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Designating Terrorist Organizations: Due Process Overdue

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COMMENT

DESIGNATING TERRORIST ORGANIZATIONS:

DUE PROCESS OVERDUE

> The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble.
> Justice Felix Frankfurter[1]

INTRODUCTION

Justice Frankfurter wrote these powerful words in 1951, in the early part of the Cold War.[2] This was a time when the United States of America struggled to keep a nation secure while still preserving the principles upon which it stood. This was a time of war, a time of fear, and a time of immense distrust in a dangerous enemy engaged in covert activities. It was thought by some that certain constitutional protections must be sacrificed in order to maintain national security. Yet, in *Joint Anti-Fascist Refugee Committee v. McGrath*, a case challenging the authority of the Attorney General of the United States to designate organizations as communist, the United States Supreme Court upheld the organizations' constitutional rights.[3] This quotation appeared in Justice Frankfurter's concurrence in which he wrote a commanding defense of

[1] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

[2] *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

[3] *Id.*

procedural due process rights.[4] In 1951, the enemy was communism. Today, it is terrorism. Yet, the temptation to forgo constitutional protections in favor of laws that purport to offer greater security remains the same.

With striking similarity to the communist designations at issue in *McGrath*, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in response to terrorist attacks.[5] Section 302 of the AEDPA, codified at 8 U.S.C. § 1189 ("§ 1189"), gives the Secretary of State the authority to designate an organization as a Foreign Terrorist Organization ("FTO"), thereby freezing its assets and criminalizing its supporters.[6]

Without a doubt § 1189 is a powerful tool.[7] It fights terrorism by cutting off its source—support, financial or otherwise.[8] The so-called "material support" provisions of the AEDPA, primarily found in 18 U.S.C. § 2339B, provide the Justice Department with a powerful tool to intercept and prevent terrorist acts from occurring at all, rather than merely prosecuting the actors after the acts of terrorism have already been carried out.[9] Since its passage, § 1189, together with the material support provisions of the AEDPA, has proven to be one of the most effective means of fighting terrorism.[10] Yet § 1189 is wholly lacking in basic procedural due process protections. It does not provide notice of the designation, an opportunity for the organization to rebut the factual support for the designation, or the opportunity to be heard before an unbiased adjudicator.[11] Two of these three basic requirements, notice and a hearing, have been judicially mandated.[12] However, neither § 1189 nor any subsequent judicial decision has required the most important element of basic procedural due process—an unbiased adjudicator.[13]

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[4] *Id.* at 171-72 (Frankfurter, J., concurring).

[5] Pub. L. No. 104-132, 110 Stat. 1214 (1996); *Presidential Statement*, 1996 WL 203049, at *1 (Apr. 26, 1996).

[6] *See generally* 8 U.S.C. §1189 (2009); 18 U.S.C. § 2339B (2009).

[7] *See generally A Review of the Material Support to Terrorism Prohibition Improvements Act Before the Senate Comm. on the Judiciary Subcomm. on Terrorism, Technology and Homeland Security*, 104th Cong. (Apr. 20, 2005) (joint statement of Daniel Meron, Principal Deputy Assistant Attorney General, Civil Division and Barry Sabin, Chief, Counterterrorism Section, Department of Justice), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1466&wit_id=3808.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *See generally* 8 U.S.C. § 1189 (2009).

[12] *See* Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192, 200 (D.C. Cir 2001).

[13] *See* 8 U.S.C. §1189 (2009); People's Mojahedin Org. of Iran v. U.S. Dep't of State (*PMOI*), 182 F.3d 17, 23 (D.C. Cir. 1999); *NCRI*, 251 F.3d at 205; People's Mojahedin Org. of Iran

An unbiased adjudicator is important not simply to remedy the constitutional deficiencies as applied to the organizations themselves, but also as applied to the people severely punished for supporting them. It is hard to imagine a law that, with a single act of the Executive, has ripple effects on more lives. After the Secretary of State designates an FTO, all the organization's assets within the United States are frozen.[14] It becomes a crime, punishable by fifteen years in prison, to give "material support" to the organization.[15] Any person who gives support to an FTO is ineligible for entry into the United States,[16] and aliens currently residing within the United States are deportable.[17] Material support is defined broadly and can include providing food and shelter to a member of the organization.[18] The AEDPA does not require that a person intend to support the illegal purpose of the FTO.[19] Even where the organization undertakes legitimate activities and the support was intended to further only those legitimate activities, the support is illegal.[20] The invalidity of the FTO designation is no defense to these charges.[21] The prosecutor must only show that the organization was a designated FTO, not that that designation was accurate.[22]

After a deadly, unconscionable attack on our Nation, the temptation to forgo constitutional protections in favor of laws that purport to offer greater security is certainly high. Still, laws that fight terrorism but lack basic constitutional protections are no more valid after catastrophic acts of war than they are in times of peace. For this reason, § 1189 must be amended to include the basic requirements of procedural due process.

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v. U.S. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003); National Council of Resistance of Iran v. Dep't of State, 373 F.3d 152 (D.C. Cir. 2004); Chai v. Dep't of State, 466 F.3d 125, 129 (D.C. Cir. 2006); Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 398 (9th Cir. 2003), *vacated*, Humanitarian Law Project v. U.S. Dep't of Justice, 393 F.3d 902 (9th Cir. 2004); Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001); U.S. v. Afshari, 426 F.3d 1150, 1157-58 (9th Cir. 2005); U.S. v. Rahmani, 209 F. Supp. 2d 1045, 1059 (C.D. Cal. 2002); Chai v. Dep't of State, 466 F.3d 125, 127 (2006); U.S. v. Lindh, 212 F. Supp. 2d 541, 569 (E.D. Va. 2002); U.S. v. Assi, 414 F. Supp. 2d 707, 713 (E.D. Mich. 2006); U.S. v. Al-Arian, 329 F. Supp. 2d 1294, 1300, 1304-05 (M.D. Fla. 2004); U.S. v. Marzook, 383 F. Supp. 2d 1056, 1071-72 (N.D. Ill. 2005).

[14] 8 U.S.C. § 1189 (2009).

[15] 18 U.S.C. § 2339B (2009).

[16] 8 U.S.C. § 1182(a)(3)(B)(i)(I) (2009).

[17] *Id.* at § 1227(a)(4)(B).

[18] Singh-Kaur v. Ashcroft, 385 F.3d 293, 301 (3d Cir. 2004).

[19] *See* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1130-33 (9th Cir. 2007).

[20] *Id.*

[21] *See* 8 U.S.C. § 1189(a)(8) (2009).

[22] 8 U.S.C. § 1189(a)(8) (2009); *see also* U.S. v. Afshari, 426 F.3d 1150 (9th Cir. 2005) ("Under § 2339B, if defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not.").

This Comment argues that § 1189 is unconstitutional because it deprives accused terrorist organizations due process under the Fifth Amendment to the U.S. Constitution. Section I will provide an explanation of § 1189 and § 2339B and their effect on both an organization and its supporters. Section II will provide a brief overview of the Due Process Clause in the context of administrative proceedings. Section III will show how § 1189 deprives organizations due process under the Fifth Amendment because the statute does not include the most fundamental requirements of procedural due process. Section III(A) will address the initial question of whether organizations are entitled to due process protection. Section III(B) will compare the requirements of the Due Process Clause with the statute as it is written. Section III(C) will look at the additional protections the courts have read into the statute. Section III(D) will show why, even with these additional protections, the statute is missing a vital component of procedural due process—an unbiased adjudicator. Finally, section IV will show that under the United States Supreme Court's current framework for analyzing the requirements of procedural due process, § 1189 is unconstitutional and should be amended to include an unbiased and neutral decisionmaker to adjudicate an accused organization's opposition.

I. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

After the Oklahoma City bombing,[23] Congress passed and President William Jefferson Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[24] Title three of AEDPA, entitled "International Terrorism Prohibitions," was designed to provide "valuable tools for stopping and punishing terrorists"[25] and to combat the circumstance, as found by Congress, that "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."[26]

As the Ninth Circuit put it, the AEDPA "has teeth."[27] First, section 302—codified at 8 U.S.C. § 1189—gives the Secretary of State the power to designate an organization as a "foreign terrorist organization," thereby freezing all the organization's assets within the United States.

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[23] U.S. Dep't of Justice *Responding to Terrorism Victims: Oklahoma City and Beyond* (Oct. 2000), *available at* http://www.ojp.usdoj.gov/ovc/publications/infores/respterrorism/chap1.html.

[24] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[25] *Presidential Statement*, 1996 WL 203049, at *1 (Apr. 26, 1996).

[26] Pub. L. No. 104-132, § 301(a)(6), 110 Stat. at 1247.

[27] Humanitarian Law Project v. Reno, 205 F.3d 1130, 1132 (9th Cir. 2000).

Second, because these designated organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct,"[28] section 303—codified at 18 U.S.C. § 2339B—makes it illegal to contribute "material support" to these organizations.[29] Finally, the AEDPA authorizes exclusion and deportation of the organization's members and representatives from the United States.[30] The following sections will examine each of these provisions in more detail.

