), the PMOI argued that the Secretary of State’s use of classified information in making the redesignation violated due process.⁷⁹ The court explained that it had already determined in *NCRI* that the only process due to designated organizations was direct notice and a written hearing.⁸⁰ Reasoning that the executive branch had a compelling interest in the secrecy of its classified information and that courts were “ill-suited to determine the sensitivity of classified information,” the court reaffirmed that the Secretary of State need only disclose unclassified information used in the designation to the designated organization.⁸¹ Even if the use of classified information were error, the court held that the error was harmless because “the unclassified record taken alone is quite adequate to support the Secretary of State’s determination.”⁸² Listing several undisputed examples of terrorist activity against Iranian targets, the court stated that “we could hardly find that the Secretary of State’s determination that the Petitioner engaged in terrorist activities is ‘lacking substantial support in the administrative record taken as a whole.’”⁸³ In response, the PMOI argued that “the attempt to overthrow the despotic government of Iran, which itself remains on the State Department’s list of state sponsors of terrorism, is not ‘terrorist activity,’ or if it is, it does not threaten the security of the United States or its nationals.”⁸⁴ As in *PMOI I*, the court held that the Secretary’s finding that the PMOI threatened national security was nonjusticiable.⁸⁵ For the third time, the court upheld the designation of the PMOI as a terrorist organization.⁸⁶

One commentator has criticized the D.C. Circuit’s approach. Joshua Ellis argues that designated terrorist organizations should only receive post-designa-

76. *Id.* at 208.

77. *Id.* at 209.

78. *Id.*

79. 327 F.3d 1238, 1241-42 (D.C. Cir. 2003).

80. *Id.* at 1242.

81. *Id.* at 1242-43.

82. *Id.* at 1243.

83. *Id.* at 1243-44 (quoting § 1189(b)(3)(D)).

84. *Id.* at 1244.

85. *Id.*

86. *Id.* at 1245.

tion notice and hearings.⁸⁷ Ellis asserts that the *NCRI* court gave inadequate weight to the government's interest in national security, which he believes outweighs the risk of an erroneous deprivation and the *NCRI*'s interest in its small bank account.⁸⁸ On the issue of what process is due to designated organizations, however, Ellis agrees with the *NCRI* court's reading of direct notice and hearing requirements into section 1189.⁸⁹

B. A Different Approach

In *United States v. Rahmani*, a district court in California rejected the D.C. Circuit's approach and found section 1189 unconstitutional under the Due Process Clause.⁹⁰ *Rahmani* dealt with seven defendants charged under section 2339B with knowingly providing material aid to the PMOI.⁹¹ Although section 1189 explicitly states that defendants charged under title 18, section 2339B cannot attack the validity of the underlying designation,⁹² the defendants made two arguments attacking the PMOI's designation on procedural due process grounds in a motion to dismiss their indictment.

The defendants first tried to collaterally attack the underlying designation under *United States v. Mendoza-Lopez*,⁹³ in which the Supreme Court held that deported aliens charged with illegal reentry could collaterally attack the underlying deportation order when the deportation proceedings violated due process.⁹⁴ Referring to *NCRI*, the defendants argued that the designation of the PMOI violated procedural due process and, therefore, *Mendoza-Lopez* allowed them to attack that designation.⁹⁵ The district court rejected this argument, reasoning that on remand the Secretary of State had designated the PMOI as a terrorist organization "after the due process defects were purportedly cured" and, as a result, those defects were not prejudicial to the PMOI.⁹⁶

The court agreed with the defendants' second argument, however, holding that they could raise the constitutionality of section 1189 as a defense to a violation of section 2339B.⁹⁷ The court noted that section 1189 allows designated

87. Ellis, *supra* note 20, at 715-16.

88. *Id.* at 698-710. Interestingly, Ellis' article treats all the *Calero-Toledo* factors as a sub-analysis within the government interest prong of the *Mathews* test. *Id.* For a discussion of *Calero-Toledo* factors, see footnote 124 and accompanying text.

89. *Id.* at 710-15.

90. 209 F. Supp. 2d 1045 (C.D. Cal. 2002).

91. *Id.* at 1047; 18 U.S.C. § 2339B(a)(1).

92. 8 U.S.C. § 1189(a)(8).

93. 481 U.S. 828 (1987).

94. *Rahmani*, 209 F. Supp. 2d at 1055.

95. *Id.*

96. *Id.* The district court in *United States v. Sattar* also rejected the notion that defendants charged with § 2339B could use *Mendoza-Lopez* to attack the Secretary of State's designation of the terrorist organization to which they had allegedly provided material support. 272 F. Supp. 2d 348, 365-68 (S.D.N.Y. 2003) (holding that § 1189(a)(8) did not violate the due process rights of defendants charged with § 2339B by precluding them from challenging the factual correctness of the Secretary of State's designation of the Islamic Group ("IG") as a terrorist organization because § 1189(b) enabled the IG itself to obtain judicial review of its designation).

97. *Rahmani*, 209 F. Supp. 2d at 1054-55. In so holding, the court rejected the argument that the D.C. Circuit is "the sole arbiter of Section 1189's constitutionality." *Id.* at 1053-54. Although

organizations to seek judicial review of their designations, but forbids defendants charged under section 2339B from challenging the designation that forms the basis for their crime.⁹⁸ As a result, defendants on trial for providing material support to designated organizations would be deprived of their liberty based in part on a designation that they could not challenge.⁹⁹ For the court, this inability to challenge the underlying designation violated the defendants' due process rights.¹⁰⁰ The court also found that while the issue of whether the PMOI was a terrorist organization raised a nonjusticiable political question, the court nonetheless had "the duty to scrutinize the designation *procedure* for conformance with the Constitution."¹⁰¹

The court then proceeded to analyze the constitutionality of section 1189, finding that "[s]ection 1189, by its express terms, provides the designated organization with no notice and no opportunity to object to the administrative record or supplement it with information to contradict the designation."¹⁰² The government argued that section 1189 was not unconstitutional on its face because circumstances exist in which the statute would be valid, such as those discussed in *PMOI I* and *NCRI*.¹⁰³ But the court refused to find a constitutional application of section 1189 in *PMOI I*, because that court "explicitly found that the entity had neither presence nor property in the U.S. and, therefore, did not enjoy any constitutional rights."¹⁰⁴ The court also rejected *NCRI*, finding that the D.C. Circuit had engaged in impermissible "judicial legislation" in construing "non-existent provisions into a statute to save it from unconstitutionality."¹⁰⁵ Thus, the court found that, due to the lack of any notice and hearing for designated organizations, section 1189 was unconstitutional under the Due Process Clause.¹⁰⁶ As a consequence, the government could not rely on section 1189

section 1189 specifically provides for judicial review of designations in the D.C. Circuit, the district court found that this provision did not provide "clear and convincing evidence" that Congress intended to prevent other courts from considering the constitutionality of section 1189. *Id.*

98. *Id.* at 1054-55.

99. *Id.*

100. *Id.* But see *Sattar*, 272 F. Supp. 2d at 367 ("The inability to raise as a defense in this case the correctness of the Secretary's determination that [the IG] is [a foreign terrorist organization] is not itself a violation of the defendants' rights to due process. The element of the offense is the designation of the IG as an FTO, not the correctness of the determination."). Cf. *Yakus v. United States*, 321 U.S. 414, 469-89 (1944) (Rutledge, J., dissenting) (arguing that splitting up a criminal prosecution into two parts, an administrative proceeding without the protections afforded criminal defendants and a later criminal proceeding where the result of the administrative proceeding could not be challenged, is unconstitutional).

101. *Rahmani*, 209 F. Supp. 2d at 1051-52 (emphasis in original).

102. *Id.* at 1055.

103. *Id.* at 1055-56.

104. *Id.* at 1056.

105. *Id.* at 1056-57.

106. *Id.* at 1058.

designations in section 2339B prosecutions.¹⁰⁷ The court therefore dismissed the indictment against the defendants.¹⁰⁸

C. Conflicting Approaches in Cases Involving the Designation of Specially Designated Global Terrorists Under Executive Order 13,224

Courts have also dealt with procedural due process issues in cases involving the designation of Specially Designated Global Terrorists ("SDGTs") under Executive Order 13,224,¹⁰⁹ which President George W. Bush promulgated pursuant to the International Emergency Economic Powers Act ("IEEPA").¹¹⁰ Courts considering designations under Executive Order 13,224 and section 1189 face similar procedural due process issues, so examining the former sheds light on the present analysis.

Under IEEPA, the President can declare a national emergency to deal with foreign threats "to the national security, foreign policy, or economy of the United States."¹¹¹ After declaring a national emergency, the President has broad authority to regulate international economic transactions relating to the emergency.¹¹² Following the terrorist attacks of September 11, 2001, President Bush declared a national emergency and signed Executive Order 13,224¹¹³ as a response to the terrorist threat.¹¹⁴ Executive Order 13,224 authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate any individual or entity determined "to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the

107. *Id.* at 1058-59. Confronted with the government's argument that "invalidating Section 1189 would have serious negative consequences on this country's counter-terrorism efforts," the court decided that "[w]hen weighted against a fundamental constitutional right which defines our very existence, the argument for national security should not serve as an excuse for obliterating the Constitution." *Id.* at 1057.

108. *Id.* at 1059. The United States has appealed the district court's decision to the Ninth Circuit. See Brief for the Appellant, *United States v. Rahmani*, 2002 WL 32298238 (9th Cir. 2002) (No. 02-50355). No opinion has been issued yet.

109. 66 Fed. Reg. 49,079 (Sept. 23, 2001).

110. Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. § 1701 et seq.).

111. 50 U.S.C. § 1701(a) (2000).

112. 50 U.S.C. § 1702(a)(1)(B) (2000 & Supp I. 2001). IEEPA is modeled after the Trading with the Enemy Act ("TWEA"), Pub L. No. 65-91, 40 Stat. 411 (1917) (codified at 50 U.S.C. App. § 1 et seq.), which grants the President similar authority to regulate international economic transactions in wartime. 50 U.S.C. App. § 5 (2000).

113. Exec. Order No. 13,224, 66 Fed. Reg. 49,079, appears to be modeled after Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), in which President Bill Clinton authorized the Secretary of the Treasury to block transactions with Specially Designated Terrorists ("SDTs") who were disrupting the Middle East peace process.

114. The Executive Order defines the term "terrorism" as

an activity that (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears intended (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

§ 3(d), 66 Fed. Reg. at 49,080; cf. 8 U.S.C. § 1182(a)(3)(B)(iii) (definition of terrorist activity as used in § 1189).

United States" as an SDGT.¹¹⁵ The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, can further designate as SDGTs any organizations owned or controlled by, or acting on behalf of SDGTs designated by the Secretary of State.¹¹⁶ The Secretary of the Treasury has the power to block all property interests of SDGTs in the United States and prohibit any transactions involving the blocked property interests.¹¹⁷

The D.C. Circuit and the Seventh Circuit have split on the issue of when due process should be afforded to SDGTs. In *Holy Land Foundation for Relief and Development v. Ashcroft* ("*Holy Land Foundation*"), the D.C. Circuit held that the pre-designation notice and hearing requirements of *NCRI* also apply to the designation of SDGTs.¹¹⁸ By contrast, in *Global Relief Foundation v. O'Neill*, the Seventh Circuit held that post-designation notice and hearings were sufficient for SDGTs.¹¹⁹ The courts did agree, however, that any classified information utilized in these designations need not be disclosed to the designated organizations.¹²⁰

In *Holy Land Foundation*, the Secretary of the Treasury designated the Holy Land Foundation for Relief and Development ("*HLF*"), a large Islamic charity, as an SDGT because it acted for or on behalf of Hamas, a militant Palestinian group previously designated as an SDGT.¹²¹ Seeking a preliminary injunction against the designation, the HLF argued that the designation violated its procedural due process rights because the government had not provided it with notice or a hearing prior to its designation.¹²²

The district court found that *NCRI* did not control its decision in this case because, unlike in *NCRI*, "a Presidentially declared national emergency (as required by the IEEPA) existed to justify the absence of notice and an opportunity to be heard" prior to the designation.¹²³ The court examined the HLF's due process claim in light of the test outlined in *Calero-Toledo v. Pearson Yacht Leasing Company*.¹²⁴ To justify post-deprivation notice and hearings under the *Calero-Toledo* test, the government must show that

115. § 1(b), 66 Fed. Reg. at 49,079.

116. § 1(c), 66 Fed. Reg. at 49,079. The Secretary of the Treasury has delegated such decisions to the Department's Office of Foreign Assets Control ("*OFAC*"). See Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333, 336-39 (2002).

117. §§ 2, 4, 66 Fed. Reg. at 49,080. These sections of the Executive Order also prohibit contributions to SDGTs. *Id.*; cf. 18 U.S.C. § 2339B (prohibiting knowingly providing material support or resources to a designated terrorist organization).

118. 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 2004 WL 368125 (Mar. 1, 2004).

119. 315 F.3d 748 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 531 (2003).

120. *Holy Land Found.*, 333 F.3d at 164; *Global Relief Found.*, 315 F.3d at 754.

121. *Holy Land Found.*, 333 F.3d at 159. Hamas had also been designated as an SDT under Exec. Order No. 12,497, 60 Fed. Reg. 5079. *Id.* at 159-60.

122. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 64, 77 (D.D.C. 2002), *aff'd*, *Holy Land Found.*, 333 F.3d 156.

123. *Id.* at 76.

124. 416 U.S. 663, 679-80 (1974). In *Calero-Toledo*, the Supreme Court held that post-deprivation notice and hearing was sufficient for the seizure of a yacht containing drugs. *Id.* The *Calero-Toledo* test relied on factors originally outlined in *Fuentes*, 407 U.S. at 90-91 (1972).

(1) the deprivation was necessary to secure an important government interest; (2) there has been a special need for very prompt action; and (3) the party initiating the deprivation was a government official responsible for determining, under the standards, [sic] of a narrowly drawn statute, that it was necessary and justified in a particular instance.¹²⁵

First, the court recognized that the designation served the important governmental interest of combating terrorism.¹²⁶ Second, the court found that “prompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order.”¹²⁷ Third, the court found that government officials, rather than private parties, blocked the HLF’s property interest pursuant to “the IEEPA and two Executive Orders that specifically authorize[d] such action in limited circumstances.”¹²⁸ Therefore, according to the district court, the HLF was only entitled to post-designation notice and hearing, and its procedural due process rights had not been violated.¹²⁹

On appeal, the D.C. Circuit affirmed the district court’s holding but relied on its own reasoning in *NCRI* rather than that of the district court. The appellate court held that “[e]ven if Treasury’s initial designation [in December 2001] arguably violated HLF’s due process rights” because it lacked pre-designation notice and hearing, the Secretary of the Treasury had given the HLF the “notice and opportunity for response” required by *NCRI* prior to its redesignation as an SDGT in May 2002.¹³⁰ Thus, the “HLF’s funds are blocked currently by a redesignation which Treasury applied in accordance” with procedural due process.¹³¹ Also consistent with *NCRI*, the court reiterated that “we do not require an agency to provide procedures which approximate a judicial trial; therefore, HLF has no right to confront and cross-examine witnesses.”¹³² The court also explained that the Secretary of the Treasury did not have to disclose the classified information utilized in making the designation, reasoning that the executive branch had the privilege to maintain the secrecy of its classified information and that “IEEPA expressly authorizes *ex parte* and *in camera* review of classified information.”¹³³

In *Global Relief Foundation*, the Secretary of the Treasury designated the Global Relief Foundation (“GRF”), an Illinois-based Islamic charity, as an SDGT for funding various terrorism activities.¹³⁴ Pursuing a preliminary injunction against its designation, the GRF argued that its procedural due process rights were violated because it had no notice or hearing before its designation.¹³⁵ Like the district court in *Holy Land Foundation*, the district court in this

125. *Holy Land Found.*, 219 F. Supp. at 76 (citing *Calero-Toledo*, 416 U.S. at 679-80).

126. *Id.* at 76-77.

127. *Id.* at 77.

128. *Id.*

129. *Id.* at 76-77.

130. *Holy Land Found.*, 333 F.3d at 163-64.

131. *Id.* at 163.

132. *Id.* at 164 (internal citations omitted).

133. *Id.* In this case, the court essentially standardized its procedural due process requirements for the designation of terrorist organizations under section 1189 and Executive Order 13,224.

134. 315 F.3d at 750-51.

135. *Id.*

case also applied the *Calero-Toledo* test.¹³⁶ The court held that the GRF could receive only post-designation due process because of “the need to prevent the flight of assets and destruction of records” and “the compelling government interest in promoting its declared national security and foreign policy goals.”¹³⁷ Furthermore, the court found that the post-designation administrative procedures available to the GRF, such as the right to present evidence that the designation was in error and the opportunity to “request licenses for payment of certain expenses,” were adequate.¹³⁸ The court also found that the government did not violate due process by denying the GRF access to classified documents because “Congress and the President have determined a need for the secrecy of government information” in this situation.¹³⁹

The Seventh Circuit affirmed, holding that the Constitution did not entitle the GRF to pre-designation notice and hearing.¹⁴⁰ According to the court, pre-designation notice and hearings “would allow any enemy to spirit assets out of the United States.”¹⁴¹ Acknowledging that “pre-seizure hearing is the constitutional norm,” the court nonetheless stated that “postponement is acceptable in emergencies.”¹⁴² Although “[r]isks of error rise when hearings are deferred,” the court reasoned that “these risks must be balanced against the potential for loss of life if assets should be put to violent use.”¹⁴³ The court noted that if its designation “turns out to be invalid,” the GRF could “obtain recompense under the Tucker Act.”¹⁴⁴ Yet, if the GRF’s designation was not in error, the “GRF does not have any grievance, any more than a cocaine ring has a right to recover the value of the illegal drugs or a thief a right to be paid the value of confiscated burglar’s tools.”¹⁴⁵ The court also held that “[a]dministration of the IEEPA is not rendered unconstitutional because that statute authorizes the use of classified evidence that may be considered *ex parte* by the district court.”¹⁴⁶ Noting that *ex parte* consideration of classified information was common, the court reasoned that “[t]he Constitution would indeed be a suicide pact if the only way to curtail enemies’ access to assets were to reveal information that might cost lives.”¹⁴⁷

136. *Global Relief Found. v. O’Neill*, 207 F. Supp. 2d 779, 803-04 (N.D. Ill.), *aff’d*, 315 F.3d 748 (7th Cir. 2002).

137. *Id.*

138. *Id.* at 804-05. This licensing mechanism does not seem to be available under AEDPA.

139. *Id.* at 805.

140. *Global Relief Found.*, 315 F.3d at 754.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* More specifically, if its designation was in error, the GRF could bring a Takings Clause claim in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a) (2000). *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (internal citations omitted). The court noted that *ex parte* consideration of classified information is common in criminal cases, as well as those involving the Freedom of Information Act and the Foreign Intelligence Surveillance Act. *Id.*

IV.

COMPARISON TO PROCEDURAL DUE PROCESS IN THE CONTEXT
OF COMMUNISM

The current threat that terrorism poses to the national security of the United States is similar to the national security threat posed by communism during the Cold War.¹⁴⁸ Therefore, an examination of *McGrath*,¹⁴⁹ where the Supreme Court confronted the issue of procedural due process in the context of the threat of communism, can inform a discussion of the process due to designated terrorist organizations.

In *McGrath*, three entities designated as Communist organizations by the Attorney General mounted procedural due process challenges to their designations.¹⁵⁰ Under Executive Order 9835,¹⁵¹ the Attorney General had the authority to designate any entity as a Communist organization.¹⁵² The Attorney General then provided the names of designated organizations to the Loyalty Review Board, which considered membership in them as evidence in determining whether to fire federal employees or refuse to hire applicants for federal employment on the grounds of disloyalty to the U.S. government.¹⁵³ Executive Order 9835 provided for no pre-designation notice or hearing, requiring only that the

148. Compare AEDPA § 301(a)(1) (“[I]nternational terrorism is a serious and deadly problem that threatens the vital interests of the United States.”); H. REP. NO. 104-383, pt. 2, at 43 (“Terrorist organizations have developed sophisticated international networks that allow them great freedom of movement, and opportunity to strike, including inside the United States.”), and Exec. Order. No. 13,224, 66 Fed. Reg. at 49,079 (“[G]rave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001 . . . and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”), with Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 93 (1961) (“Congress has found that there exists a world Communist movement, foreign-controlled, whose purpose it is by whatever means necessary to establish Communist totalitarian dictatorship in countries throughout the world, and which has already succeeded in supplanting governments in other countries.”), and *id.* at 93-94 (“Congress has found that . . . the foreign government controlling the world Communist movement establishes in various countries action organizations which, dominated from abroad, endeavor to bring about the overthrow of existing governments, by force if need be, and to establish totalitarian dictatorships subservient to that foreign government.”).

149. 341 U.S. 123.

150. *Id.* at 130-37. The three organizations were the Joint Anti-Fascist Refugee Committee, which raised funds for exiles and refugees of the Spanish Civil War, the National Council of American-Soviet Friendship, Inc., which desired to strengthen relations between the Soviet Union and the United States, and the International Workers Order, a fraternal society that supplied insurance to its members. *Id.*

151. Exec. Order. No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947), rested on the authority of section 9A of the Hatch Political Activity Act, 53 Stat. 1148 (1939) (codified at 5 U.S.C. § 118(j) (Supp. III 1946)), which prohibited federal employees from being a member of “any political party or organization which advocates the overthrow of our constitutional form of government in the United States.”

152. 12 Fed. Reg. 1935 § (III)(2)(3). The Attorney General could also designate organizations as totalitarian, fascist, subversive, or committed to the violent overthrow the United States government. *Id.*

153. *Id.* § (III)(2)(3), (V)(8). At their loyalty hearing, employees could not challenge the underlying designation of an organization as Communist. *McGrath*, 341 U.S. at 184; cf. § 1189(a)(8) (defendant charged with § 2339B cannot challenge underlying designation under § 1189).

Attorney General make the designation "after appropriate investigation and determination."¹⁵⁴ In their complaints, the three organizations averred that the designations had caused a decline in their membership, a decrease in their financial support, and the stigma of public disgrace for their remaining members.¹⁵⁵

Eight justices produced six opinions in the case.¹⁵⁶ Announcing the judgment of the Court, Justice Burton vacated the designations of the three organizations without addressing the due process issue because the Attorney General defended the designations based "upon the very facts alleged by" the organizations in their complaints, which did not "state facts from which alone a reasonable determination can be derived that the organizations are Communist."¹⁵⁷ Four concurring opinions each found that the designations violated the due process rights of the organizations.¹⁵⁸ A three-justice dissent rejected the due process claim.¹⁵⁹ Despite the fragmented nature of the decision, the similarity between designations under Executive Order 9835 and section 1189 warrant a look at how the concurring justices handled the procedural due process issue.

Since the concurring justices believed that the three organizations had suffered an actionable deprivation,¹⁶⁰ they went on to discuss the due process issue. Examining the when of due process in this case, Justice Frankfurter stated that "the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society."¹⁶¹ While the "precise nature of the [organizations'] interest that has been adversely affected" must "be weighed against a claim of the greatest of all public interests, that of national security," Justice Frankfurter nonetheless found that "[n]othing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to the organizations the nature of the case against them and to permit them to meet it if they can."¹⁶² Justice Black agreed with Justice Frank-

154. 12 Fed. Reg. 1935 § (III)(2)(3); see also *McGrath*, 341 U.S. at 138 n.11, 161.

155. *McGrath*, 341 U.S. at 130-35.

156. *Id.* at 123. Justice Clark did not participate. *Id.*

157. *Id.* at 126. Justice Douglas joined Justice Burton's opinion.

158. Justices Frankfurter, Douglas, and Jackson thoroughly addressed the due process issue. *Id.* at 160-74 (Frankfurter, J., concurring), 175-83 (Douglas, J., concurring), 186-87 (Jackson, J., concurring). In his concurrence, Justice Black stated that he agreed with Justice Frankfurter's conclusions on the due process issue. *Id.* at 143.

159. The dissenting justices (Justice Reed joined by Chief Justice Vinson and Justice Minton) did not believe that the designations deprived the organizations of any liberty or property interest. *Id.* at 202.

160. See *id.* at 160-61 (Frankfurter, J., concurring) ("This designation imposes no legal sanction on these organizations other than it serves as evidence in ridding the Government of persons reasonably suspected of disloyalty. It would be blindness, however, not to recognize that in the conditions of our time such designation drastically restricts the organizations, if it does not proscribe them."); *id.* at 175 (Douglas, J., concurring) ("An organization branded as 'subversive' by the Attorney General is maimed and crippled. The injury is real, immediate, and incalculable."); *id.* at 185 (Jackson, J., concurring) (finding that the deprivation of present and future government employment caused by an organization's designation was enough for an organization to state a due process claim); *id.* at 143 (Black, J., concurring) (standing was derived from right of organizations to be free from "unjustified governmental defamation").

161. *Id.* at 168 (Frankfurter, J., concurring).

162. *Id.* at 163-64, 172-73 (Frankfurter, J., concurring). This somewhat hints at the Court's future *Mathews* test.

furter that “the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and a fair hearing.”¹⁶³ Similarly, Justice Douglas found that “[t]he gravity of the present charges is proof enough of the need for notice and hearing before the United States officially brands these organizations as ‘subversive.’”¹⁶⁴ Justice Jackson also found that “[t]o promulgate with force of law a conclusive finding of disloyalty, without [a] hearing at some stage before such finding becomes final, is a denial of due process of law.”¹⁶⁵ Thus, a scattered plurality agreed that organizations designated as Communist should receive pre-designation notice and hearing.

As to the what of due process, Justice Frankfurter touched on the type of notice and hearing required for a designated organization. To ensure the correctness of the designation, Justice Frankfurter suggested that the Attorney General should provide the designated organization with notice of the basis for the designation and give the designated organization a chance to submit evidence to rebut the designation.¹⁶⁶ According to Justice Frankfurter, the hearing “must be a real one, not a sham or a pretense.”¹⁶⁷ The rationale behind Justice Frankfurter’s concept of a hearing was that “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights,” because “[s]ecrecy is not congenial to truth-seeking” and “[a]ppearances in the dark are apt to look different in the light of day.”¹⁶⁸ His concurrence noted that “[t]he plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.”¹⁶⁹ Justice Douglas also believed that the hearing must consist of “an opportunity to appear and rebut the charge.”¹⁷⁰

Having pieced together the views of the concurring justices, the question becomes what this case means for the issues of when and what process is due to designated terrorist organizations.¹⁷¹ Certainly, strong similarities exist between *McGrath* and cases involving designations under section 1189. In both

163. *McGrath*, 341 U.S. at 143 (Black, J., concurring) (basing his agreement on the assumption that “the Constitution permits the executive officially to determine, list and publicize individuals and groups as traitors and public enemies”). However, Justice Black denied that assumption. *Id.* Citing the First Amendment, he did not believe the executive had such authority “with or without a hearing.” *Id.* For him, the designation also amounted to an unlawful bill of attainder. *Id.*

164. *Id.* at 178 (Douglas, J., concurring).

165. *Id.* at 186 (Jackson, J., concurring). Justice Jackson noted that he agreed with Justice Frankfurter on this point. *Id.*

166. *See id.* at 171-72 (Frankfurter, J., concurring) (“No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”).

167. *Id.* at 164 (Frankfurter, J., concurring) (quoting *Palko*, 302 U.S. at 327).

168. *Id.* at 170-71 (Frankfurter, J., concurring).

169. *Id.* at 171 (Frankfurter, J., concurring) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting)).

170. *Id.* at 178 (Douglas, J., concurring).