A. DESIGNATING A TERRORIST ORGANIZATION

Before an organization can be designated a Foreign Terrorist Organization ("FTO"),[31] § 1189 requires the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General (collectively "the Secretary"),[32] to make three findings: 1) that the organization is "foreign;" 2) that the organization engages in "terrorist activity, or "retains the capability and intent to engage in terrorist activity;" and 3) that the organization's terrorist activity threatens "the security of United States nationals or the national security of the United States."[33] The Secretary is also authorized to designate all aliases of the

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[28] Pub. L. No. 104-132, § 301(a)(7), 110 Stat. at 1247.

[29] *See generally* 8 U.S.C. § 1189 (2009); 18 U.S.C. § 2339B (2009); *see also* 8 U.S.C. § 1182 (2009).

[30] *See generally* 8 U.S.C. §§ 1182(a)(3)(B)(i)(I); 1227(a)(4)(B), 1536 (a)(1)(A).

[31] In addition to FTO designations under AEDPA, organizations and individuals may be labeled as "terrorist" pursuant to the International Emergency Economic Powers Act ("IEEPA"). IEEPA, codified at 50 U.S.C. § 1701 et seq., allows the President to impose a wide range of economic sanctions once he or she has officially declared a state of national emergency. 50 U.S.C. § 1702 In 1995, President Clinton declared a National Emergency and signed Executive Order 12947 prohibiting transactions with terrorists who threaten to disrupt the Middle Eastern peace process. Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995). Organizations designated under Executive Order 12947 are labeled Specially Designated Terrorists (SDT). *Id.* After September 11th, President George W. Bush also utilized his powers under IEEPA with Executive Order 13224, which gives the Secretary of State together with the Secretary of the Treasury and the Attorney General the power to designate foreign entity or individual who has "committed, or [] pose[s] 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 United States" as a Specifically Designated Global Terrorist (SDGT). Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001). This Comment will address only FTO designations under 8 U.S.C. § 1189. There are currently at least 41 blocked organizations under 8 U.S.C. § 1189. Office of Foreign Assets Control U.S. Dep't of the Treasury, *Terrorist Assets Report,* (2006), *available at* http://www.treas.gov/offices/enforcement/ofac/reports/tar2006.pdf. For an alphabetical list of all blocked organizations and persons, which the Department of the Treasury collectively calls "Specifically Designated Nationals," as of July 24, 2007, *see* 72 Fed. Reg. 40374-01 (2007).

[32] "Secretary" as used throughout the statute is defined in the statute as the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General. 8 U.S.C. § 1189(d)(4) (2009). This Comment will also use the term "Secretary" to refer to those individuals collectively.

[33] 8 U.S.C. § 1189(a)(1) (2009).

organization as FTOs.[34]

Section 1189 does not define the term "foreign organization" or the phrase "threatens the security of United States nationals or the national security of the United States" for the purposes of an FTO designation.[35] Nonetheless, because the latter of these two requirements rests on a foreign policy decision by the Executive Branch,[36] courts have found that element of the FTO designation completely nonjusticiable.[37] "Foreign organization" is not defined in the statute, but whatever the definition, a designee is not permitted to argue that it is a government entity rather than an "organization" because the determination of "who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges . . . of that government."[38]

The term "terrorist activity" is defined in two places.[39] The first definition is located at 8 U.S.C. § 1182, which defines "terrorist activity" as that which is (1) "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 laws of the United States or any State)" and (2) involves certain, specifically enumerated, conduct.[40] Much of the conduct meeting this statutory definition is obvious terrorist activity such as highjacking an aircraft, taking hostages, assassinations, and the use of

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[34] Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192, 200 (D.C. Cir 2001) ("It would simply make no sense for us to hold that Congress empowered the Secretary to designate a terrorist organization . . . only for such periods of time as it took such organization to give itself a new name, and then let it happily resume the same status it would have enjoyed had it never been designated."); *see also* 8 U.S.C § 1189 (b)(1) ("The Secretary may amend a designation under this subsection if the Secretary finds that the organization has changed its name, adopted a new alias . . . .").

[35] Though the statute does not define what it means to "threaten United States national security," 8 U.S.C. § 1189(d)(2) does define the term "national security" as "the national defense, foreign relations, or economic interests of the United States." 8 U.S.C. § 1189(d)(2) (2009).

[36] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) ("A federal court may entertain a controversy only if it is 'justiciable.' Both characterizations mean that a court will not a decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.").

[37] *See, e.g.*, People's Mojahedin Org. of Iran v. U.S. Dep't of State ("*PMOI*"), 182 F.3d 17, 23 (D.C. Cir. 1999) (quoting Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) ("these are political judgments, 'decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'")).

[38] *PMOI*, 182 F.3d at 23.

[39] 8 U.S.C. § 1189(a)(1)(B) (2009).

[40] *Id.* at § 1182(a)(3)(B)(iii).

biological or nuclear weapons.[41] However, the "terrorist activity" definition is broad-sweeping, as it includes "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."[42] Additionally, the statute provides that an attempt, conspiracy or threat to engage in any of the foregoing activities constitutes "terrorist activity."[43] The second, less-utilized definition of "terrorist activity," found at 22 U.S.C. § 2656f, is "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[44]

In making the designation under § 1189, the Secretary must compile an "administrative record."[45] The Secretary has authorized the Office of the Coordinator for Counterterrorism in the State Department ("S/CT") to investigate organizations for potential FTO designations.[46] The S/CT monitors the activities of "terrorist groups" focusing "not only at the actual terrorist attacks that a group has carried out," but also "whether the group has engaged in planning and preparations for possible future acts of terrorism, or retains the capability and intent to carry out such acts."[47] Once such a group is identified, the S/CT compiles an administrative record that will show that the organization meets the statutory definition of "terrorist organization" described above.[48] From here the Secretary makes the ultimate determination of whether to designate the organization under § 1189.[49]

Nothing in the statute limits the type of evidence contained in the administrative record.[50] Therefore, it often consists entirely of "third hand accounts, press stories, material on the Internet or other hearsay

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[41] *Id.* at § 1182(a)(3)(B)(iii).

[42] *Id.* at § 1182(a)(3)(B)(iii)(V)(b).

[43] *Id.* at § 1182 (a)(3)(B)(iii)(VI).

[44] 22 U.S.C. § 2656f(d)(2) (2009).

[45] 8 U.S.C. § 1189(a)(3) (2009).

[46] Office of Counterterrorism Fact Sheet (2005), *available at* http://www.state.gov/s/ct/rls/fs/37191.htm.

[47] *Secretary of State Has Key Role in Designating Terrorist Groups*, State Dep't Press Releases & Documents (2005), *available at* 2005 WLNR 16595452.

[48] *Secretary of State has Key Role in Designating Terrorist Groups*, State Dep't Press Releases & Documents (2005), *available at* 2005 WLNR 16595452.

[49] *See generally* 8 U.S.C. § 1189 (2009); *see also* Audrey Kurth Cronin, Specialist in Terrorism, *The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations*, CRS Report for Congress (2003) ("Designations normally occur after an involved interagency process; but the Secretary of State makes the ultimate decision.").

[50] 8 U.S.C. § 1189(a)(3) (2009).

regarding the organization's activities."[51] Additionally, § 1189 specifically authorizes FTO designations on the basis of classified information, which need not be disclosed except to certain members of Congress[52] and courts for *ex parte* and *in camera* reviews.[53]

Unlike traditional administrative proceedings, which will be discussed in section II, *infra*, during this designation process "there is no adversary hearing, [and] no presentation of what courts and agencies think of as evidence."[54] Nor does the statute require that the organization "affected by the Secretary's internal deliberations" be notified before designation[55] or allow the designated organization the opportunity to present evidence in opposition to the designation.[56] Instead, the statute requires only that the Secretary notify certain members of Congress of her intent to designate, along with the factual basis for the designation,[57] and seven days later, the designation must be published in the Federal Register.[58]

B. JUDICIAL REVIEW

Provided that an organization files a petition within thirty days of the FTO designation, § 1189 does provide for judicial review.[59] However, this review is extremely limited.[60] Only the United States Court of Appeals for the District of Columbia has the authority to review these designations.[61] Additionally, this court may reverse a designation only if, on the basis of the administrative record alone,[62] the designation is found to be (1) arbitrary, capricious, an abuse of discretion, or

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[51] People's Mojahedin Org. of Iran v. U.S. Dep't of State ("*PMOI*"), 182 F.3d 17, 18-19 (D.C. Cir. 1999).

[52] 8 U.S.C. § 1189(a)(3)(B) (2009).

[53] *Id.* at § 1189(c)(2); *see also PMOI*, 182 F.3d 17; People's Mojahedin Org. of Iran v. United States Dep't of State, 327 F.3d 1238, 1245 (D.C. Cir. 2003) (Edwards, J., concurring).

[54] *PMOI*, 182 F.3d at 19.