171. The *PMOI I* court cited *McGrath*, but found it inapplicable because the *PMOI* had no due process rights. 182 F.3d at 22. The *NCRI* court, which reached the due process issue, did not cite to the case. 251 F.3d 192.

instances, pursuant to legal authority,¹⁷² a high-level executive official¹⁷³ designates organizations deemed to be national security threats, which results in harsh consequences for the organizations¹⁷⁴ and their members,¹⁷⁵ without affording prior notice and hearings to the organizations. Had a full majority in *McGrath* reached the same conclusions as the concurrences, courts facing section 1189 would likely be bound to follow the same reasoning. Given the fragmented plurality, however, this cannot be true.¹⁷⁶ At best, the concurrences, especially Justice Frankfurter's,¹⁷⁷ serve as merely persuasive authority.

V.

WHEN PROCESS IS DUE TO TERRORIST ORGANIZATIONS DESIGNATED UNDER SECTION 1189

A. *Alien Presence in the United States*

The first inquiry in the due process analysis is whether foreign terrorist organizations can even invoke the Due Process Clause. The case law regarding the point at which aliens receive constitutional protections is well established. While aliens seeking entry into the United States have only those due process rights granted by Congress, lawful resident aliens possess certain due process rights under the Fifth Amendment.¹⁷⁸ The Supreme Court has also held that alien organizations possess Fifth Amendment rights when they hold property in

172. Compare § 1189 (congressional authority for designations), with Exec. Order No. 9835, 12 Fed. Reg. 1935 (presidential authority for designations).

173. Compare § 1189(a)(1) (designation made by Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury), with Exec. Order No. 9835, § (III)(2)(3), 12 Fed. Reg. 1935 (designation made by the Attorney General).

174. Compare § 1189(a)(2)(C) (designation results in the freezing of terrorist organization's funds), with *McGrath*, 341 U.S. at 130-35 (designations led to the loss of membership and financial support).

175. Compare § 2239B (designation is element in crime of knowingly providing material aid to terrorist organization), with Exec. Order No. 9835, § (IV)(8), 12 Fed. Reg. 1935 (designation presented as evidence in Loyalty Review Board hearing).

176. *But see* Paul v. Davis, 424 U.S. 693, 702-05 (1976) (piecing together the opinions in *McGrath* to show that "at least six of the eight Justices" viewed a stigma imposed by official action "as an insufficient basis for invoking" the Due Process Clause). It is probably a stretch to say that a majority of the Court agreed that pre-designation due process was necessary in this case. With one justice absent, three justices came to that conclusion. A fourth, Justice Black, only mentioned his agreement in passing and clearly stated that he believed the entire Act to be unconstitutional under the First Amendment and the Bill of Attainder Clause. Even if all the justices had agreed, they would still only have comprised a plurality. In *City of Erie v. Pap's A.M.*, the Court stated that "[i]t is permissible to find precedential effect in a fragmented decision," but "to do so a majority of the Court must have been in agreement on the concept that is deemed to be the holding." 529 U.S. 277, 285 (2000).

177. Justice Frankfurter's concurrence is frequently cited for its legal propositions. *See, e.g., Mathews*, 424 U.S. at 333; *Fuentes*, 407 U.S. at 81.

178. Compare *Knauff*, 338 U.S. at 544 (holding that an alien entering the United States is entitled only to "[w]hatever the procedure authorized by Congress is"), with *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) ("It is well-established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment."); *Rafeedie v. INS*, 880 F.2d 506, 522 (D.C. Cir. 1989) ("[I]t is clear that, in defining an alien's right to due process, the Supreme Court is concerned with whether he is a permanent resident.").

the United States.¹⁷⁹ This is because, as the Supreme Court articulated in *United States v. Verugo-Urquidez*, “aliens receive constitutional protections when they have [voluntarily] come within the territory of the United States and developed substantial connections with the country.”¹⁸⁰ In that case, the issue was whether a Mexican drug dealer, who had been arrested in Mexico and transported to the United States for trial, could challenge a post-arrest search of his Mexican home by United States law enforcement agents under the Fourth Amendment.¹⁸¹ The Court, after reviewing its cases on alien constitutional rights, many of which concerned the Due Process Clause, held that the defendant had no Fourth Amendment protections because he had “no previous significant voluntary connection with the United States.”¹⁸² Therefore, the D.C. Circuit seems to be correct that designated organizations with voluntary, substantial connections to the United States must receive due process rights, while designated organizations without such connections are only entitled to what process Congress gave them in section 1189.¹⁸³

B. *Liberty or Property Interest Implicating the Due Process Clause*

The second inquiry in the due process analysis is whether designations under section 1189 implicate a liberty or property interest¹⁸⁴ within the meaning of the Due Process Clause. According to the Supreme Court, “[p]roperty interests are not created by the Constitution, [but rather] ‘they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’”¹⁸⁵ Some examples of property interests previously found to implicate the Due Process Clause are real property, personal property, employment, and governmental entitlements.¹⁸⁶ The cognizable property interests of designated organizations include their bank accounts, financial assets, and possibly even their interests in their tax exempt status or organization

179. See *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489-492 (1931) (holding that the Fifth Amendment Takings Clause applies to an alien friend corporation with property in the United States).

180. 494 U.S. 259, 271 (1990).

181. *Id.* at 261-62.

182. *Id.* at 271, 274-75.

183. Compare *PMOI I*, 182 F.3d at 22 (holding that the PMOI had no due process rights because it did not have voluntary, substantial connections with the United States), with *NCRI*, 251 F.3d at 202-05 (holding that, based on a small bank account, the *NCRI* had a sufficient connection with the United States to possess due process rights). See also *32 County Sovereignty Comm. v. Dept. of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (holding that the possession of post office boxes and a bank account by members of designated organizations did not establish that the organizations had developed substantial connections with the United States for the purposes of the Due Process Clause).

184. The Supreme Court does not make “a categorical distinction between a deprivation of liberty and one of property”; both interests receive equal protection under the Due Process Clause. *Zinerman v. Burch*, 494 U.S. 113, 132 (1990).

185. *Loudermill*, 470 U.S. at 538 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). However, a property interest “cannot be defined by the procedures provided for its deprivation any more than can life or liberty.” *Id.* at 541.

186. *James Daniel Good*, 510 U.S. at 53-54 (home); *Calero-Toledo*, 416 U.S. at 679 (yacht); *Loudermill*, 470 U.S. at 538-41 (continued public employment); *Goldberg*, 397 U.S. at 262-64 (welfare benefits).

headquarters.¹⁸⁷ However, a designated organization's interest in its reputation alone is not an actionable property interest.¹⁸⁸

While those liberty interests that only an individual can enjoy probably do not apply to organizations,¹⁸⁹ they might still enjoy other liberty interests implicated by section 1189. For example, a designated organization has a liberty interest in its First Amendment right to solicit contributions.¹⁹⁰ A designated organization might also have associational standing to assert its members' liberty interests, such as their rights to travel¹⁹¹ and to make political and charitable contributions,¹⁹² on their behalf.¹⁹³

187. *NCRI*, 251 F.3d at 205 (small bank account); *Holy Land Foundation*, 219 F. Supp. 2d at 70-71 (contributions made by the HLF to Hamas suggest that the HLF had millions of dollars in assets); *Global Relief Foundation*, 207 F. Supp. 2d at 785 (contributions received by the GRF suggest millions of dollars in assets); *Paul*, 424 U.S. at 704-05 (suggesting that tax exempt status would be an actionable property interest); *James Daniel Good*, 510 U.S. at 53-54 (real property).

188. *Paul*, 424 U.S. at 712 (reputation alone is not a property or liberty interest under the Due Process Clause).

189. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that liberty interests include the rights to be free from bodily restraint, to acquire useful knowledge, to marry, to establish a home and raise children, to worship God, and "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"). The interest in life also probably does not apply to organizations. See Ellis, *supra* note 20, at 686.

190. See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 123 S. Ct. 1829, 1836 (2003); *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 789 (1988); *Sec'y of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959-62 (1984); *Village of Schaumburg v. Citizens for a Better Environ.*, 444 U.S. 620, 632 (1980).

191. See, e.g., *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Kwong Hai Chew*, 344 U.S. at 593-94, 601 (holding that a resident alien who was taken into custody upon return from a foreign voyage could not be denied procedural due process). Since the members of designated organizations cannot enter the United States, a member who is a resident alien or citizen might not be able to travel abroad and reenter the United States. See *NCRI*, 251 F.3d at 204.

192. Section 2339B, which prohibits the knowing provision of material support and resources to terrorist organizations, could implicate the First Amendment rights of a designated organization's members and contributors, who contribute money and possibly other material resources to the designated organization. See *Buckley v. Valeo*, 424 U.S. 1, 26-30 (1976) (announcing a First Amendment right to make political contributions); see also *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) ("The Supreme Court has acknowledged that contributions, in both charitable and political contexts, function as a general expression of support for the recipient and its views and, as such, are speech entitled to protection under the First Amendment."); *Brock v. Local 375, Plumbers Int'l Union of Amer.*, 860 F.2d 346, 349 (9th Cir. 1988) (stating that charitable contributions benefit from First Amendment protection).

193. The Court has stated that

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

Although the *NCRI* raised its members' right to travel and First Amendment rights when challenging its designation, the *NCRI* court did not reach those issues. *NCRI*, 251 F.3d at 204-05. If it had, it likely would have held that a designated organization can assert the First Amendment rights of its members. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (allowing the NAACP to assert the First Amendment rights of its members in challenging the compelled disclosure of its membership lists); see also *Fla. League of Prof. Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459 (11th Cir. 1996) (stating that an organization has standing to litigate its members' First Amendment rights when its members must either "refrain from engaging in protected First Amendment activity or risk civil sanction for alleged unethical conduct"). It is less likely that a designated

C. When Terrorist Organizations are Entitled to Due Process

The *Mathews* test is the proper test for determining when process is due to terrorist organizations designated under section 1189. Although some district courts have applied the *Calero-Toledo* test to designations under Executive Order 13,224,¹⁹⁴ they have done so mistakenly. First, while the Court in *Calero-Toledo* relied on a formulation of its procedural due process precedent articulated earlier in *Fuentes v. Shevin*,¹⁹⁵ the *Mathews* Court reformulated that precedent into a new test two years after *Calero-Toledo*.¹⁹⁶ The *Mathews* Court found that "prior decisions indicate that identification of the specific dictates of due process generally requires consideration" of the private interest, the risk of an erroneous deprivation, and the governmental interest.¹⁹⁷ Second, the Supreme Court fashioned the *Mathews* test in a case dealing with administrative procedures, making it even more appropriate for use in cases involving designations made by the executive branch.¹⁹⁸ Third, since the *Mathews* decision, the Supreme Court has consistently applied the *Mathews* test to determine when process is due in particular contexts.¹⁹⁹

organization could assert its members' right to travel. In *Communist Party of the United States*, the Supreme Court held that the Communist Party could not contest the potential deprivation of its members' right to receive and use passports. 367 U.S. at 81. To be comprehensive, this article assumes associational standing and addresses these potential liberty interests.

This article does not, however, assume associational standing for a designated organization to assert its members' liberty interest in being free from deportation, see note 30 *supra*, because it is highly unlikely that a court would find associational standing. Resident aliens do have a strong liberty interest in being free from deportation. See *Kiarelddeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) ("*Kiarelddeen P*") (noting that a resident alien's "interest in his physical liberty," including not being "removed from his community, his home, and his family," "must be accorded the utmost weight"); see also *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1068-69 (9th Cir. 1995) ("AADC") (same). But the first prong of the *Hunt* test requires that at least one member of the organization suffer "immediate or threatened injury as a result of the challenged action." 432 U.S. at 342 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Since no deportation proceedings would have been brought against any of the organization's alien members at the time of its designation, and it is possible that deportation proceedings would never be brought, those alien members could claim no injury and would not themselves have standing to sue at that point. Cf. *Communist Party of the United States*, 367 U.S. at 16-17, 79-81 (holding that the Communist Party lacked standing to address the denaturalization provisions of the Subversive Activities Control Act, which included a provision making the Party's alien members deportable). Moreover, deportation proceedings are highly factual in nature and require the presence of the individual subject to deportation. Cf. *Rent Stabilization Ass'n of New York v. Dinkins*, 5 F.3d 591, 596-97 (2d Cir. 1993) (holding that highly factual Takings Clause claims cannot be asserted by organizations on behalf of their members).

194. See discussion *supra* part III.C.

195. 407 U.S. at 90-91.

196. *Mathews*, 424 U.S. at 335.

197. *Id.*

198. *Id.* at 319-26; *California ex rel. Lockyer v. FERC*, 329 F.3d 700, 710 n.8 (9th Cir. 2003) (stating that "the *Mathews v. Eldridge* analysis is well-suited to evaluating the appropriateness of the [Federal Energy Regulatory] Commission's procedures, since '[t]he *Mathews* balancing test was first conceived to address due process claims arising in the context of administrative law") (quoting *Medina v. California*, 505 U.S. 437, 444 (1992)).

199. See, e.g., *Gilbert*, 520 U.S. at 931-36; *James Daniel Good*, 510 U.S. at 53-56; *Doehr*, 501 U.S. at 10-17; *Loudermill*, 470 U.S. at 543-45; *Dixon v. Love*, 431 U.S. 105, 112-115 (1977).

Finally, the *Mathews* test remains appropriate despite the Court's recent decision in *Dusenbery v. United States*.²⁰⁰ There, the Court held that the *Mullane* test of reasonableness under the circumstances,²⁰¹ rather than the *Mathews* test, applies to the sufficiency of notice.²⁰² In so holding, the Court stated that although it had applied the *Mathews* test to evaluate due process claims in different contexts, the Court had "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims."²⁰³ This statement has created some confusion about when the *Mathews* test still does apply.²⁰⁴ Even *Mathews* only held that "the identification of the specific dictates of due process generally requires consideration" of the three *Mathews* factors.²⁰⁵ Since *Dusenbery*, lower courts have consistently applied the *Mullane* test to determine the sufficiency of notice,²⁰⁶ but have declined to apply it either to examine the type of hearing required by due process,²⁰⁷ or when that notice and hearing are due.²⁰⁸ While it could be argued that *Mullane*'s reasonableness standard is broad enough to address all these concerns,²⁰⁹ it is not preferable to the *Mathews* test, which specifically addresses factors a court would examine in conducting a more general reasonableness analysis under *Mullane*. The *Mathews* test is thus better suited to determine the when of due process than the comparatively vague and indeterminate *Mullane* standard. This article therefore utilizes the *Mathews* test to determine the when of due process.

The *Mathews* test weighs (1) the private interest affected by the government's action, (2) the risk of an erroneous deprivation of that interest by the procedures employed by the government, as well as the probable value of any

200. *Dusenbery*, 534 U.S. at 167-68.

201. *Mullane*, 339 U.S. at 314 (requiring notice to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

202. 534 U.S. at 167-68.

203. *Id.*

204. *See, e.g.*, *People v. Gonzalez*, 31 Cal. 4th 745, 754, 74 P.3d 771, 777 (2003) (expressing uncertainty as to which test governs the sufficiency of notice in the criminal context following *Dusenbery*).

205. *Mathews*, 424 U.S. at 334-35 (emphasis added).

206. *See, e.g.*, *Mard v. Town of Amherst*, 350 F.3d 184, 190-91 (2003) (applying *Mullane* to test the sufficiency of notice of the impending termination of a firefighter's injury leave benefits); *James v. City of Dallas*, 2003 WL 22342799, at *15-17 (N.D. Tex. Aug. 28, 2003) (applying *Mullane* to test the sufficiency of the Dallas Urban Rehabilitation Standards Board's notice of hearings, default orders, and demolition orders); *cf. Gonzalez*, 31 Cal. 4th at 754, 74 P.3d at 777-78 (holding that, whether the *Mullane* or *Mathews* test applied to the sufficiency of notice to a defendant of a trial court's intended sentence, the result was the same).

207. *See infra* note 314.

208. *See, e.g.*, *Grayden v. Rhodes*, 345 F.3d 1225, 1232-43 (11th Cir. 2003) (applying the *Mathews* test to determine when notice and hearings were due to tenants whose building was condemned by the government, but applying *Mullane* to test the sufficiency of the notice of that condemnation). *Rhodes* confusingly referred to the question of whether the tenants must receive notice and hearings before or after the government deprivation as a question of "what process is due," but it is clearly a question of when process is due. *Id.* at 1232.

209. A hearing, for instance, would then need to be "reasonably calculated, under all the circumstances, . . . to afford [interested parties] an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

additional procedural safeguards, and (3) the government's interest, including the administrative burden of any additional procedural requirements.²¹⁰

1. *The Private Interest*

The first *Mathews* factor concerns the weight of "the private interest that will be affected by the official action."²¹¹ Liberty interests are often entitled to substantial weight.²¹² But not all private interests receive the same weight. For instance, the Court has recognized gradations in property interests. In *James Daniel Good*, the Supreme Court found that the seizure of a home, which entails governmental interference in "a private interest of historic and continuing importance," produced a "far greater deprivation" than the "loss of kitchen appliances and household furniture" in *Fuentes*.²¹³ Similarly, the *Mathews* Court found that the loss of welfare benefits in *Goldberg v. Kelly*, which deprived a recipient of "the very means by which to live," was greater than the loss of Social Security disability benefits, which were not based on financial need.²¹⁴ Following this logic, "a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence."²¹⁵

The "degree of potential deprivation that may be created by a particular decision," that is, the length and finality of the deprivation, must also be considered.²¹⁶ The *James Daniel Good* Court found that the seizure of a home worked a greater deprivation than the attachment of one.²¹⁷ Along similar lines, the termination of an employee causes a greater deprivation than the suspension of one, even though the employee's right to continued employment is substantial in both cases because of "the severity of depriving a person of the means of livelihood."²¹⁸ Extrapolating from this analysis then, the revocation of a driver's license would work a greater deprivation than the temporary suspension of a horseracing license.²¹⁹

While the first *Mathews* factor must be analyzed on a case-by-case basis, some general conclusions can be drawn. The *NCRI* court likely erred in finding that a \$200 bank account "would seem to weigh in favor of affording due pro-

210. *Mathews*, 424 U.S. at 335.

211. *Id.*

212. *See, e.g., Zinermon*, 494 U.S. at 131 (finding that the petitioner had "a substantial liberty interest in avoiding confinement in a mental hospital"); *Boddie*, 401 U.S. at 380-81 (holding that appellants possessed a procedural due process right to have access to the courts to get a divorce); *Mendoza-Martinez*, 372 U.S. at 160-61 (finding that the right to citizenship is "one of the most valuable rights in the world today" and its loss could be a "calamity").

213. 510 U.S. at 53-54. *See generally Fuentes*, 407 U.S. 67.

214. *Mathews*, 424 U.S. at 340-41 (quoting *Goldberg*, 397 U.S. at 264).

215. *Dixon*, 431 U.S. at 113. The court noted that, on the other hand, while entitlement payments could be made retroactively, a wrongly deprived licensee cannot be entirely made whole. *Id.*

216. *Mathews*, 424 U.S. at 341-42; *see also Gilbert*, 520 U.S. at 932.

217. 510 U.S. at 54.

218. *Compare Loudermill*, 470 U.S. at 542-43 (employment termination), *with Gilbert*, 520 U.S. at 932, 934-35 (employment suspension).

219. *Compare Dixon*, 431 U.S. 113 (revocation of driver's license), *with Barry v. Barchi*, 443 U.S. 55 (1979) (temporary suspension of horseracing license).

cess protection.”²²⁰ The court seemed to confuse the question of whether a property interest implicates the Due Process Clause with the issue of what weight to allocate it.²²¹ Both a home and a small bank account implicate the Due Process Clause, but the former is a more substantial private interest. While the NCRI’s interest in its \$200 bank account carries little weight, the interests implicated in *Global Relief Foundation* and *Holy Land Foundation* would be entitled to great weight. The contributions to the GRF totaled \$431,155 in 1995 and \$3.7 million in 2000.²²² The HLF contributed \$1.4 million to eight Hamas-controlled charity committees between 1992 and 1999, and \$5 million to seven other Hamas-controlled charitable organizations between 1992 and 2001,²²³ which suggests that the HLF has millions of dollars in assets. A designated organization’s First Amendment right to solicit contributions would also be a private interest of considerable weight. And, assuming that a designated organization could assert its members’ right to travel and First Amendment right to make contributions,²²⁴ those liberty interests would be entitled to substantial weight.

Further, designations under section 1189 are effective for two years, during which time all the assets of a designated organization remain frozen.²²⁵ Although this two-year deprivation might seem more like a suspension of employment or a license than a termination or revocation, the effects of the designation can, in some respects, be even harsher than such termination or revocation. While a fired employee can find another job and a person whose driver’s license is revoked can take other forms of transportation, a designated organization cannot reach any of its assets or acquire new assets; it has no funds with which to fulfill its organizational purpose.²²⁶ Moreover, designations can be renewed every two years,²²⁷ giving the deprivation a more permanent character.

2. *The Risk of Erroneous Deprivation*

The second *Mathews* factor weighs the risk that the administrative procedure will work an erroneous deprivation of the private interest, as well as the probable value of any additional procedural safeguards to reduce that risk.²²⁸ This factor focuses on “the fairness and reliability” of the procedures governing the deprivation, because “procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases.”²²⁹

220. NCRI, 251 F.3d at 206.

221. *See id.*

222. *Global Relief Found.*, 207 F. Supp. 2d at 785.

223. *Holy Land Found.*, 219 F. Supp. 2d at 70-71.

224. *See supra* note 193.

225. § 1189(a)(2)(C), (4)(A).

226. *See* 18 U.S.C. § 2339B (prohibiting the knowing provision of material support to terrorist organizations).

227. § 1189(a)(4)(B). Already, many entities have been redesignated multiple times. Cronin, *supra* note 34, at 6.

228. *Mathews*, 424 U.S. at 335.

229. *Id.* at 343-44.

The Supreme Court has found that a narrowly drawn statute that provides criteria "specific enough to control government action" will decrease the risk of an erroneous deprivation.²³⁰ A reliable independent assessment supporting the government's action, such as an independent finding of probable cause, can also reduce that risk.²³¹ Flaws in such an independent assessment, however, will increase the risk of an erroneous deprivation.²³² Where a deprivation decision is "sharply focused and easily documented," and turns on a limited amount of specific evidence like "routine, standard, and unbiased medical reports by physician specialists," rather than a wide variety of relevant information, the risk is lower.²³³ In general, procedures that work deprivations in a random or arbitrary manner present a high risk of an erroneous deprivation.²³⁴ If the government has a direct pecuniary interest in the outcome of a deprivation proceeding, or a post-deprivation hearing would not occur until months after the deprivation, the risk is higher.²³⁵

The Secretary of State may only designate organizations as terrorist if they are foreign and engage in terrorist activity or terrorism that threatens the national security of the United States or of its nationals (or have the capability and intent to do so).²³⁶ These statutory criteria, while broad, are no less specific than other statutory criteria previously found sufficient to control executive actions.²³⁷

230. *Hodel*, 452 U.S. at 301. Compare *id.* at 301-02 (finding that the statutory and regulatory standards governing the Secretary of the Interior's authority to stop surface mining operations that posed an imminent threat to public health and safety were specific enough to reduce the risk of an erroneous deprivation), with *Fuentes*, 407 U.S. at 93 (finding that state statutes authorizing replevin based upon the complaints of private parties were not narrowly drawn and amounted to an abdication of state control over state power).

231. See *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 241 (1988) (finding that the risk of a baseless suspension was low where a grand jury had determined that there was probable cause to indict a bank manager); *Gilbert*, 520 U.S. at 934 (finding that an employment suspension was not likely baseless or unwarranted where an independent third party determined that probable cause existed for an arrest and formal charges had been filed); *Dixon*, 431 U.S. at 113 (finding that the revocation of a license was not likely erroneous where the "appellee had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based"); *Barry*, 443 U.S. at 65 (finding that a determination of probable cause based on "an expert's affirmation, although untested and not beyond error," decreased the risk of an erroneous license suspension).

232. See *James Daniel Good*, 510 U.S. at 55 (finding that a magistrate's determination of probable cause that real property was being used for the commission of a narcotics felony offense was not an adequate safeguard, where the statute provided for an innocent owner defense but "[t]he Government is not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have"); *Doehr*, 501 U.S. at 13-14 (finding that a court's determination of probable cause based upon "a skeletal affidavit" and "one-sided, self-serving, and conclusory submissions" was an inadequate safeguard against the unwarranted attachment of a house).

233. *Mathews*, 424 U.S. at 344-45 (quoting *Richardson v. Perales*, 402 U.S., 389, 404 (1971)).

234. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-35 (1982).

235. *James Daniel Good*, 510 U.S. at 55-56.

236. § 1189(a)(1)(A)-(C).

237. See, e.g., *Hodel*, 452 U.S. at 301-02 (finding that the statutory and regulatory standards governing the Secretary of the Interior's authority to stop surface mining operations that posed an imminent threat to public health and safety were specific enough to reduce the risk of an erroneous deprivation); *Rhodes*, 345 F.3d at 1235 (finding that the definition of nuisance in the Orlando City Code, "while somewhat vague," could adequately guide the city building inspector and therefore reduced the risk of an erroneous deprivation).

Additionally, due to "the changeable and explosive nature of contemporary international relations" and the executive branch's ability to quickly gather and process foreign intelligence, "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."²³⁸ On its face, section 1189 does not seem to create a high probability of a random or arbitrary deprivation. For example, the Secretary of State cannot designate as terrorist either a domestic organization, even if it is engaged in terrorism threatening the national security, or a foreign organization engaging in terrorist activity, if that activity does not threaten the security of the United States or its nationals. It is also true that the Secretary of State does not have a direct pecuniary interest in the designation, as the designated organization's assets are frozen, not seized by the government.

The risk of an erroneous deprivation comes not from the statutory criteria, but instead from the lack of a notice and hearing requirement in section 1189. Organizations affected by the designations have no opportunity to present their own evidence rebutting the Secretary of State's findings on the statutory criteria and the statute does not direct the Secretary to consider exculpatory evidence.²³⁹ This results in the type of one-sided determination denounced by Justice Frankfurter.²⁴⁰ Further, the determination is based on a wide variety of foreign relations and intelligence information, rather than a limited amount of specific evidence. Since the Secretary of State's finding that an organization represents a national security threat is nonjusticiable,²⁴¹ the inability of a designated organization to present evidence on its behalf forecloses *any* possibility of challenging the evidence in support of that finding. The lack of *any* direct notice²⁴² or hearing for a designated organization, either before or after its designation, greatly increases the risk of an erroneous deprivation, because the Secretary of State is not compelled to consider the sufficiency of his or her evidence in an adversarial manner.²⁴³ Were the Secretary of State to err in a designation, there is a high probability that the error would remain uncorrected.

238. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

239. See generally § 1189; *NCRI*, 251 F.3d at 196.

240. See *McGrath*, 341 U.S. at 170 (Frankfurter, J., concurring) ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.").

241. The *PMOI I* court was likely correct in holding this. See *Waterman*, 333 U.S. at 111 ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). *Accord* *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

242. After making a designation, the Secretary of State publishes the names of designated organizations in the Federal Register. § 1189(a)(2)(A)(ii). However, notice is not directly sent to the designated organizations and the notice in the Federal Register does not "state the factual basis for designating each organization." Ellis, *supra* note 20, at 714.

243. See *James Daniel Good*, 510 U.S. at 55 ("The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all government decision-making."); see also *POMI I*, 182 F.3d at 25 (expressing frustration that "the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected").