[55] *Id.* at 21 n.5.

[56] *Id.* at 19.

[57] 8 U.S.C. § 1189(a)(2)(A)(i) (2009).

[58] *Id.* at § 1189(a)(2)(A)(ii).

[59] *Id.* at § 1189(c)(1). The original provision was codified in 1996 at 8 U.S.C. § 1189(b)(1).

[60] This section led an obviously frustrated court in POMI, to preface its review with this comment: "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 . . . 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." *PMOI*, 182 F.3d at 19.

[61] 8 U.S.C. § 1189(c)(1) (2009).

[62] *Id.* at § 1189(c)(2).

otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (4) lacking substantial support in the administrative record taken as a whole or in classified information submitted in the court; or (5) not in accord with the procedures required by law.[63] A designation has "substantial support" if the record provides "a sufficient basis for a reasonable person to conclude" that the organization was guilty of the alleged acts.[64] The court may only look to see if the findings are supported in the record but not whether the findings in the record are supported by *reliable* evidence.[65]

C. EFFECT OF THE DESIGNATION

Once a designation has taken effect there are several immediate and drastic consequences. This Comment will focus on the three most consequential. First, all of the organization's assets are immediately frozen.[66] Second, it becomes illegal for any person to knowingly provide the designated organization with "material support,"[67] which actually includes any support, no matter how insignificant.[68] Lastly, this designation has devastating effects on admission into and deportation from the United States for non-citizens.[69]

1. Freezing Assets

As soon as the Secretary informs Congress of her intent to designate an organization as an FTO, the Secretary of the Treasury may require domestic financial institutions that possess assets of the organization to

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[63] *Id.* at § 1189(c)(3)(A)-(E).

[64] Chai v. Dep't of State, 466 F.3d 125, 129 (D.C. Cir. 2006) (citing *PMOI*, 182 F.3d at 25).

[65] *See PMOI*, 182 F.3d at 25 ("We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. . . . [T]he 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. As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism.").

[66] 8 U.S.C. § 1189 (a)(2)(C) (2009).

[67] 18 U.S.C. § 2339B (2009).

[68] SHAINA ABER ET AL., UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR, GEORGETOWN UNIVERSITY LAW CENTER HUMAN RIGHTS INSTITUTE REFUGEE FACT-FINDING INVESTIGATION 18 (May 2006) ("material support" is a legal term of art that means any support, no matter how insignificant) (citing Singh-Kaur v. Ashcroft, 385 F.3d 293, 298 (3d Cir. 2004)).

[69] *See generally* 8 U.S.C. §§ 1182(a)(3)(B)(i)(I); 1227(a)(4)(B), 1536 (a)(1)(A) (2009).

block all transactions involving such assets.[70] Any domestic financial institution that possesses or controls assets of the organization must seize the funds and report their existence to the Secretary or be subject to civil penalty.[71]

2. Criminalizing "Material Support" to the Organization

As soon as a designation is published in the Federal Register, § 2339B takes effect, and it becomes illegal to knowingly provide "material support or resources" to the organization.[72] "Material support or resources" is defined broadly as follows:

> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training,[73] expert advice or assistance,[74] safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation), and transportation, except medicine or religious materials.[75]

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[70] 8 U.S.C. § 1189(a)(2)(C) (2009).

[71] 18 U.S.C. § 2339B(a)(2) (2009); 18 U.S.C. § 2339B(b) (2009) ("Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a civil penalty in an amount that is the greater of— (A) $50,000 per violation; or (B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control.").

[72] To "knowingly" contribute material support a defendant must either (1) know that the organization was designated as an FTO, or (2) know that the organization engages in "terrorist activity" or "terrorism" as defined above. 18 U.S.C. § 2339B(a)(1) (2009). As the statute was originally drafted, however, "knowingly" was not defined and the statute simply made it a crime to knowingly provide material support or resources. 18 U.S.C. § 2339B (1996). This led some courts to conclude that a specific intent to further the illegal aims of the organization was required. *See* United States v. Al-Arian, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004) (holding that the Fifth Amendment right to be free from punishment in the absence of personal guilt required the court to read into the statute a specific intent to further the illegal aims of the organization). However, the current definition of "knowingly" appears to incorporate the ruling of the Ninth Circuit in *Humanitarian Law Project*, which found in light of the long adhered-to "principle that '[t]he existence of a mens rea is the rule of, rather than the exception to, principles of Anglo-American criminal jurisprudence.' . . . when Congress included the term 'knowingly' in § 2339B, it meant that proof that a defendant knew of the organization's designation as a terrorist organization or proof that a defendant knew of the unlawful activities that caused it to be so designated." Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 398 (9th Cir. 2003), *vacated*, Humanitarian Law Project v. U.S. Dep't of Justice, 393 F.3d 902 (9th Cir. 2004); *see also* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1130-33 (9th Cir. 2007).

[73] 18 U.S.C. § 2339A(b)(2) (2009) ("'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.").

[74] *Id.* (defining "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge").

[75] 18 U.S.C. § 2339A(b)(1) (2009).

Congress intended the exceptions for medicine or religious materials to be construed narrowly.[76] The punishment for a violation of § 2339B was no more than ten years in prison, as originally drafted under AEDPA.[77] That punishment has now been increased to fifteen years,[78] and Congress has recently considered increasing it to twenty-five years.[79] Violation of § 2339B also gives rise to civil liability under 18 U.S.C. § 2333[80] and constitutes a "crime of violence" under the Bail Reform Act,[81] which allows pre-trial detention.[82] Additionally, § 2339B applies extraterritorially[83] when certain jurisdictional predicates are present.[84]

3. Alien Inadmissibility and Removal

Under 8 U.S.C. § 1182, any alien who provides "material support" to a designated FTO is ineligible for entry into the United States.[85] The

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[76] H.R. CONF. REP. NO. 104-518, at 114 ("'Medicine' should be understood to be limited to the medicine itself, and does not include the vast array of medical supplies. 'Religious materials' . . . [is] limited to those religious articles typically used during customary and time-honored rituals or teachings of a particular faith, denomination, or sect.").

[77] Pub. L. No. 104-132, § 303(a), 110 Stat. at 1250.

[78] 18 U.S.C. § 2339B(a)(1) (2009).

[79] *See* 2007 CONG US HR 2376 (May 17th 2007); 2007 CONG US S 1320 (May 07, 2007).

[80] Boim v. Quranic Literacy Inst., 340 F. Supp. 2d 885, 895 (N.D. Ill. 2004).

[81] U.S. v. Goba, 240 F. Supp. 2d 242, 250 (W.D.N.Y. 2003).

[82] 18 U.S.C. § 3142(f)(1)(A) (2009).

[83] *Id.* at § 2339B(d)(2) (2009); *see also* Alexander J. Urbelis, *Rethinking Extraterritorial Prosecution in the War on Terror: Examining the Unintentional Yet Foreseeable Consequences of Extraterritorially Criminalizing the Provision of Material Support to Terrorist and Foreign Terrorist Organizations*, 22 CONN. J. INT'L L. 313 (2007) (discussing the harmful effects on the ability to gather counter-terrorism information when extraterritorial jurisdiction does not predicate the terrorist act).

[84] 18 U.S.C. § 2339B(d)(1) (2009) ("There is jurisdiction over an offense under subsection (a) if—(A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))); (B) an offender is a stateless person whose habitual residence is in the United States; (C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States; (D) the offense occurs in whole or in part within the United States; (E) the offense occurs in or affects interstate or foreign commerce; or (F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).").

[85] 8 U.S.C. § 1182(a)(3)(B)(i)(I) (2009) (providing that an alien who "engages in terrorist activity" is inadmissible to the United States); *see* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc) (2009) (defining "terrorist activity" as knowingly affording "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" to a foreign terrorist organization designated under § 1189).

term "material support" is defined less broadly in § 1182 than in § 1189, but it has been interpreted just as expansively.[86] This provision has been interpreted to include individuals who merely provide food and shelter to members of designated terrorist organizations.[87] Aliens who contribute "material support" are also deportable.[88] Pending a removal hearing, the alien may be detained,[89] and the removal proceeding may be based entirely on classified information.[90] Additionally, aliens who provide terrorists "material support" are ineligible for asylum.[91] As with all of these provisions, this law applies regardless of whether the support was provided under duress.[92]

Given all of these far-reaching and devastating consequences of designation under § 1189, this statute provides significant tools to fight

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[86] *Compare* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2009) (material support includes "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") *with* 18 U.S.C. § 2339A(b)(1) (2009) ("the term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.").

[87] Singh-Kaur v. Ashcroft, 385 F.3d 293, 301 (3d Cir. 2004).

[88] 8 U.S.C. § 1227(a)(4)(B) (2009) ("Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.").

[89] 8 U.S.C. § 1536 (a)(1)(A) (2009). This applies to lawful permanent residents as well, although these aliens are entitled to a release hearing where they only be released if they can show that (1) they are a lawful resident; (2) they are not likely to flee if released; and (3) they "will not endanger national security, or the safety of any person or the community, if released." 8 U.S. C. § 1536 (a)(2)(A)(i)-(iii) (2009).

[90] 8 U.S.C. § 1533 (c)(1)(A) (2009) ("In determining whether to grant [the removal] application under this section, a single judge of the removal court may consider, ex parte and in camera, in addition to the information contained in the application . . . other information, including classified information, presented under oath or affirmation . . . ."). While there is a waiver clause that allows the Secretary to forgo application of the "material support" clause with respect to admissibility and deportation of aliens, it does not apply to those aliens who are already in removal proceedings. 8 U.S.C. § 1182(d)(3)(B)(i) (2009). Therefore, as a practical matter the waiver, even during its broadest application, is not likely to benefit very many aliens. *See* Margaret D. Stock, *Providing Material Support to a Foreign Terrorist Organization: The Pentagon, the Department of State, the People's Mujahedin of Iran, & the Global War on Terrorism,* BENDER'S IMMIGRATION BULLETIN (2006).

[91] 8 U.S.C. § 1158 (b)(2)(A)(v) (2009) (asylum will not be granted if "the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity) . . . .").

[92] SHAINA ABER ET AL., UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR, GEORGETOWN UNIVERSITY LAW CENTER HUMAN RIGHTS INSTITUTE REFUGEE FACT-FINDING INVESTIGATION (May 2006) (citing In re R.K., Oral Opinion, Judge Mirlande Tadal, United States Immigration Court, Elizabeth, New Jersey (May 9, 2005)); *see also* Stein, Kara Beth, *Female Refugees: Re-Victimized by the material Support to Terrorism Bar*, 38 MCGEORGE L. REV. 815, 823-27 (2007) (discussing especially harmful effects this law has on immigrant women).

terrorism. This is a good thing if it is applied only to true "terrorist organizations." However, because the statute does not provide even the most basic procedural safeguards to the organization, it is difficult to ensure that only *terrorist* organizations are blacklisted, criminalized, and bankrupted through this process.

II. A BRIEF OVERVIEW OF PROCEDURAL DUE PROCESS IN THE ADMINISTRATIVE CONTEXT

This section will discuss the origin and scope of some of the procedural safeguards required by the Due Process Clause of the Fifth Amendment. Because FTO designations are administrative determinations,[93] the following analysis will focus on the requirements of due process in the context of administrative adjudication.[94]

The Fifth Amendment to the Constitution states that no person shall be deprived of "life, liberty, or property, without due process of law."[95] The Supreme Court has interpreted this clause as having both a substantive and a procedural component. The substantive component limits the way in which government can restrict individual freedoms.[96]

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[93] As discussed earlier, FTOs are designated by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General. 8 U.S.C. § 1189(a)(1), (d)(4) (2009). Each of these individuals is an appointed leader of a federal agency. The Secretary of State is the head of the U.S. Department of State. *See* http://www.state.gov/. The Secretary or the Treasury is the head of the U.S. Department of the Treasury. *See* http://www.treasury.gov/. The Attorney General is the head of the Department of Justice. *See* http://www.usdoj.gov/ag/.

[94] In a given administrative proceeding there may be both statutory and constitutional requirements for procedural due process protections. The statutory requirements, found in the Administrative Proceeding Act ("APA"), require that in "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554 et seq. (2009). The hearing must comply with certain procedures. *Id.* These guidelines include specific requirements for notice of the potential deprivation, access to as well as an opportunity to meet the government's evidence, and limitations on certain combinations of investigative and adjudicative function. *Id.* Also included are guidelines for the types of evidence that may be used. 5 U.S.C. § 556 (2009). Whether a statute uses language that will trigger the application of the APA is a "matter of statutory interpretation" and "[c]courts differ over whether to defer to an agency's interpretation that a particular statute does not require formal adjudication." AMERICAN BAR ASS'N, SECTION OF ADMIN. LAW AND REGULATORY PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 6 (2004). As discussed in section I, § 1189 only requires the Secretary to compile an administrative record and it does not require a hearing at all. For these reasons, the procedural requirements under APA probably do not apply, though they are still useful guidance for the type of hearing that may be required under the constitutional protections of the Fifth Amendment.

[95] U.S. CONST. amend. V.

[96] This component is known as "substantive due process." Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring) (Due Process Clause contains "a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.'").

The procedural component ensures a certain minimum amount of process that is due before a person is deprived of "life, liberty, or property."[97]

Procedural due process is one of the most fundamental concepts in American jurisprudence.[98] However, "process" is not required every time the state asserts its authority over an individual.[99] Due process is not a rigid principle, and its protections vary depending on the facts involved.[100] Therefore, when analyzing an alleged violation of due process, there are three distinct questions that must be addressed: *whether*, *what*, and *when*.[101]

Whether a person is entitled to procedural due process under the Constitution depends upon a determination that the government is acting to deprive the person of an interest recognized by the Due Process Clause—life, liberty or property.[102] In the case of FTO designations, an additional question of *whether* a person is entitled to due process arises because the person deprived is a non-citizen. In these situations, the person (i.e., the organization) must establish sufficient connections with the United States to afford it protections under the Constitution.[103] Lastly, because the Due Process Clause is flexible and provides different levels of protection depending on the circumstances of the deprivation, the next two questions that must be answered are *what* due process requires and *when*.[104]

A. WHETHER DUE PROCESS IS DUE

The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process of the law.[105] Therefore,

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[97] This component is known as "procedural due process." Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring) (Due Process Clause also "is a guarantee of fair procedure, sometimes referred to as 'procedural due process': the State may not execute, imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards.") (footnote omitted).

[98] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

[99] RONALD D. ROTUNDA & JOHN E. NOWARK, *CONSTITUTIONAL LAW* 593 (3d ed. & 1999 Supp 2007).

[100] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[101] *See, e.g.*, Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192, 205 (D.C. Cir 2001).

[102] *See, e.g., id.* at 203-04.

[103] People's Mojahedin Org. of Iran v. U.S. Dep't of State ("*PMOI*"), 182 F.3d 17, 22 (D.C. Cir. 1999).

[104] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 321 (1976) ("'(D)ue process is flexible and calls for such procedural protections as the particular situation demands,'.") (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[105] U.S. CONST. amend. V.

there are two basic prerequisites for its protection: (1) one must be a "person" within the meaning of this clause, and (2) there must be a deprivation of one of the enumerated rights.

A "person" under the Constitution is not limited to citizens. Instead, it applies to "all persons within the territorial jurisdiction."[106] A person within the territorial jurisdiction of the United States includes people who are physically present[107] or who own property within the United States.[108] Thus, courts sometimes describe this requirement as having "presence" within[109] or "substantial connections" with the United States.[110] Without presence in the United States, the Due Process Clause does not offer any protections.[111]

Similarly, the Due Process Clause does not apply unless the state has deprived[112] the person of "life, liberty, or property."[113] What constitutes "life, liberty, or property" has given rise to extensive commentary; however, some basic principles are beyond dispute. "Life" is that period after birth[114] and before the cessation of brain activity.[115] "Liberty" includes "any form of action or choice which is accorded constitutional recognition by the Court."[116] There are two ways the

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[106] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[107] Johnson v. Eisentrager, 339 U.S. 763, 777-78 (1950); *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953).

[108] Sardino v. Federal Reserve Bank of N.Y., 361 F.2d 106, 111 (1966) ("[T]he Court has declared unequivocally, with respect to non-resident aliens owning property within the United States, that they 'as well as citizens are entitled to the protection of the Fifth Amendment.'") (quoting United States v. Pink, 315 U.S. 203, 228 (1942)); *see also* Guessefeldt v. McGrath, 342 U.S. 308, 318 (1952) ("friendly aliens are protected by the Fifth Amendment requirement of just compensation.").

[109] Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192, 200-01 (D.C. Cir 2001).

[110] U.S. v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

[111] People's Mojahedin Org. of Iran v. U.S. Dep't of State ("*PMOI*"), 182 F.3d 17, 22 (D.C. Cir. 1999) (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990)).

[112] A deprivation is an intentional state action that has an adverse effect on one of these protected interests. AMERICAN BAR ASS'N, SECTION OF ADMIN. LAW AND REGULATORY PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW, (2004); *see also* Daniels v. Williams, 474 U.S. 327, 328 (1986) ("The Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.").

[113] U.S. CONST. amend. V.

[114] In *Roe v. Wade* the court held that an unborn fetus was not a "person" under the Fourteenth Amendment. Roe v. Wade, 410 U.S. 113 (1973). This Comment will not attempt to tackle the debate surround the meaning and confines of the term "life."

[115] Although the Supreme Court has not dealt with the issue, in *People v. Eulo* the highest court in New York held that "death" could be either the cessation of breathing, or when breathing is artificially maintained, the cessation of brain activity. People v. Eulo, 63 N.Y.2d 341, 346 (1984).