The Secretary of State's consultation with the Attorney General and the Secretary of the Treasury²⁴⁴ is not the type of independent assessment that the Supreme Court has found to decrease the risk of an erroneous deprivation. Unlike a grand jury or a judicial officer (or even a law enforcement officer unconnected to the ultimate deprivation decision), the Attorney General and the Secretary of the Treasury, both of whom belong to the same executive administration as the Secretary of State, are not independent third parties and are not required by section 1189 to undertake an independent investigation of the facts supporting the designation. While it is possible that the legislators notified by the Secretary of State prior to the designation might prevent it,²⁴⁵ such a possibility does not amount to a procedural safeguard in the majority of designations.²⁴⁶ The participation of these government officials in the designation can neither significantly protect the designated organization's private interest nor provide a substitute for an adversarial test of the evidence.²⁴⁷ Furthermore, the lack of any hearing means that the D.C. Circuit must review a designation solely on the basis of the unchallenged findings of the Secretary of State.²⁴⁸ In sum, the risk of an erroneous deprivation under the procedures set out in section 1189 is high.

The second *Mathews* factor also includes an analysis of the probable value of any additional procedural safeguards. Since the high risk of an erroneous deprivation stems from the lack of any direct notice and hearing afforded to designated organizations, reading a notice and hearing requirement into section 1189 is appropriate.²⁴⁹ The Supreme Court has explained that the central meaning of procedural due process is that "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified."²⁵⁰ According to the Court, "when a person has the opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."²⁵¹ As stated by Justice Frankfurter, "[n]o better instrument

244. § 1189(c)(4).

245. § 1189(a)(2)(B)(i)-(ii).

246. See *Mathews*, 424 U.S. at 344 (stating that "the generality of cases, not the rare exceptions" shape procedural due process rules). For the same reason, the possibility of revocation by Congress or the Secretary of State, which would not occur in the majority of cases, cannot substitute for the lack of any hearing before or after the designation.

247. Cf. *James Daniel Good*, 510 U.S. at 55-56 (stating that an *ex parte* pre-forfeiture proceeding, where "[t]he Government is not required to offer any evidence on the question of innocent ownership," cannot adequately protect the interests of the innocent owner).

248. See *NCRI*, 251 F.3d at 196-97.

249. The *NCRI* court also read a notice and hearing requirement into section 1189, although during its discussion of the what of due process. 251 F.3d at 208. Because the second *Mathews* factors specifically provides for an analysis of additional procedural safeguards, this does not smack of the "judicial legislation" complained of in *Rahmani*. 209 F. Supp. 2d at 1056-57.

250. *Fuentes*, 407 U.S. at 80 (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)); see also *Goldberg*, 397 U.S. at 267 ("The fundamental requisite of due process of law is the opportunity to be heard.") (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

251. *Fuentes*, 407 U.S. at 81; see also *id.* at 87 ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due

has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."²⁵² Giving designated organizations notice and a hearing would decrease the risk that a designation is erroneous, because the rebuttal and exculpatory evidence submitted by designated organizations would test the sufficiency of the Secretary of State's evidence and, as a result, make the Secretary of State's findings more reliable. Subjecting the administrative record of a designation to the adversary process would also facilitate better judicial review, because a reviewing court would not have to rely solely on the Secretary of State's findings in making its own determinations.

3. *The Government Interest*

The third *Mathews* factor weighs the strength of the government's interest.²⁵³ For instance, the government has a strong interest in the maintenance of public safety,²⁵⁴ the preservation of public health,²⁵⁵ the successful exercise of its war powers and foreign relations responsibilities,²⁵⁶ the promotion of market stability,²⁵⁷ and the assurance of its fiscal soundness.²⁵⁸ In certain circumstances, the government must act quickly to prevent its interest

process of law would have led to the same result because he had no adequate defense upon the merits.'" (quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915)).

252. *McGrath*, 341 U.S. at 171 (Frankfurter, J., concurring).

253. *Mathews*, 424 U.S. at 335.

254. *See Gilbert*, 520 U.S. at 932 (finding that a state university has a strong interest in preserving public confidence in its police officers, "who occupy positions of great public trust and high public visibility"); *Hodel*, 452 U.S. at 300 ("Protection of the health and safety of the public is a paramount governmental interest."); *Dixon*, 431 U.S. at 114 (finding a strong public interest in safety on the roads and highways); *Jones v. City of Gary*, 57 F.3d 1435, 1443 (7th Cir. 1995) (finding that a city has a strong interest "in having a full complement of firefighters" that are able to "respond in a timely and effective manner").

255. *See Hodel*, 452 U.S. at 300 (finding that the government has a strong interest "in protecting the public health and safety and the environment from imminent danger"); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 601 (1950) (finding a strong public interest in preventing the distribution of food and drug articles that are dangerous or fraudulently or misleadingly labeled); *N. Amer. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315, 320 (1908) (finding that a city has a strong interest in destroying food "unfit for human consumption" in order to protect the public health).

256. *See Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961) (finding that the government has a strong interest in managing "the internal operation of an important federal military establishment"); *Mendoza-Martinez*, 372 U.S. at 159 ("The powers of Congress to require military service for the common defense are broad and far-reaching."); *Bowles v. Willingham*, 321 U.S. 503, 520-21 (1944) (finding that Congress has a strong interest in stabilizing housing rents to control for inflation during the exigencies of wartime, because "[n]ational security might not be able to afford the luxuries of litigation and the long delays which preliminary hearings traditionally have entailed"); *Stoehr v. Wallace*, 255 U.S. 239, 245-46 (1921) (finding that the government has a strong interest in the seizure of enemy-owned property in wartime).

257. *Mallen*, 486 U.S. at 240-41 (finding that the government has a strong interest in protecting the interests of depositors and maintaining public confidence in financial institutions); *Fahey v. Mallonee*, 332 U.S. 245, 250-54 (1947) (finding that the government has a strong interest in preserving the stability of a financial institution).

258. *Phillips v. Comm'r*, 283 U.S. 589, 595 (1931) (finding that the government has a strong interest in tax collection).

from being thwarted.²⁵⁹ This “special need for very prompt action” is an exigency that weighs heavily in favor of post-deprivation notice and hearings.²⁶⁰

With regard to section 1189, the issue is the government’s national security interest in fighting terrorism.²⁶¹ The Supreme Court has declared that “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the nation.”²⁶² In passing AEDPA, Congress, which “under the Constitution has power to safeguard our national security,”²⁶³ found that “international terrorism is a serious and deadly problem that threatens the vital interests of the United States.”²⁶⁴ As a means of combating the terrorist threat,

259. See *Mallen*, 486 U.S. at 241 (finding that the prompt suspension of an indicted bank manager was necessary to preserve “the integrity of our banking institutions”); *Hodel*, 452 U.S. at 301 (finding that the halting of surface mining to prevent an environmental disaster was a situation “in which swift action is necessary to protect the public health and safety”); *Calero-Toledo*, 416 U.S. at 679 (finding that the government interest in seizing property used to transport drugs would be thwarted if advance warning were given of the seizure of a yacht, which was the sort of property “that could be removed to another jurisdiction, destroyed, or concealed”); *Dixon*, 431 U.S. at 114 (noting that the government had a strong interest “in the prompt removal of a safety hazard”); *Ewing*, 339 U.S. at 601 (finding that a pre-seizure hearing would thwart the “speedy, preventative device of multiple seizures” that Congress chose as the means to protect the public from food and drug articles that are dangerous or fraudulently or misleadingly mislabeled); *N. Amer. Cold Storage Co.*, 211 U.S. at 320 (finding that “the destruction of food which is not fit for human use” is an emergency situation requiring speedy action in the interest of public health); *Rhodes*, 345 F.3d at 1237 (holding that “the emergency evacuation of tenants from a dangerous and potentially life-threatening structure” was an exigent circumstance that justified their eviction “without a pre-deprivation hearing”).

260. See *Fuentes*, 407 U.S. at 91; see also *Calero-Toledo*, 416 U.S. at 679; *Mallen*, 486 U.S. at 240.

261. See AEDPA, Pub. L. No. 104-132 (stating that deterring terrorism was a major purpose of AEDPA); H.R. REP. 104-383, pt. 2, at 38 (“The fundamental purpose of this legislation, then, is to provide our law enforcement agencies—within carefully prescribed constitutional boundaries—with the tools necessary to prevent and punish criminal terrorist enterprises.”); *id.* at 37 (“The legislation is intended to strengthen the ability of the United States to deter terrorist acts and to punish those who engage in terrorism.”); 8 U.S.C. § 1189(a)(1) (granting the Secretary of State only the power to designate foreign organizations whose terrorist activity or terrorism threatens “the national security of the United States or the security of its nationals”); USA PATRIOT Act, Pub. L. No. 107-56 (“An Act [t]o deter and punish terrorist Acts in the United States and around the world.”).

262. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)); see also *id.* (“Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.”); *Wayte*, 470 U.S. at 611-12 (stating that “[f]ew interests can be more compelling than a nation’s need to ensure its own security” because “[u]nless a society has the capability and the will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning”); *McGrath*, 341 U.S. at 164 (Frankfurter, J., concurring) (stating that national security is “the greatest of all public interests”); *Communist Party of the United States*, 367 U.S. at 95 (“To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.”) (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889)); *id.* (noting that James Madison wrote in the *Federalist* No. 41 that “[s]ecurity against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union”).

263. *Aptheker*, 378 U.S. at 509.

264. AEDPA § 301(a)(1). In passing AEDPA, the House Judiciary Committee noted that “[t]here is no more important responsibility of government than to protect the lives and safety of its citizens.” H.R. REP. 104-383, pt. 2, at 38.

Congress delegated to the Secretary of State, a member of the executive branch, which is itself "endowed with enormous power in the two related areas of national defense and international relations,"²⁶⁵ the power to designate foreign terrorist organizations so that their activities might be stopped.²⁶⁶ Thus, contrary to the *NCRI* court's conception of the government interest at stake in section 1189 cases, the government has a strong interest in maintaining the national security of the United States independent of its national security interest in classified information.²⁶⁷ In determining when process is due to designated organizations, the government's national security interest in fighting terrorism must be considered compelling and afforded the greatest weight.

Further, designations under section 1189 involve a pressing need for prompt action to prevent the frustration of the government's compelling national security interest in fighting terrorism.²⁶⁸ Congress has determined that an effective way to fight terrorism is to freeze the assets of terrorist organizations.²⁶⁹ This can be difficult, however, as assets in American financial institutions are fungible and can be quickly removed to and concealed in other jurisdictions.²⁷⁰ In Executive Order 13,224, President Bush found that "because of the ability to transfer funds or assets instantaneously, prior notice to [Specially Designated Global Terrorists] of measures to be taken pursuant to this order would render these measures ineffectual."²⁷¹

265. *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring).

266. § 1189(a)(1).

267. The *NCRI* court found that the government interest in national security applied to the what of due process, because "the United States enjoys a privilege in classified information affecting national security," but that "[i]t is not immediately apparent how that affects the 'when' of the process." 251 F.3d at 207. Yet, as discussed here, the government also has a strong national security interest in fighting terrorism. That interest, unlike the government's national security interest in its classified information, is certainly pertinent to when process is due to designated organizations.

268. See *James Daniel Good*, 510 U.S. at 56 ("The governmental interest we consider here is not some general interest in forfeiting property but the specific interest in seizing real property before the forfeiture hearing. The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action.").

269. § 1189(a)(2)(C). In *Sardino v. Fed. Reserve Bank of New York*, a Cuban sued to regain \$7,000 frozen in a New York bank pursuant to the Cuban Assets Control Regulations, 31 C.F.R. § 515.201, and the TWEA, 50 U.S.C. App. § 5(b)(1). 361 F.2d 106, 107 (2d Cir. 1966). Holding against Sardino, the court reasoned that "[t]he founders could not have meant to tie one of the nation's hands behind its back by requiring it to treat as a friend a country which has launched a campaign of subversion throughout the Western Hemisphere." *Id.* at 112. The court continued: "Hard currency is a weapon in the struggle between the free and communist worlds; it would be a strange reading of the Constitution to regard it as demanding depletion of dollar resources for the benefit of a government seeking to create a base of activities inimical to our national welfare." *Id.* (footnotes omitted); cf. *Silesian-American Corp. v. Clark*, 332 U.S. 469, 476 (1947) (upholding the government's seizure of alien property in "preparation for the storm of war" under the war power because "[t]his taking may be done as a means of avoiding the use of the property to draw earnings or wealth out of this country to territory where it may more likely be used to assist the enemy than if it remains in the hands of the government").

270. See *Global Relief Found.*, 207 F. Supp. 2d at 803-04; *Holy Land Found.*, 219 F. Supp. 2d at 77; Ellis, *supra* note 20, at 707-08; cf. *Calero-Toledo*, 416 U.S. at 679-80 (finding that exigent circumstances existed where a yacht involved in a drug crime could be moved to another jurisdiction upon advance notice of its forfeiture, thus frustrating the government's interest).

271. §10, 66 Fed. Reg. at 49,081.

The same consideration applies to designations under section 1189. If a foreign organization were to receive advance notice of its impending designation²⁷² and realized that its assets were about to be frozen, its response would almost certainly be to immediately remove its assets—whether they total \$200 or \$2 million—from American financial institutions. Those assets could then fund future terrorist activity against the United States and its nationals. Any real or personal property held by the designated organization could also be liquidated to the same end.²⁷³ Moreover, the same reasoning applies to an organization's right to solicit contributions and other liberty interests it and its members otherwise enjoy. If a designated organization could speed up its fundraising during the period between the advance notice and the designation, it could raise a substantial amount of money for terrorist activity pending the designation.²⁷⁴ Similarly, between the notice and the designation, the organization's members could donate a substantial amount of money and other support.²⁷⁵ They could also hastily travel abroad to transmit funds to (or solidify plans with) terrorists planning attacks on the United States or its nationals.²⁷⁶ In light of these exigent circumstances, it is clear that pre-designation notice and hearings would soundly frustrate the government's compelling national security interest in fighting terrorism. The government's pressing need for prompt action here also distinguishes this case from *McGrath*, where pre-designation notice and hearings would not have frustrated the government's ability to use the designations in subsequent loyalty hearings.²⁷⁷ This pressing need for prompt action, which the

272. See *supra* part III. A., for the example notice suggested by the *NCRI* court. 251 F.3d at 208. The court also held that advance notice must be provided "as soon as the Secretary has reached a tentative determination that the designation is impending." 251 F.3d at 209. While the Secretary of State would presumably wait as long as possible to reach this tentative decision in order to decrease the amount of time between the advanced notice and the designation, this standard, which clearly evidences the court's intent for notice to be given to a designated organization as far in advance as possible, certainly seems to allow enough time for the government's national security interest to be thwarted in the ways described here.

273. See *Global Relief Found.*, 315 F.3d at 754.

274. Cf. Christopher Marquis, *Fund-Raising Records Fall As Soft Money Ban Looms*, N.Y. TIMES, July 12, 2002, at A15 (describing how national political parties embarked on a "cash-seeking frenzy" trying to obtain soft money donations before the McCain-Feingold soft money ban took effect); Alison Mitchell, *Fearing Limits on Soft Money, Parties Fill Coffers*, N.Y. TIMES, Feb. 11, 2002, at A1 (describing how national political parties engaged in a "helter-skelter drive to raise soft money in case such fund-raising is suddenly ended").

275. See AEDPA § 301(a)(6) ("[S]ome foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations."); H.R. REP. 104-383, pt. 2, at 43 ("This legislation severely restricts the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States.").

276. Cf. *Zemel*, 381 U.S. at 15-18 (upholding ban on travel to Cuba, which was supported by "the weightiest considerations of national security," against a challenge based on the right to travel); *Regan v. Wald*, 468 U.S. 222, 242-43 (1984) (again upholding the ban on travel to Cuba, the purpose of which was to "curtail the flow of hard currency to Cuba," against a right to travel challenge because it was "justified by weighty concerns of foreign policy").

277. In that case, the purpose of the Attorney General's designations was to furnish the Loyalty Review Board with a list of Communist organizations. Exec. Order No. 9835, § (III)(2)(3), (V)(8), 12 Fed. Reg. 1935. A federal employee's (or job applicant's) membership in a designated Communist organization was evidence of disloyalty in hearings before the board. *Id.* § (V)(8). However, while the government's national security interest in fighting communism is similar to its national

D.C. Circuit did not consider in *NCRI*,²⁷⁸ weighs heavily in favor of post-designation due process.²⁷⁹

Finally, the third *Mathews* factor also examines the administrative costs of the additional procedural safeguards.²⁸⁰ The government has an interest "in conserving scarce fiscal and administrative resources" and the cost of the additional notice and hearing requirements in section 1189 could be considerable.²⁸¹ Nevertheless, the value of the notice and hearing requirements in decreasing the risk of an erroneous deprivation, and in assuring the constitutionality of section 1189,²⁸² outweighs any increased costs and delays resulting from those requirements.

4. *Balancing the Mathews Factors*

The question, then, is how to balance the *Mathews* factors. This is not a situation where a substantial private interest and a high risk of error can outweigh a moderate but not pressing government interest,²⁸³ nor is it an instance where an important government interest and a low risk of error can outweigh the private interest.²⁸⁴ In the context of section 1189, the private interest could range from insubstantial to substantial, the risk of error is high, and the governmental interest is both compelling and pressing.

Nevertheless, it is possible to balance the government's interest with the need to minimize the risk of an erroneous deprivation of the private interest, no matter how substantial. Were a designated organization to receive pre-designation notice and hearings, it would almost certainly take actions that would thwart the government's interest. This is exactly the type of exigent circumstance that

security interest in fighting terrorism, the type of exigent circumstances that exist for designations under § 1189 (for example, the government's pressing need to block a designated terrorist organization's assets before they are removed from American financial institutions) have no parallel in *McGrath*.

278. See *NCRI*, 251 F.3d at 207-08.

279. See *Palestine Info. Office v. Schultz*, 853 F.2d 932, 942-43 (D.C. Cir. 1988) ("The Supreme Court has long recognized and deferred to the need of the executive branch to act speedily and authoritatively in the realm of foreign affairs.").

280. *Mathews*, 424 U.S. at 335.

281. *Id.* at 347-348.

282. See *Rahmani*, 209 F. Supp. 2d at 1058 (declaring section 1189 unconstitutional under the Due Process Clause because it did not provide designated organizations with notice and a hearing).

283. See, e.g., *James Daniel Good*, 510 U.S. 43 (holding that a hearing was required before the seizure of real property where the private interest in home ownership was "of historic and continuing importance," the risk of error was high, and the government's legitimate interest in ensuring that "the property not be sold, destroyed, or used for further illegal activity" was not in danger of being thwarted).

284. See, e.g., *Mallen*, 486 U.S. at 240-41 (holding that a post-suspension hearing was sufficient because the strong government interest in protecting the interests of depositors and maintaining public confidence in financial institutions outweighed an indicted bank manager's private interest in continued employment, where the risk of error was low due to a grand jury indictment); *Dixon*, 431 U.S. at 113-14 (holding that a pre-license revocation hearing based on too many traffic violations was not necessary because the "important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard" outweighed the private interest in a driver's license, where the risk of error was low due to prior judicial hearings on the underlying traffic violations).

the Supreme Court has found to justify post-deprivation due process.²⁸⁵ In cases arising under section 1189, the government's interest is so compelling and pressing that it outweighs even the high risk of an erroneous deprivation of even a substantial private interest. Therefore, a designated organization is not entitled to direct notice or a hearing prior to its designation.

Once the designation takes effect and the consequences of section 1189 apply, however, the government's pressing need for prompt action disappears; at that point, even the government's compelling national security interest cannot outweigh the high risk of an erroneous deprivation of even an insubstantial private interest. A designated organization must therefore receive notice and a hearing promptly after its designation.²⁸⁶ It could then rebut the evidence against it and create an administrative record subject to the adversary process for the purpose of judicial review.

This arrangement would decrease the risk of an erroneous deprivation without thwarting the government's compelling national security interest in fighting terrorism and would therefore satisfy due process for designations under section 1189. It better balances the competing interests involved in designations than the *NRCI* court's approach, which over-weighed the NRCI's \$200 bank account and did not consider the government's compelling national security interest in fighting terrorism and its pressing need for prompt action.²⁸⁷

VI.

WHAT PROCESS IS DUE TO DESIGNATED TERRORIST ORGANIZATIONS

A. *Type of Notice*

Notice is "[a]n elementary and fundamental requirement of due process," because the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."²⁸⁸ As the Supreme Court recently reiterated in *Dusenbery*,²⁸⁹ notice is sufficient if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."²⁹⁰ The notice "must be

285. *See supra* notes 259-260.

286. *Cf. Gilbert*, 520 U.S. at 931-35 (holding that a post-suspension hearing for an employee suspended after an arrest and the filing of formal charges satisfied due process, but that "[o]nce the charges were dropped, the risk of an erroneous deprivation increased substantially, and . . . there was likely value in holding a prompt hearing").

287. The *NRCI* court did leave open the possibility that the Secretary of State could "in an appropriate case" demonstrate the need for withholding pre-designation notice and hearing. 251 F.3d at 208. In most designations, however, this particularized approach would not give adequate credence to the government's interest and its pressing need for action, resulting in a high probability that the government's interest would be frustrated.

288. *Mullane*, 339 U.S. at 314.

289. 534 U.S. at 167-68.

290. *Mullane*, 339 U.S. at 314.

of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance."²⁹¹

Under the circumstances of section 1189 designations, the Secretary of State's post-designation publication of the organization's name in the Federal Register²⁹² will not satisfy due process. Constructive notice does not provide the type of information needed by the designated organization to begin gathering rebuttal or exculpatory evidence and to start formulating its defense against the designation. After making a designation, therefore, the Secretary of State must give the designated organization direct, written notice of its designation in such a way that the organization is reasonably likely to receive it.²⁹³ This notice should inform the designated organization of the designation, note the consequences flowing from it, and reference the statutory scheme authorizing it.²⁹⁴ The notice must inform the designated organization that it is entitled to a hearing to contest its designation, describing in sufficient detail when that hearing will take place and how it will be conducted; any specific time frame or procedural rules should also be included.²⁹⁵ Having informed a designated organization of the charges against it, the notice must state enough of the factual basis for the designation so that the organization can gather the necessary rebuttal or exculpatory evidence and formulate an effective response.²⁹⁶ If the Secretary of State does not afford designated organizations a reasonable opportunity to know the claims against them and their factual basis,²⁹⁷ then the hearing will not be adequate.²⁹⁸

291. *Id.* (citations omitted).

292. *See Ellis, supra* note 20, at 713-15.

293. *See Mullane*, 339 U.S. at 315 ("The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.")

294. *See Morrissey v. Brewer*, 408 U.S. 471, 486-87 (1972) (stating that notice to a parolee of a parole revocation hearing should "state what parole violations have been alleged").

295. *See id.* (stating that a parolee "should be given notice that the [parole revocation] hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation").

296. The Court held in *Morgan* that

The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

304 U.S. at 18-19 (holding that the Secretary of Agriculture inadequately informed market agencies at the Kansas City Stock Yards of the charges against them).

297. Since due process normally does not require the Secretary of State to disclose classified information utilized in making the designation to the designated organization, see discussion *infra* part VI.C., the notice does not have to include the factual basis for that classified information. However, because due process requires the Secretary of State to provide a designated organization with an unclassified summary of all classified information utilized in the designation, see discussion *infra* part VI.C., that summary should be included with the notice.

298. *See Morgan*, 304 U.S. at 18-19.

B. Type of hearing

The essence of the hearing requirement is that a party must be given a meaningful opportunity to present its case.²⁹⁹ Due process does not require any particular type of hearing in every circumstance.³⁰⁰ Instead, the type of hearing mandated by due process is “tailored, in light of the decision to be made, to ‘the capacities and circumstances of those who are to be heard.’”³⁰¹

In *Goldberg v. Kelly*, the Supreme Court held that a trial-type evidentiary hearing had to be given to welfare recipients before the termination of their benefits.³⁰² In that case, the Court found that welfare recipients must be able to present their evidence and arguments at an oral hearing.³⁰³ Written submissions were “an unrealistic option” for many recipients who “lack the educational attainment necessary to write effectively and who cannot obtain professional assistance.”³⁰⁴ In addition, written submissions were an inadequate basis for a decision where the credibility of the recipient was at issue.³⁰⁵ Welfare recipients also needed the opportunity to confront and cross-examine adverse witnesses.³⁰⁶ The Court stopped short of requiring a full judicial hearing, deciding that “[i]nformal procedures will suffice” and that “due process does not require a particular order of proof or mode of offering evidence.”³⁰⁷ Later cases made clear, however, that the Court based its decision heavily on the circumstances facing welfare recipients.³⁰⁸ In *Mathews*, the Supreme Court noted that “[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances.”³⁰⁹

An important question is when due process requires an oral hearing and when a hearing on written submissions is sufficient. The presentation of testimony at an oral hearing may be required under some circumstances, such as

299. See *Boddie*, 401 U.S. at 377 (noting that “due process of law signifies a right to be heard in one’s defence”) (quoting *Hovey*, 167 U.S. at 417); *Morgan*, 304 U.S. at 18 (holding that the right to a hearing embraces “the right to present evidence”).

300. *Mathews*, 424 U.S. at 348-49; *Loudermill*, 470 U.S. at 545; *FCC v. WJR*, 337 U.S. 265, 277 (1949).

301. *Mathews*, 424 U.S. at 349 (quoting *Goldberg*, 397 U.S. at 268-69).

302. *Goldberg*, 397 U.S. at 266-71.

303. *Id.* at 267-68.

304. *Id.* at 269.

305. *Id.*

306. *Id.* at 268-70.

307. *Id.* at 269.

308. See, e.g., *Loudermill*, 470 U.S. at 545 (“In only one case, *Goldberg v. Kelly*, has the Court required a full adversarial evidentiary hearing prior to adverse governmental action.”) (citations omitted).

309. *Mathews*, 424 U.S. at 348; see also *Loudermill*, 470 U.S. at 545 (“In general, ‘something less’ than a full evidentiary hearing is sufficient prior to adverse administrative action.”) (quoting *Mathews*, 424 U.S. at 343); *United States v. Nugent*, 346 U.S. 1, 7-9 (1953) (holding that hearings to evaluate the sincerity of conscientious objectors to military service did not require “a full-scale trial”).

where a final decision involves credibility determinations.³¹⁰ In *FCC v. WJR*, however, the Court stated that

due process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, in others that argument submitted in writing is sufficient.³¹¹

Therefore, whether a party may orally argue its position at a hearing, or whether that party may only submit written documents, clearly depends upon the circumstances.³¹²

The *Mathews* test is the proper test for determining what type of hearing is due to designated organizations, even after *Dusenbery*. As with the when of due process,³¹³ there is no indication that *Dusenbery*, which dealt solely with the sufficiency of notice,³¹⁴ displaced the use of the *Mathews* test to determine the adequacy of hearing procedures. Since *Dusenbery*, lower courts have consistently applied the *Mathews* test to evaluate the adequacy of hearing procedures.³¹⁵ This article does so as well.³¹⁶ The D.C. Circuit held that hearings on written submissions would be sufficient to satisfy due process.³¹⁷ The remainder of this section discusses whether, pursuant to the *Mathews* test, that holding is correct, or whether designated organizations are entitled to oral or trial-type hearings.

The *Mathews* test first weighs the private interest.³¹⁸ In designations under section 1189, the weight of the private interest depends on the factual circumstances of a particular case.³¹⁹ A designated organization could have a small

310. *Califano v. Yamasaki*, 442 U.S. 682, 697 (1979) ("Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale.")

311. 337 U.S. at 275 (footnotes and citations omitted); see also *Mallen*, 486 U.S. at 247-48 ("There is no inexorable requirement that oral testimony must be heard in every administrative proceeding in which it is tendered.")