[116] RONALD D. ROTUNDA & JOHN E. NOWARK, CONSTITUTIONAL LAW 27 (3d ed. & 1999 Supp 2007).

government can deprive a person of "liberty." The first is through physical restraint, such as imprisonment.[117] The second is by limiting a person's freedom of choice by criminalizing or penalizing a substantive right,[118] which is "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[119] Finally, "property" certainly includes all traditional forms of real and personal property.[120] It also includes government benefits such as welfare,[121] disability benefits,[122] and government employment.[123]

Without these basic prerequisites, the Due Process Clause does not provide any procedural protection whatsoever. Assuming the state has deprived a person of life, liberty, or property, the Due Process Clause does not offer the same protections for all deprivations. Therefore, the next question is *what* procedural protections are required.

B. WHAT DUE PROCESS REQUIRES AND WHEN—THE *MATHEWS* TEST

Due process is "'flexible and calls for such procedural protections as the particular situation demands.'"[124] Ultimately, the procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis for government actions that deprive him of life, liberty or property.[125] Therefore, the determination of what "due process may require under any given set of circumstances begins with a determination of precise nature of government function involved as well as private interests that have been affected by governmental action."[126] In

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[117] Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

[118] Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[119] Michael H. v. Gerald D., 491 U.S. 110, 122-23 (1989) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (Cardozo, J.)).

[120] RONALD D. ROTUNDA & JOHN E. NOWARK, CONSTITUTIONAL LAW 69 (3d ed. & 1999 Supp 2007).

[121] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

[122] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

[123] *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 928-29 (1997).

[124] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[125] RONALD D. ROTUNDA & JOHN E. NOWARK, CONSTITUTIONAL LAW 100 (3d ed. & 1999 Supp 2007).

[126] Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886 (1961); *see also* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) ("The extent to which procedural due process must be afforded [to] the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental

administrative proceedings many, if not most, of the formal requirements of a trial will not be required under the Due Process Clause.[127] While a full trial-like hearing is not often required in the context of administrative adjudication,[128] these proceedings still must provide the "fundamental requiste of due process of law" of notice and an opportunity to be heard upon such notice[129] in front of an unbiased adjudicator.[130]

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interest in summary adjudication. Accordingly . . . 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'") (citations omitted).

[127] 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 613-15 (4th ed. 2002). There are perhaps twenty elements to a formal "trial-type" hearing:

> (1) 'timely and adequate notice detailing the reasons for the proposed termination,' (2) 'an effective opportunity to defend by confronting any adverse witnesses,' (3) oral presentation of arguments, (4) oral presentation of evidence, (5) cross-examination of adverse witnesses, (6) disclosure to the claimant of opposing evidence, (7) the right to retain an attorney, (8) a determination resting 'solely on the legal rules and evidence adduced at the hearing,' (9) 'the decisionmaker should state the reasons for his determination and indicate that evidence he relied on',"... (10) 'an impartial decisionmaker... (11) 'a complete record.' (12) 'a comprehensive opinion,' (13) counsel provided by the government, ... (14) 'a full opinion or even formal finding of fact and conclusions of law.'... (15) a jury trial, (16) a right to appeal to a higher authority, (17) a right to subpoena witnesses and evidence and a right of discovery, (18) a hearing open to the public, including the press, (19) proof beyond a reasonable doubt, and (20) protection against undue delay.

CHARLES H. KOCK, JR., ADMINISTRATIVE LAW AND PRACTICE 65 (2d ed. 1997) (quoting Goldberg v. Kelly, 397 U.S. 254 (1970)).

[128] Prior to 1970, the courts rarely considered this question of what kind of "hearing" was required. 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 615 (4th ed. 2002). Once the courts concluded that the Due Process Clause applied, it found that a "hearing" was necessary but did not address what kind of hearing was required. *Id.* at 613. However, with the abandonment of the "rights" vs. "privileges" distinction the protections of the Due Process Clause were being applied to an ever growing arena of administrative actions, which up until that time were viewed as privileges not entitled to Constitutional protection. O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 716-17 (1996); *see also* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). Therefore, the question became what was required when the State deprived persons of these new, broader, concepts of property and liberty. The pivotal case came in 1970 when the Supreme Court held that a hearing was required before the state could terminate welfare benefits. Goldberg v. Kelly, 397 U.S. 254, 264 (1970). Following this case, there was a "due process explosion" in which the lower courts struggled to determine what due process required. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975). In 1975, Judge Henry Friendly wrote that three most important procedural safeguards, fundamental to fair adjudicatory decision-making, are (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; and (3) an opportunity to present reasons why the proposed action should not be taken. *Id.* at 1279-81 (listing eleven basic elements of a fair hearing in order of priority).

[129] Grannis v. Ordean, 234 U.S. 385, 394 (1914); Anderson Nat. Bank v. Luckett, 321 U.S. 233 (1944); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Mathews v. Eldridge, 424 U.S. 319, 333-34 (1976); Richards v. Jefferson County, Ala., 517 U.S. 793, 116 (1996); Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192, 200-09 (D.C. Cir 2001).

In the landmark decision of *Mathews v. Eldridge,* the Supreme Court articulated the modern test for determining whether a particular procedural safeguard is required, and when it is required under the Due Process Clause.[131] In *Mathews v. Eldridge*, Justice Powell developed a test for evaluating when the Due Process Clause has been violated because of the omission of one or more procedural safeguards. Synthesizing recent Supreme Court cases, Justice Powell found that the analysis must balance three factors. The first is the "private interest" affected by the official action, which requires a consideration of both the degree and the length of the potential deprivation.[132] The second factor is the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value, if any, of additional procedural safeguards.[133] This factor takes into consideration the risk inherent in the truth finding process;[134] the degree to which the person is given "access to the information relied upon by the state agency in making the determination" and an opportunity to respond to the determination made by the agency;[135] and lastly, the existence of an appeal procedure after the determination and the rate of success of those appeals.[136] The third and final factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[137]

Because due process is flexible, the *Mathews* balancing test assesses the necessity of a given procedural due process protection. Although the Court has articulated other tests for determining the adequacy of due process protections, the *Mathews* test is the basic test to be used in most circumstances[138] and particularly in the context of administrative proceedings.[139] The *Mathews* test is also the proper test to apply to FTO

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[130] In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

[131] Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

[132] *Id.* at 341.

[133] *Id.* at 333.

[134] *Id.* at 344.

[135] *Id.* at 335-46.

[136] *Id.* at 346-47.

[137] *Id.* at 334.

[138] State of California ex rel. Lockyer v. F.E.R.C., 329 F.3d 700, 709 n.8 (9th Cir. 2003) (it is also a general test to be applied in most other contexts except in rare circumstances).

[139] Girard v. Klopfenstein, 930 F.2d 738, 742 (9th Cir. 1991) (the *Mathews* test is "the standard for determining whether certain challenged administrative procedures comply with the requirements of due process."). In *Dusenbery,* the Court noted that the *Mathews* test was never meant to guide all questions of due process. Dusenbery v. United States, 534 U.S. 161, 168 (2001). That case involved the adequacy of the FBI's notice to a federal prisoner. *Id.* at 163. Rather than applying *Mathews*, the Court held that the *Mullane* test of reasonableness was more appropriate. *Id.*

designation proceedings under § 1189.[140]

III. SECTION 1189 UNCONSTITUTIONALLY DEPRIVES ORGANIZATIONS WITH PRESENCE IN THE UNITED STATES DUE PROCESS UNDER THE FIFTH AMENDMENT

With this background on procedural due process in mind, section III will first address the circumstances under which potentially designated FTOs are entitled to due process protection. Second, this section will show that when an organization is entitled to protection under the Constitution, § 1189 does not meet the basic requirements of the Due Process Clause of the Fifth Amendment. Lastly, section III(C) will show that although the United States Court of Appeals for the District of Columbia has interpreted the statute to include some due process protections, these protections are not sufficient. Application of the *Mathews* balancing test reveals that the demands of the Due Process Clause require not only notice of the impending designation, but also an opportunity for the organization to present its case before an unbiased tribunal.

A. QUALIFYING FOR CONSTITUTIONAL PROTECTION

The first question that must be addressed is *whether* organizations designated under § 1189 are entitled to due process. This requires not only a deprivation of life, liberty or property, but also, because they are likely to be foreign organizations, enough presence to be entitled to Constitutional protection. In the case of an FTO designation, these two questions of *whether* the organization is entitled to protections under the Due Process Clause are likely to be related. Many potentially designated organizations will not have physical presence within the United States because by definition they are foreign. However, they may have

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at 167. Additionally, some courts have applied the *Calero-Toledo* test to determine the sufficiency of the procedure to designate SDGT's under Executive Order 13,224. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 76 (D.D.C. 2002) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679-80 (1974)).