312. *WJR*, 337 U.S. at 276, 284 ("[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances.")

313. See discussion *supra* part V.C.

314. 534 U.S. at 167-68 (using the *Mullane* test of reasonableness under the circumstances instead of the *Mathews* three-prong test to determine the sufficiency of notice given to prisoners); see also *Lockyer*, 329 F.3d at 710 n.8 (noting that, while the *Mathews* test was not "all-embracing," the Supreme Court had applied it "in all but a few contexts" and declined to apply it "in only a few specific contexts," such as determining the sufficiency of notice).

315. See, e.g., *Lockyer*, 329 F.3d at 707-713 (applying the *Mathews* test to the adequacy of the hearing provided by the Federal Energy Regulatory Commission to California and the Northern California Power Agency); *Sonnleitner v. York*, 304 F.3d 704, 711-16 (7th Cir. 2002) (applying the *Mathews* test to determine whether a pre-suspension hearing was inadequate because it had not given a state employee the chance to respond to some of the more serious charges against him).

316. Since section 1189 did not provide for a hearing at all, this article cannot use the *Mathews* test to determine whether statutory procedures are adequate. Cf. *Mathews*, 424 U.S. at 339-49 (determining the adequacy of hearing procedures outlined by Social Security regulations). But the *Mathews* test can be used to determine what type of hearing due process affords a designated organization.

317. *NCRI*, 251 F.3d at 209.

318. 424 U.S. at 335.

319. See discussion *supra* part V.C.1.

property interest, like a \$200 bank account, a substantial property interest like millions of dollars in assets, or a substantial liberty interest like the right to solicit contributions or its members' right to travel and First Amendment right to make contributions.

The second *Mathews* factor weighs the risk of an erroneous deprivation.³²⁰ Under the circumstances of a section 1189 designation, the purpose of a hearing is to allow the designated organization to present evidence rebutting the Secretary of State's findings which form the basis for the designation.³²¹ An ancillary purpose is to create an administrative record of evidence and counter-evidence for judicial review.³²² The plain language of paragraph (a)(1) limits the evidence and arguments that designated organizations need to present in their defense. First, the organization could rebut the Secretary of State's finding that it is foreign³²³ by simply introducing evidence that it is in fact a domestic organization. Second, the organization could rebut the Secretary of State's finding that it engages in terrorist activity or terrorism, or has the capability and intent to do so,³²⁴ by producing evidence that it did not commit the terrorist acts alleged by the Secretary of State or that the acts committed by it did not meet the statutory definitions of terrorist activity or terrorism,³²⁵ and that it lacked either the capability or intent to engage in terrorist activity or terrorism. Third, the organization could provide evidence that, even if it committed the specified terrorist acts, those acts did not threaten the national security of the United States or the security of its nationals.³²⁶ For example, the designated organization could show that it purposefully and successfully avoided targeting Americans or attacking American economic and security interests.³²⁷

In light of the limited arguments and evidence that a designated organization needs to present to rebut the Secretary of State's evidence supporting the designation, the risk of an erroneous deprivation in a hearing on written submissions is relatively low. The Secretary of State does not generally need supplementary oral clarifications to examine the type of hard evidence that a designated organization would need to submit on its behalf, such as financial records, tax filings, internal documents relating to its mission and activities, and

320. 424 U.S. at 335.

321. See § 1189(b).

322. Presumably, if the designated organization produces enough evidence to successfully rebut any one of the findings, then the Secretary of State (or the reviewing court) would realize that the designation was in error and rescind it.

323. § 1189(a)(1)(A).

324. § 1189(a)(1)(B).

325. See definitions *supra* notes 12-14. In 1999, the Secretary of State dropped the DFLP and FPMR/D from the list of terrorist organizations because they did not commit terrorist activity within the two-year redesignation period. See *supra* note 35.

326. § 1189(a)(1)(C).

327. Perhaps the designated organization could submit evidence that it targeted only an enemy of the United States or that the United States covertly funded its operations. See *PMOI II*, 327 F.3d at 1243; see also *Rahmani*, 209 F. Supp. 2d at 1051 (noting that some members of Congress disagreed with the Secretary of State's finding that the PMOI was a threat to the United States and believed instead that the PMOI was "a legitimate resistance movement fighting the tyrannical regime presently in power in Iran").

so on. In its written submissions, the designated organization could thoroughly explain why its evidence negates the Secretary of State's findings and compels a revocation of the designation.³²⁸ Unlike cases in which credibility plays a significant role,³²⁹ a face-to-face confrontation is probably not necessary in most instances. Also, it will rarely be necessary for designated organizations to confront and cross-examine adverse witnesses to rebut the Secretary of State's findings so long as they are fully informed of the factual basis underlying those findings.³³⁰ A hearing by written submissions would also create a reliable record for judicial review.

Yet, a bright line rule prohibiting any oral hearing for a designated organization is probably not desirable. For instance, after having evaluated the written submissions, the Secretary of State might need to hear supplemental oral testimony from a designated organization official or an anti-terrorism expert who submitted an affidavit stating that, based on his or her research, the designated organization was not engaged in terrorist activity threatening the national security of the United States.³³¹ Additionally, if the designation turns on whether the organization has the intent to engage in terrorist activity or terrorism, the credibility of the organization's leaders or members might become an issue. In that instance, oral testimony or even trial-type procedures, such as cross-examination, might be necessary.³³² It is unlikely, however, that these concerns will arise in most cases.³³³

328. At this point, a designated organization's assets would be frozen and its avenues of material support would be cut off, hampering its ability to mount a defense. Cf. *Caplin & Drysdale v. United States*, 491 U.S. 617, 625-626 (1989) (holding that a defendant on trial for drug crimes could not use his forfeited assets to pay for his legal defense). Holding the hearing promptly after the organization's designation, however, would temper this hardship.

329. *Nugent*, 346 U.S. at 5-6 (noting that an oral hearing was necessary to determine whether a person actually held the beliefs of a conscientious objector); *Goldberg*, 397 U.S. at 267-69 (requiring an oral hearing to examine the credibility of a welfare recipient); *Califano*, 442 U.S. at 697 (requiring an oral hearing to examine the credibility of a recipient of Social Security disability benefits).

330. Even if due process requires the Secretary of State to reveal classified information pertaining to a designation to the designated organization, but see discussion *infra* part VI.C., it is not clear that a designated organization should be able to confront and cross-examine the government's intelligence sources. If the designated organization can rebut the factual basis of the Secretary of State's decision, then a cross-examination of the Secretary of State's intelligence sources would be superfluous. If the designated organization cannot rebut the factual basis of the Secretary of State's decision, then it is unlikely that the value of such a cross-examination would outweigh the danger in exposing the Secretary's foreign intelligence sources.

331. See *Kiareldeen I*, in which a former FBI director testified that Kiareldeen was probably not involved in the 1993 World Trade Center bombing. 71 F. Supp. 2d at 417.

332. It is not unusual for due process to require different types of hearings for similar or related administrative proceedings if the circumstances warrant it. See, e.g., *Califano*, 442 U.S. at 695-97 (holding that an oral hearing is not necessary for Social Security disability benefit recipients requesting reconsideration of the government's decision to recoup overpaid benefits because "reconsideration involve[s] relatively straightforward matters of computation for which written review is ordinarily an adequate means to correct prior mistakes," but that an oral hearing is necessary for recipients requesting waiver of the recoupment because the broad standard for waiver decisions required a credibility determination).

333. See *Mathews*, 424 U.S. at 344 (stating that "the generality of cases, not the rare exceptions" shape procedural due process rules).

Finally, the *Mathews* test also weighs the government's interest.³³⁴ At issue here is "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources."³³⁵ This factor does not merely weigh the administrative cost and burden of a particular designated organization's hearing, but rather "the ultimate additional cost in terms of money and administrative burden" in holding hearings for all designated organizations.³³⁶ As discussed above, designated organizations must receive hearings after their initial designation and after each subsequent redesignation.³³⁷ A trial-type hearing would be more costly than an oral hearing, which in turn would be more costly than a hearing on written submissions. Nonetheless, the administrative cost and burden of a hearing on written submissions is not insubstantial. According to a Congressional Research Service report, "[i]t is a significant bureaucratic burden to ensure that the designations are appropriately reviewed, investigated, the administrative record updated, the appropriate agencies consulted, and the public statement of renewal made every two years after the initial designation."³³⁸ Compounding this burden are the great number of entities listed as terrorist under different governmental lists³³⁹ and the generally simultaneous nature of biennial redesignation reviews. The weight of the government interest in conserving scarce fiscal and administrative resources is therefore at least moderate and perhaps high.

The three *Mathews* factors must be weighed together. A hearing on written submissions poses a low risk of an erroneous deprivation of a designated organization's private interest, no matter how substantial. This would not outweigh the moderate to great government interest in conserving scarce fiscal and administrative resources. A hearing on written submissions is thus sufficient to satisfy due process in most circumstances.

C. *The Secretary of State's Use of Classified Information in Making a Designation*

Closely related to the issues of notice and hearings under section 1189 is the question of whether due process requires the Secretary of State to release classified information used to support designations to the designated organizations so that they may rebut it. In making a designation under section 1189, the

334. *Id.* at 335.

335. *Id.* at 348.

336. *Id.* at 347.

337. See *supra* notes 249-252 and accompanying text (reading a hearing requirement into section 1189).

338. CRONIN, *supra* note 34, at 10.

339. In addition to foreign terrorist organizations, the U.S. government tracks, pursuant to various statutes, state sponsors of terrorism, SDTs, SDGTs, and various other non-terrorist entities. *Id.* at 3-5. There are currently over 200 SDTs and SDGTs. *Id.* at 4. For OFAC's comprehensive list of all "Specially Designated Nationals and Blocked Persons," which includes all of these and numerous other designations, and is constantly updated, see <http://www.treas.gov/offices/eoiffc/ofac/sdn/index.html> (last visited March 28, 2004). Not included in this master list are those individuals who are on the Secretary of State's "Terrorist Exclusion List," who cannot enter the United States and who may be deported from it. *Id.* at 5. Additionally, the United Nations, the European Union, and other intergovernmental agencies maintain similar lists. *Id.* at 3 n.6.

Secretary of State may consider classified information,³⁴⁰ which “shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court *ex parte* and *in camera* for the purposes of judicial review.”³⁴¹ By the statute’s plain language, designated organizations have no opportunity to review any classified information used by the Secretary of State and thus have no opportunity to refute evidence that forms the basis of a designation they challenge.

The facts of *Kiareldeen v. Reno*, which concerned the habeas corpus petition of a Palestinian man subject to deportation, illustrate the dilemma posed by the use of classified information in adversary proceedings.³⁴² In *Kiareldeen*, the INS made an *ex parte* and *in camera* submission of classified information to an immigration judge alleging that

- (1) Kiareldeen was a member of a foreign terrorist organization, (2) he was involved in a meeting planning the 1993 attack on the World Trade Center one week prior to the actual attack, at which a suicide bombing was discussed, and (3) he later threatened to kill Attorney General Janet Reno for her role in convicting those responsible for the 1993 bombing of the World Trade Center.³⁴³

According to the FBI, this information came from multiple sources that it considered reliable.³⁴⁴ Based on unclassified summaries of the classified information given to him by the INS, however, Kiareldeen believed that “one likely source of the government’s allegations is his ex-wife Amal Kamal, whom he claims seeks revenge after a bitter divorce.”³⁴⁵ Kiareldeen introduced evidence, including police reports, showing that he had been falsely arrested six times due to “false accusations by Ms. Kamal of domestic violence charges.”³⁴⁶ Kiareldeen produced evidence that his ex-wife made allegations that he and his brother were terrorists, and that “he had threatened to put a bomb in her car unless she permitted him to visit their daughter,” an accusation which a state court later found to be baseless.³⁴⁷ The problems highlighted by this case are stark: classified information strongly suggested that Kiareldeen was a national security threat, but it was probably based all or in part merely on the unreliable accusations of his estranged ex-wife. Moreover, the government’s interest in the secrecy of its classified information was upset when Kiareldeen was able to

340. § 1189(c)(1) (“[T]he term ‘classified information’ has the meaning given to that term in section 1(a) of the Classified Information Procedures Act.”). The term “classified information” means “any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.” 18 U.S.C. App. § 1(a) (2000).

341. § 1189(a)(3)(B); *see also* § 1189(b)(2) (the administrative record may include classified information.).

342. *Kiareldeen I*, 71 F. Supp. 2d at 404-05.

343. *Kiareldeen v. Ashcroft*, 273 F.3d 542, 546 (3d Cir. 2001) (regarding the government’s appeal of Kiareldeen’s subsequent suit for attorney’s fees under the Equal Access to Justice Act) (“*Kiareldeen II*”).

344. *Id.*

345. *Kiareldeen I*, 71 F.Supp. 2d at 416.

346. *Id.* at 416-17.

347. *Id.* at 417. The INS refused to put Kamal on the stand, although she had to submit to written interrogatories. *Id.*

determine that his ex-wife was likely one of the FBI's sources based on unclassified summaries of classified information.

The nature of the case in which the government seeks to preserve the secrecy of its classified information can influence a court's decision whether or not to require its disclosure. In tort cases against the government, courts have held that the government need not divulge classified information, because plaintiffs "suing the sovereign on the limited terms to which it has consented" are not necessarily entitled to discover information when disclosure would threaten the national security of the United States.³⁴⁸ In deportation or criminal cases, where the government has itself brought a proceeding against an individual, courts are more wary of allowing the government to use its interest in confidential information as a sword rather than a shield.³⁴⁹ Designations under section 1189 are more like deportation and criminal cases than civil cases such as torts. That similarity, however, cannot by itself force the government to disclose classified information to designated terrorist organizations. Even in criminal cases, courts have sometimes permitted the government to keep classified information secret from the defendant.³⁵⁰

The *Mathews* test governs whether the Secretary of State can use classified information to make a designation without disclosure to the designated organization.³⁵¹ As mentioned above, this is true even after *Dusenbery*, which did not

348. *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1023 (Fed. Cir. 2003) (holding that the state secrets privilege—the government's privilege against disclosure of information that would adversely affect national security—prevented discovery of the government's classified information in a contractual dispute); *see also Molerio v. FBI*, 749 F.2d 815, 820-22 (D.C. Cir. 1984) (holding that the state secrets privilege blocked discovery of classified information on why the FBI had rejected the plaintiff's employment application).