[140] Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192, 206 (D.C. Cir 2001). The *Mathews* test is superior to the other tests articulated by the Court for several reasons. First, unlike the other tests, it was fashioned specifically for administrative proceedings. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976). Second, it was created after the *Calero-Toledo* test and is better equipped to weight the precise issues involved in administrative designations. *Compare Mathews with Calero-Toledo*, 416 U.S. 663 (1974). Finally, the courts have consistently used the *Mathews* test to evaluate due process considerations in FTO designations. *Compare NCRI*, 251 F.3d at 206, *with* People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003) *and* Chai v. Dep't of State, 466 F.3d 125 (D.C. Cir. 2006).

"substantial connections" through money in U.S. bank accounts or other property within the United States.[141]

In *NCRI,* it was enough to trigger the application of the Due Process Clause that the NCRI had an "overt presence within the National Press Building in Washington, D.C.," and claimed "an interest in a small bank account."[142] However, as will often be the case, the court noted that much of its determination rested on classified evidence that it could not reveal.[143] Still, statistics from the Department of Treasury indicate that many potential FTOs have substantial assets within the United States.[144] Because § 1189 provides that upon designation all assets must be blocked, this property interest will also likely be the constitutionally protected right that is deprived upon designation.[145] Without this connection to the United States, the organization has no due process protections and is entitled only to statutory protections.[146] Assuming the question is resolved in a manner that entitles an organization to the protections of the Constitution, the following analysis will show that the basic standards imposed by the Due Process Clause of the Fifth Amendment to the Constitution are not present in § 1189.

B. SECTION 1189 FAILS TO PROVIDE EVEN THE MOST BASIC REQUIREMENTS OF DUE PROCESS

The most basic and fundamental requirements of due process are notice of the proposed government action, an opportunity to meet and refute the government's case, and a neutral tribunal to adjudicate the proposed government action.[147] Section 1189 fails to meet even these

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[141] The organization will not, however, be able to rely on its members' ownership of property within the United States. *See* 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) ("[T]he affidavits petitioners submitted in this case demonstrate only that some of their American 'members' personally rented post office boxes and utilized a bank account to transmit funds and information to 32 County and the Association in Ireland. The affidavits do not aver that either organization possessed any controlling interest in property located within the United States, nor do they demonstrate any other form of presence here.").

[142] *NCRI*, 251 F.3d at 201.

[143] *Id.* at 202.

[144] *See, e.g.*, OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPARTMENT OF THE TREASURY, TERRORIST ASSETS REPORT CALENDAR YEAR 2006 FIFTEENTH ANNUAL REPORT TO CONGRESS ON ASSETS IN THE UNITED STATES OF TERRORIST COUNTRIES AND INTERNATIONAL TERRORISM PROGRAM DESIGNEES, *available at* http://www.treas.gov/offices/enforcement/ofac/reports/tar2006.pdf ("As of December 31, 2006, assets blocked pursuant to Executive Orders 12947, 13099, and 13224 totaled $16,413,733.80").

[145] 8 U.S.C. § 1189(a)(2)(C) (2009).

[146] People's Mojahedin Org. of Iran v. U.S. Dep't of State ("*PMOI*"), 182 F.3d 17, 23 (D.C. Cir. 1999).

[147] Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-81 (1975)

most basic and fundamental aspects of due process. First, there is no requirement in § 1189 that the Secretary notify the organization of the designation prior to the actual designation.[148] Although § 1189 does provide for notice in the Federal Register, once this occurs the consequences of designation immediately take effect.[149] Therefore, the publication in the Federal Register is not pre-deprivation notice because the moment it is published is also the moment of the deprivation. Second, even if the organization was notified, the statute does not require the Secretary to provide a hearing before the designation is effectuated.[150] The organization is not given the opportunity to refute the Secretary's evidence or to present its own evidence proving that it is not a "terrorist organization."[151]

C. THE ADDITIONAL DUE PROCESS REQUIREMENTS IMPOSED BY NATIONAL COUNCIL OF RESISTANCE OF IRAN

Almost immediately after Secretary of State Madeleine K. Albright published the first batch of FTOs in the Federal Register, the People's Mojahedin Organization of Iran ("PMOI")[152] began challenging its designation.[153] In 2001, the Court of Appeals for the District of Columbia found that an organization with sufficient connection to the United States has the right to be heard "at a meaningful time and in a meaningful manner."[154]

(listing eleven basic elements of a fair hearing in order of priority, the first three being those listed above in the text).

[148] *NCRI*, 251 F.3d at 208.

[149] 8 U.S.C. § 1189(a)(2)(ii) (2009).

[150] *See generally* 8 U.S.C. § 1189 (2009). Section 1189 does outline a procedure for revoking FTO designations after they are in effect. However, this is only done only after a two-year delay and does not *review* previous designation, but instead determines whether the situation has changed such that the designation is no longer appropriate. 8 U.S.C. §1189(b) (2009).

[151] *PMOI*, 182 F.3d at 19.

[152] The PMOI has several names. PMOI is often abbreviated as MEK and is frequently identified in this way by the government and the media. The group also goes by the name Mujahideen-e-Khalq Organisation (MKO). People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 20 n.3 (D.C. Cir. 1999). The U.S. government has maintained that the National Council Resistance of Iran (NCRI) is an alias for the PMOI; however, that is something both the PMOI and the NCRI deny. 72 Fed. Reg. 40374-01 40599 ("People's Mujahedin Organization of Iran (a.k.a . . National Council of Resistance (NCR)) . . . .").

[153] After being officially designated an FTO in 1997, the PMOI petitioned for review, arguing that § 1189 denied it due process under the Fifth Amendment to the Constitution. *PMOI*, 182 F.3d at 22. This would be the beginning of a long series of challenges to § 1189's procedure for designating groups as FTOs. *See PMOI*, 182 F.3d 17; *NCRI*, 251 F.3d 192; People's Mojahedin Org. of Iran v. U.S. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003); National Council of Resistance of Iran v. Dep't of State, 373 F.3d 152 (D.C. Cir. 2004).

[154] *NCRI*, 251 F.3d at 208 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

The PMOI is an Iranian activist organization that seeks to overthrow the current government of Iran and establish a non-theocratic republic.[155] The first time it challenged the designation, the D.C. Circuit found that it was not entitled to due process protections because it lacked presence in the United States.[156] When the PMOI was re-designated as an FTO in 1999, the Secretary listed the National Council of Resistance of Iran ("NCRI") as its alias.[157] The PMOI, together with the NCRI, again argued that the FTO designation, without notice or a hearing, violated their due process rights under the Constitution.[158]

First, the court addressed whether the organization was entitled to due process protections.[159] The NCRI had an interest in a U.S. bank, which the court determined to be sufficient presence within U.S. territory.[160] Because the two groups were one, according to the Secretary, each had sufficient presence within the United States to be entitled to protection under the Constitution.[161] Since their property interest was frozen by the FTO designation, the court also found the organizations had been deprived of "property" by § 1189.[162] The court then used the *Mathews* balancing test to determine whether the Secretary

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[155] Mears, Bill, *Justices Won't Intervene in Terror Case*, CNN LAW CENTER, Jan. 8, 2007, *available at* http://www.cnn.com/2007/LAW/01/08/scotus.terror/.

[156] *PMOI*, 182 F.3d at 22. Therefore the court merely examined the administrative record compiled by the Secretary to determine whether it contained "substantial" support that the organizations engaged in terrorist activity; "not surprisingly," it did. *Id* at 24. After reluctantly reaching this conclusion, the court emphasized the very narrow ruling it was making: "we reach no judgment whatsoever regarding whether the material before the Secretary is or is not true . . . [h]er 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." *Id.* at 25; *see also id.* at 19 ("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.").

[157] *NCRI*, 251 F.3d at 197.

[158] *Id.* at 200.

[159] *Id.* at 200-05.

[160] *Id.* at 201. The court could not reveal many of the facts that led to this conclusion, as much of it was apparently based on classified information. *Id.* at 202 ("[W]e have reviewed the entire record including the classified information and determine that NCRI can rightly lay claim to having come within the territory of the United States and developed substantial connections with this country. We acknowledge that in reviewing the whole record, we have included the classified material. As we noted above and in People's Mojahedin, we will not and cannot disclose the contents of the record.").

[161] *Id.* at 202 ("Insofar as PMOI's claimed presence is concerned, the United States is now hoist with its own petard. The Secretary concluded in her designation, which we upheld for the reasons set forth above, that the NCRI and the PMOI are one. The NCRI is present in the United States. If A is B, and B is present, then A is present also.").

[162] *Id.* at 204.

was required to implement the additional procedural safeguards sought by the groups.[163] Thus, the court looked at the private interests implicated by the government action, the risk of erroneous deprivation and the government or public's interests.

Under the first factor, the court only acknowledged the organizations' small interest in the bank account.[164] Although the *Mathews* test is a balancing test designed to weigh, comparatively, the interests at stake, the court declined to address whether the organization could assert its members' constitutional rights.[165] The court seemed to confuse the issue of *whether* the Due Process Clause was triggered with *what* the Due Process Clause required.[166] Therefore, after finding a property interest affected by the designation, the court simply moved on to the second prong of the *Mathews* test.[167] The court disagreed with the Secretary's argument that the risk of erroneous deprivation is diminished because prior to the designations members of Congress are informed.[168] The court found that notice must be given to the person affected by the government action.[169] As for the third *Mathews* factor, the government or public's interests, the court found that while the Secretary's interest in national security was undoubtedly strong, providing notice and an opportunity to be heard prior to the deprivation would not implicate that interest.[170] This was especially true because the court was not granting the organization access to the classified portion of the administrative record, but merely the information that would, in any event, be made

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[163] *Id.* at 204-09.