349. *AADC*, 70 F.3d at 1070 (holding that, even if the government could use the state secrets privilege as a shield in tort cases, the government could not use classified information as a sword in deportation cases); *Kiarelddeen I*, 71 F. Supp. 2d at 410-14 (holding that the use of classified information in a unlike in civil cases, courts have reasoned in criminal cases that "it is unconscionable to allow [the Government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense") (quoting *United States v. Reynolds*, 345 U.S. 1, 12 (1953)).

350. *See, e.g., United States v. Yunis*, 867 F.2d 617, 622-25 (D.C. Cir. 1989) (holding that a defendant accused of hijacking was not entitled to discovery of the government's classified information because "a legitimate government privilege protects national security concerns"). The Supreme Court has also held that people petitioning to be relieved from military service as conscientious objectors are not entitled to see FBI reports on their background and reputation so they can respond during a hearing on their petition. *Gonzales v. United States*, 364 U.S. 59, 64-65 (1960); *Nugent*, 346 U.S. at 5-6.

351. *See, e.g., AADC*, 70 F.3d at 1068-70 (applying the *Mathews* test to determine whether the government's refusal to disclose classified information violated due process); *Kiarelddeen I*, 71 F. Supp. 2d at 412-414 (using the *Mathews* test to determine whether the use of classified information in an immigration proceeding violated due process); *Al Najjar v. Reno*, 97 F. Supp. 2d 1329, 1352-57 (S.D. Fla. 2000), *vacated as moot sub nom. Al Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001) (utilizing the *Mathews* test to determine whether the use of classified information in an alien's bond redetermination hearing violated due process). In *Yunis*, the D.C. Circuit applied the state secrets privilege to analyze whether the government's classified information was subject to disclosure in a criminal trial. 867 F.2d at 622-25. But since subsection 1189(a)(3)(B) already allows the Secretary of State to consider classified information in a designation without disclosing that information to a designated organization, the Secretary of State would not need to invoke the state secrets privilege anyway. Moreover, even if the Secretary of State's use of classified information under subsection

change the application of the *Mathews* test to the adequacy of hearing procedures.³⁵² The first *Mathews* factor weighs the private interest.³⁵³ As discussed above,³⁵⁴ the weight of the private interest involved in a designation under section 1189 depends on the factual circumstances of a particular designation. The property interest of a designated organization could vary from a \$200 bank account to millions of dollars in assets. Its liberty interests, such as its right to solicit contributions or its members' right to travel and First Amendment right to make contributions, could be substantial.

Turning to the second *Mathews* factor, the risk of an erroneous deprivation³⁵⁵ in this situation appears high.³⁵⁶ The "hallmark of the adversary system" is that parties have access to the evidence used against them, because "[t]he openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts."³⁵⁷ "Use of secret evidence," however, "creates a one-sided process by which the protections of our adversarial system are rendered impotent," compelling parties to "prove the negative in the face of anonymous 'slurs of unseen and unsworn informers.'"³⁵⁸ Preventing the disclosure of classified information means that "there is no adversarial check on the quality of information" used against a party.³⁵⁹ In *Rafeedie v. INS*, the Immigration and Naturalization Services ("INS") sought to exclude a resident alien who left the country from re-entry because he allegedly belonged to various Palestinian terrorist groups.³⁶⁰ The court noted that

Rafeedie—like Joseph K. in *The Trial*—can prevail before the [INS] Regional Commissioner only if he can rebut the undisclosed evidence against him, *i.e.*, prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.³⁶¹

1189(a)(3)(B) does violate due process, then the state secrets privilege likely cannot save that violation.

352. See *supra* parts V.C., VI.B.

353. 424 U.S. at 335.

354. See discussion *supra* part V.C.1.

355. 424 U.S. at 335.

356. In *AADC*, the court found that the government's confidential information concerning the terrorist activities of the Popular Front for the Liberation of Palestine ("PFLP") was not sufficient by itself to show that its members could be deported as terrorists. 70 F.3d at 1069-70. But since the Secretary of State's classified information must show that the foreign organization itself engaged in terrorist activity, this guilt-by-association problem would probably not arise in designations under section 1189.

357. *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

358. *Kiarelddeen I*, 71 F. Supp. 2d at 413 (quoting *Jay v. Boyd*, 351 U.S. 345, 365 (1956) (Black, J., dissenting)); see also *McGrath*, 341 U.S. at 171 (Frankfurter, J., concurring) ("Secrecy is not congenial to truth-seeking."); *id.* ("The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.") (quoting *Knauff*, 338 U.S. at 551 (Jackson, J., dissenting)); H.R. REP. 104-383, pt. 3, at 180 (dissenting view) ("The cardinal rule of due process is that evidence used against a party must be fully disclosed to that party.").

359. *AADC*, 70 F.3d at 1069.

360. 880 F.2d at 508-09.

361. *Id.* at 516.

Similarly, the Ninth Circuit has found that "the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error."³⁶² That section 1189 provides for the *ex parte* and *in camera* disclosure of the Secretary of State's classified information during independent judicial review³⁶³ decreases the risk of an erroneous deprivation.³⁶⁴ However, such disclosure cannot fully eliminate the risk. Courts, lacking the institutional competency to review foreign policy and national security information as they would other information, must give strong deference to the political branches in these matters.³⁶⁵ Furthermore, even with *ex parte* and *in camera* disclosure, designated organizations still cannot review and rebut the classified information used in the designation.

The third *Mathews* factor weighs the government's interest.³⁶⁶ The Supreme Court has found that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."³⁶⁷ This is so because "[i]t is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence."³⁶⁸ In order to secure these sources, the government must "tender as absolute an assurance of confidentiality as it possibly can."³⁶⁹ If intelligence sources believe that the government will be "unable to maintain the confidentiality of its relationship to them," they will refuse to supply information the government needs.³⁷⁰ The Court has therefore recognized that "[e]ven a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'"³⁷¹ In addition, the disclosure of classified information could result in valuable United States intelligence information falling into the hands of its adversaries, who could glean from it important knowl-

362. *AADC*, 70 F.3d at 1069.

363. § 1189(a)(3)(B).

364. See *Abourzek*, 785 F.2d at 1061 (noting that even where statutes provide for the *ex parte* and *in camera* inspection of classified information, the court had been "vigilant to confine to a narrow path submissions not in accord with our general mode of open proceedings").

365. See *CIA v. Sims*, 471 U.S. 159, 176 (1985); *Wald*, 468 U.S. at 242; *Agee*, 453 U.S. at 292; *Zemel*, 381 U.S. at 17; *Waterman*, 333 U.S. at 111; *Harisiades*, 342 U.S. at 588-89; *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936); *Oetjen*, 246 U.S. at 302.

366. 424 U.S. at 335.

367. *Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980) (holding that an ex-CIA agent breached his contract with the CIA by publishing a book without allowing the CIA to examine it to ensure that he had divulged no classified information, as stipulated in his employment contract); see also *Sims*, 471 U.S. at 175; *Yunis*, 867 F.2d at 623.

368. *Snepp*, 444 U.S. at 512 n.7.

369. *Sims*, 471 U.S. at 175 (holding that the Freedom of Information Act did not require the CIA to release the names of researchers who had worked on the MKULTRA project, which researched ways to counter "Soviet and Chinese advances in brainwashing and interrogation techniques").

370. *Id.* "The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents." *Snepp*, 444 U.S. at 507.

371. *Sims*, 471 U.S. at 175.

edge not apparent to a court.³⁷² Since the disclosure of classified information could result in the loss of intelligence sources and reveal important intelligence information to terrorists, the Secretary of State has a compelling interest in preserving the secrecy of classified information concerning designated organizations.

The question is how to balance the *Mathews* factors here. It could be argued that the high risk of the erroneous deprivation of a substantial private interest would outweigh even this compelling government interest. The second *Mathews* factor, however, allows for the consideration of additional procedural safeguards that would decrease the risk of an erroneous deprivation.³⁷³ As in *Kiareldeen*, the Secretary of State could provide a designated organization with an unclassified summary of its classified information,³⁷⁴ which would allow the designated organization to mount at least some sort of defense against the classified information, materially decreasing the risk of an erroneous deprivation. Such an unclassified summary should give the designated organization "access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests."³⁷⁵ An unclassified summary is not without risk to the government interest,³⁷⁶ but the risk a summary poses to national security is certainly less than that posed by full disclosure of the classified information. Notably, the unclassified summary would be created by the Secretary of State, who is in the best position to know how to both preserve intelligence sources and protect the classified information from terrorists. Further, the administrative cost and burden associated with writing unclassified summaries would not tip the scales against their creation. Given the reduction in the risk of error that unclassified summaries would entail, the government interest in keep-

372. *Yunis*, 867 F.2d at 623; *Sims*, 471 U.S. at 176-77. In *Kiareldeen I*, the district court stated that it did not "necessarily accept at face value the government's contentions that national security is implicated by the petitioner's alleged misdeeds" and found that "the government's unclassified 'summary' evidence" was "lacking in either detail or attribution to reliable sources which would shore up its credibility." 71 F. Supp. 2d at 414. Referring to this finding in *Kiareldeen II*, the Third Circuit responded: "That the FBI would be unwilling to compromise national security by revealing its undercover sources, [sic] is both understandable and comforting. That a court would then choose to criticize the FBI for being unwilling to risk undermining its covert operations against terrorism is somewhat unnerving." 273 F.3d at 552; see also *id.* at 553 (criticizing the district court for disregarding the government's "often complex determinations involved in releasing confidential counterterrorism intelligence into the public arena through its introduction into both administrative hearings and court proceedings"). It is clear that, when examining classified information, courts have to walk a fine line between rubberstamping classified information that may be unreliable and ordering the disclosure of classified information that may be harmful to national security.

373. *Mathews*, 424 U.S. at 335.

374. 273 F.3d at 546 ("The INS provided *Kiareldeen* with several unclassified summaries of the [FBI's] classified evidence."); see also 18 U.S.C. App. § 6(c)(1)(B) (2000) (stating that an alternative to disclosing classified information is the creation of "a summary of the specific classified information").

375. *Abourzek*, 785 F.2d at 1060; see also *Kiareldeen II*, 273 F.3d at 551-52 (noting that the unclassified summaries of classified information provided to *Kiareldeen* by the government illustrated "a concentrated effort to divulge as much information as possible to assist him in his defense, without disclosing information in a way that could potentially compromise national security").

376. As mentioned above, *Kiareldeen* was able to speculate that his ex-wife was a confidential source based on the unclassified summaries of classified information. *Kiareldeen I*, 71 F. Supp. 2d at 416-17.

ing classified information secret would likely outweigh even a substantial private interest held by a designated organization and actual classified information would not itself need to be disclosed. Having read the possibility of unclassified summaries being made available to designated organizations that seek them into section 1189, the Secretary of State's use of classified information in making designations does not offend due process.

CONCLUSION

In enacting AEDPA in 1996, Congress found that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States."³⁷⁷ Terrorist organizations had "developed sophisticated international networks that allow them great freedom of movement, and opportunity to strike, including inside the United States."³⁷⁸ Many terrorist organizations were "attracting a more qualified cadre of 'believers' with greater technical skills" and had "established footholds within ethnic or resident alien communities in the United States."³⁷⁹ Those organizations were raising "significant funds within the United States" and using "the United States as a conduit for receipt of funds raised in other nations."³⁸⁰ Faced with these facts, Congress chose to combat the terrorist threat by delegating to the Secretary of State the power to designate foreign terrorist organizations and attaching harsh consequences to these designations, such as the freezing of the designated organizations' funds and the prohibition of the knowing provision of material support to them. The question posed by this article is whether Congress's chosen means for fighting terrorism, codified in section 1189 of title 8 of the United States Code, are constitutional under the Fifth Amendment Due Process Clause.

The answer is that section 1189 comports with procedural due process so long as designated organizations are entitled to post-designation notice and hearings. This is because the government's pressing need for prompt action to avoid the frustration of its compelling national security interest in fighting terrorism outweighs the high risk of an erroneous deprivation of even a substantial private interest of a designated organization. After the designation, however, when the government's pressing need for prompt action disappears, a designated organization must receive prompt notice and a hearing. The due process that designated organizations must receive is direct notice of the designation and a written (or, in some cases, oral) hearing to rebut the Secretary of State's evidence. The Secretary may also use classified information in making a designation, so long as the designated organization is provided with an unclassified summary of the classified information. In that case, the government's compelling national security interest in maintaining the secrecy of its intelligence information outweighs the risk of an erroneous deprivation of even a substantial private interest.

377. AEDPA § 301(a)(1).

378. H.R. REP. 104-383, pt. 2, at 43.

379. *Id.*

380. AEDPA § 301(a)(6).

Congress has chosen to fight the terrorist threat with the means outlined in section 1189. As Justice Frankfurter stated in *Communist Party of the United States v. Subversive Activities Control Board*, "the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods."³⁸¹ Similarly, in *Harisiades v. Shaughnessy*, Justice Jackson stated that "[w]e, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional."³⁸² Where, as here, the "[m]eans for effective resistance against foreign incursion" pass constitutional muster under the Fifth Amendment, those means "may not be denied to the national legislature."³⁸³

381. 367 U.S. at 96-97; see also *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("[W]e must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.'") (quoting *McGrath*, 341 U.S. at 164) (Frankfurter, J., concurring).

382. 342 U.S. at 590; see also *Humanitarian Law Project I*, 205 F.3d at 1136 ("We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress had the fact-finding resources to properly come to such a conclusion.").

383. *Communist Party of the United States*, 367 U.S. at 95.