[164] *Id. at* 206.

[165] *Id.* at 205 ("On each of the second and third consequences, each side offers plausible arguments. But we need not decide as an initial matter whether those consequences invade Fifth Amendment protected rights of liberty, because the invasion of the Fifth Amendment protected property right in the first consequence is sufficient to entitle petitioners to the due process of law.").

[166] *See, e.g.,* Eric Broxmeyer, *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,* 22 BERKELEY, J. INT'L L. 439, 466 (arguing the same); Joshua Ellis, *Designation of Foreign Terrorist Organizations Under the AEPA: The National Council Court Erred in Requiring Pre-Designation Process,* 2002 BYU L. REV. 675, 699-701.

[167] *NCRI*, 251 F.3d at 206.

[168] *Id.* at 207.

[169] *Id.* at 207 ("[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. Again, the government has offered nothing that apparently weighs in favor of a post-deprivational as opposed to pre-deprivational compliance with due process requirements of the Constitution.").

[170] *Id.* at 208 ("It is particularly difficult to discern how such a notice could interfere with the Secretary's legitimate goals were it presented to an entity such as the PMOI concerning its redesignation.").

public at the time of the court's judicial review.[171]

Having considered the *Mathews* factors, the court required two basic elements of due process. First, the court required notice of the impending designation to the organization. The notice was to be made "as soon as the Secretary has reached a tentative determination that the designation is impending" and was to include the unclassified information that formed the basis for the designation.[172] The court also acknowledged that in some circumstances notice may be postponed until after the deprivation; however, this required "an adequate showing to the court" that a pre-designation notice "would impinge upon the security and other foreign policy goals of the United States."[173] Second, the court required that the organization be given an "opportunity to be heard."[174] This did not mean a jury trial, but the "opportunity to present, at least in written form," evidence both to "rebut the administrative record" and to "negate the proposition that they are foreign terrorist organizations."[175] Because the NCRI had not been given these protections, the court remanded with instructions for the Secretary to retroactively provide the NCRI an opportunity to present its case.[176]

It has been seven years since the *NCRI* ruling.[177] In the few

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[171] *Id.* at 208-09.

[172] *Id.* at 209.

[173] *Id.* at 208.

[174] *Id.* at 208.

[175] *Id.* at 209.

[176] *Id.* Contrary to statutory command, after finding that the NCRI was deprived of its due process rights, the court did not vacate the designation. *Id.* ("We recognize that a strict and immediate application of the principles of law which we have set forth herein could be taken to require a revocation of the designations before us. However, we also recognize the realities of the foreign policy and national security concerns asserted by the Secretary in support of those designations. We further recognize the timeline against which all are operating: the two-year designations before us expire in October of this year. We therefore do not order the vacation of the existing designations, ..."). This meant that although the court had found that the designation had been made in violation of the organizations Constitutional rights all prosecutions for "material support" under § 2339B and immigration proceedings under § 1182 remained in place. *See, e.g.,* U.S. v. Afshari, 426 F.3d 1150, 1157-58 (9th Cir. 2005). While the court in U.S. v. Rahmani, 209 F. Supp. 2d 1045, 1059 (C.D. Cal. 2002) found that a 2339B prosecution could not stand on the basis of an designation made in violation of the Due Process Clause, that decision was overturned by *Afshari,* 426 F.3d at 1157-58. *But see* U.S. v. Afshari, 446 F.3d 915 (9th Cir. 2006) (Kozinski, J., dissenting) (the "net result" of majority's decision "is that Rahmani is being criminally prosecuted, and almost certainly will be convicted, for contributing to an organization that has been designated as terrorist with none of the protections that are constitutionally required for such a designation. Worse, Rahmani will in all likelihood spend many years in prison for contributing to an organization whose designation the D.C. Circuit has held does not even meet the requirements of due process. Because I believe that the prosecution in this case runs contrary to two of our defining traditions-that of free and open expression, and that of justice and fair play-I respectfully dissent from the court's failure to correct the panel's errors by taking this case en banc.").

[177] *See NCRI,* 251 F.3d at 206.

challenges made to the designation process since that time, the court has continued to apply its holding, and it has never been reviewed by another court.[178] Review is long overdue. While notice and hearing requirements are vitally important, they mean very little if the court does not give the organization the right to be heard in front of an impartial and detached decisionmaker.[179] The court in *NCRI* did not fully address the far-reaching effects of the FTO designation or the extent of the *Mathews* factors involved.

D. THE SECRETARY IS NOT A FAIR AND UNBIASED DECISIONMAKER

Assuming that the Secretary is complying with the requirements of *NCRI* and providing organizations pre-designation notice and an opportunity to present an opposition to the designation, § 1189 is still unconstitutional because it deprives potentially designated organizations their constitutional right to a fair and unbiased adjudicator.[180] Without this basic due process requirement, the opportunity to be heard is virtually meaningless.

An unbiased adjudicator[181] is a basic requirement of due process.[182] This requirement topped the list of Justice Friendly's basic elements of procedural due process.[183] The United States Supreme Court has held

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[178] *See, e.g.,* People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003); Chai v. Dep't of State, 466 F.3d 125 (D.C. Cir. 2006).

[179] In fact the court held that the organization must be given the opportunity "to be meaningfully heard *by the Secretary* upon the relevant findings." *NCRI*, 251 F.3d at 209. As will be discussed at length below, because the Secretary makes the designations, she should not be the individual to adjudicate the opposition to the designation.

[180] At least one commentator has suggested that no such notice-and-hearing requirement is being offered unless specifically ordered by the court for a particular group. Randolph N. Jonakai, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125, 147-48 (2003/04). In *Chai*, the Secretary did give some the organization notice of a pending designation. Chai v. Dep't of State, 466 F.3d 125, 127 (2006). However, the notice only offered to provide the administrative record upon request. *Id.* Although the organizations there did respond, requesting the unclassified portions of the record, the Secretary did not so provide because the "did not indicate it was written on behalf of a representative . . . [the organization]." *Id.* at 128, 132. The court did not address whether this complied with the NCRI holding because "the alleged errors were . . . clearly rendered harmless." *Id.* at 132.

[181] Adjudication is a determination of individual rights or duties. UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL OF THE ADMINISTRATIVE PROCEDURE ACT 14 (1947). Here, the Secretary's FTO designations are adjudications because she is determining the right of the organization to use and have access to its personal property.

[182] *In re* Murchison, 349 U.S. 133, 136, (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

[183] Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV.1267, 1279 (1975) (listing

that the basic requirement of a fair trial in a fair tribunal "applies to administrative agencies which adjudicate as well as to courts."[184] While there are certainly different notions of what it means to be unbiased, the Supreme Court has recognized some basic tenets. First, an adjudicator may not have a financial or pecuniary interest in the outcome of the case.[185] Second, an adjudicator may be disqualified if one of the parties has personally criticized or abused the adjudicator.[186] Generally "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation."[187] However, there are certain additional factors that will make a person's ability to be partial questionable.[188] Therefore, courts have found that when a judge makes a public statement about the case indicating bias, the judge must recuse him or herself.[189] Similarly, "when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review."[190] It is also a violation of due process when a decisionmaker is asked to evaluate or review his or her own decision.[191] When one individual rather than one commission or agency acts as both investigator or prosecutor and decisionmaker, this may also indicate an impermissible bias in adjudication.[192]

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eleven basic elements of a fair hearing in order of priority and listing "an unbiased tribunal" first).

[184] Withrow v. Larkin, 421 U.S. 35, 46 (1975).

[185] *Id.* (citing Gibson v. Berryhill, 411 U.S. 564, 579 (1973)); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927); *cf.* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968); *see also* Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995) (articulating a test for determining the extent of the pecuniary interest which will disqualify a judge.).

[186] Withrow v. Larkin, 421 U.S. 35, 46 (1975) (citing Taylor v. Hayes, 418 U.S. 488, 501-03 (1974)); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Pickering v. Board of Education, 391 U.S. 563, 578-79 n. 2 (1968); *cf.* Ungar v. Sarafite, 376 U.S. 575, 584 (1964).

[187] *Withrow*, 421 U.S. at 58.

[188] *Id.* ("[I]f the initial view of the facts . . . as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.").

[189] *See, e.g.*, 1616 Second Ave. Rest., Inc. v. N.Y. State Liquor Auth., 75 N.Y. 2d 158 (N.Y. 1990) (holding that when a State Liquor Commissioner appointed to hear a case regarding an alleged violation of state liquor laws by a Manhattan restaurant made comments about the case when called to testify before the state senate, he should have recused himself from the three-member commission).

[190] *Withrow*, 421 U.S. at 58 n.25; *see also* Brown v. State Bd. of Dental Examiners, No. 93A-1-017, 1994 WL 315304, at *4 (Del. Super. Ct. May 23, 1994) (finding violation of due process when the State Board of Examiners for dental licensing both graded applicant's dental exam and heard his petition for review of that decision).

[191] Brown v. State Bd. of Dental Examiners, No. 93A-1-017, 1994 WL 315304 (Del. Super. Ct. May 23, 1994); *see also* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

[192] *See, e.g.*, Walker v. City of Berkeley, 951 F.2d 182, 184 (9th Cir. 1991) (finding a "fatal

In *Morrissey v. Brewer*, for example, the Supreme Court held, in a case involving an administrative decision by the Iowa Board of Parole to revoke parole, that "due process requires that . . . the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case."[193] The statute at issue in *Morrissey* provided for a two-step process. First, there was an initial arrest after a suspected parole violation.[194] This often occurred after a recommendation from the parolee's parole officer. At the second stage, the parole board would make a final determination as to whether the parole would be revoked.[195] The Court found that due process required a prompt "preliminary hearing" adjudicated by someone detached and uninvolved in the case.[196] The Court explained that while it may be unfair to assume that the parole officer "bears hostility against the parolee that destroys his neutrality," an "officer directly involved in making recommendations cannot always have complete objectivity in evaluating them."[197]

Similarly, in *Goldberg v. Kelly*, the Supreme Court held that due process required a preliminary evidentiary hearing before a welfare recipient's welfare could be terminated.[198] In *Goldberg*, the New York City Department of Social Services promulgated a policy whereby a caseworker, after questioning a welfare recipient's eligibility, made a recommendation to the supervisor whether the recipient's aid should be terminated.[199] The recipient could object with written evidence, but if that submission was rejected the welfare was immediately terminated.[200]

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defect" in "allowing the same person to serve both as decisionmaker and as advocate for the party that benefited from the decision.") (citing Schweiker v. McClure, 456 U.S. 188, 190-91, 197 n.11 (1982) (finding no due process violation where Medicare permitted insurance carrier employees to serve as hearing examiners, but noting with approval that under the Secretary's rules, "'[t]he individual selected to act in the capacity of [hearing officer] must not have been involved in any way with the determination in question and neither have advised nor given consultation on any request for payment which is a basis for the hearing.'") (quoting Secretary's instruction manual). In the criminal setting, the Court also found it unconstitutional when the same judge that, through a "judge-grand jury" system whereby one judge would conduct the entire grand jury hearing in private, also tried the case in open court noting that "it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings." *In re* Murchison, 349 U.S. 133, 138 (1955).

[193] Morrissey v. Brewer, 408 U.S. 471, 485 (1972).

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Morrissey*, 408 U.S. at 485.

[198] Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

[199] *Id.* at 259.

[200] *Id.* at 260.

Only after this process was complete was the recipient entitled to a "fair hearing" in front an "independent state hearing officer" where he or she could appear personally to present evidence.[201] Primarily because of the large personal interest at stake—the individual's source of income—the Court rejected the idea that because there was a fair hearing after the termination of the benefits, the preliminary hearing did not have to offer an opportunity to present evidence in person.[202] In so holding, the Court required that the preliminary hearing be conducted by someone who did not "participate[] in making the determination under review."[203] In sum, in both *Goldberg* and *Morrissey,* the Court found that it is violation of due process when the person who originally made the decision to deprive a person of "life liberty or property" also presides over the proceedings to review the accuracy of those decisions.

Section 1189 suffers from the same shortcoming. Under § 1189, the Secretary makes both the initial decision to designate FTOs and the subsequent decision when those designations are on review.[204] In *NCRI,* the court held that the Due Process Clause requires that once this initial determination is made, the organization must be afforded notice and an opportunity to be heard before the designation takes effect.[205] Under *Goldberg* and *Morrissey*, due process does not allow the Secretary to also hear the organization's opposition to the designation. Neither the statute nor the court in *NCRI* requires that these "hearings" be heard by anyone else. "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' [] (D)ue process is flexible and calls for such procedural protections as the particular situation demands.'"[206] Neither is it so elastic that its protections become, in effect, merely theoretical. The *Mathews* test is designed to find the balance between these extremes.

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[201] *Id.* at 259.

[202] *Id.* at 261 ("While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. Suffice it to say that to cut off a welfare recipient in the face of 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.") (quoting Kelly v. Wyman, 294 F. Supp. 893, 899-900 (1968)).

[203] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[204] *See generally* 8 U.S.C. § 1189 (2009).

[205] Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192 (D.C. Cir 2001).

[206] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citation omitted).

IV. DUE PROCESS REQUIRES AN UNBIASED AND DETACHED ADJUDICATOR TO REVIEW FTO DESIGNATIONS UNDER § 1189—THE *MATHEWS* ANALYSIS

As discussed in Part II, *supra*, the Supreme Court held in *Mathews* that "identification of the specific dictates of due process generally requires consideration of three distinct factors:" 1) the private interests affected by the official action, 2) the risk of erroneous deprivation, and 3) the government's interests in omitting the procedural safeguard.[207] The *Mathews* test is used to determine both what particular procedural safeguards due process requires and when due process is required.[208] Application of the *Mathews* test will show, first, that the interests involved in FTO designations tip the scales in favor of requiring an unbiased tribunal, and second, that this should be implemented at an initial pre-deprivation hearing.

A. UNDER *MATHEWS*, DUE PROCESS REQUIRES AN UNBIASED ADJUDICATOR TO REVIEW FTO DESIGNATIONS

The "what" of due process uses the *Mathews* factors to determine "what procedural devices must the . . . [parties] have access [to] in order to protect their interests against the deprivations worked by the statute."[209] In *NCRI*, the court weighed these factors and required notice and an opportunity to be heard prior to the FTO designation.[210] However, perhaps because the court did not fully account for the private interests involved in FTO designations, it did not remedy the due process violations in § 1189, because it did not require an unbiased decisionmaker at the organization's "opportunity to be heard."[211] A full *Mathews* analysis indicates that the government's interests are outweighed by the very significant "private" interests implicated by the designation process, as well as the high risk of an erroneous deprivation when the Secretary is given the responsibility for reviewing her own FTO designations.

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[207] *Id.* at 335.

[208] *NCRI*, 251 F.3d at 205 ("When analyzing the petitioners' claims, and the government's and the government's defenses, we are mindful that two distinct questions remain for us to determine . . . *what* due process and *when*.").

[209] *Id.*

[210] *NCRI*, 251 F.3d at 208-09.

[211] *See generally NCRI*, 251 F.3d 192.

1. Private Interests

The first factor considered under *Mathews* is the private interest that will be affected by the state action.[212] This factor considers the degree of the potential deprivation as well as the possible length of the deprivation.[213] In the context of FTO designations both of these considerations are extremely important.

a. Degree of the Potential Deprivation

In *NCRI*, the only private factor considered by the court was the financial assets of the organization.[214] As explained in section III, *supra*, the court erroneously declined to reach the question of whether the organization could assert the two other private factors implicated by the designation: the organization's right to have its members enter the United States, and the organization's members' right of freedom of association.[215] These two interests also did not factor into the court's reasoning when examining the questions of *what* or *when* due process was due.[216] Because the *Mathews* analysis requires a balancing of competing interests, it is necessary to consider all of the interests implicated under the designation.[217] Therefore, a proper *Mathews* analysis of the private interests must take into account not only the organization's property interests but also the First Amendment rights of its members.[218]

Although it will be a fact-specific determination, many organizations are likely to have a substantial property interest seized

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[212] Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

[213] *Id.* at 334.

[214] *NCRI*, 251 F.3d at 206.

[215] *Id.* at 204-05. The organization raised these interests as additional property interests of which they were deprived under § 1189.

[216] *NCRI*, 251 F.3d at 205-09.

[217] *Id.* at 206; *see also* Eric Boxmeyer, *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*, 22 BERKELEY J. INT'L L. 439, 466 (2004) (court seemed to be confusing the question of whether a property interest implicates the Due Process clause with the issue of what weight to allocate it).

[218] It is much less clear whether the organization could assert the rights of its members to enter the country. Although an alien's interest in not being "removed from his community, his home, and his family" is "accorded the utmost weight," Kiareldeen v. Reno, 71 F. Supp. 2d 402, 413 (D.N.J. 1999), it is unlikely that the organization would have standing to assert it because there is no definite "injury in fact." Unlike the inability of the organization to raise funds, the deportation or inadmissibility of its members is not automatic but rather depends on factors listed in § 1182. For that reason, this Comment will only consider the First Amendment rights of the organizations members in conducting the *Mathews* analysis.

upon by a § 1189 designation. The statute provides that upon designation, U.S. financial institutions must block all financial transactions involving the organization's "assets."[219] Because the Department of Treasury defines "assets" in the Code of Federal Regulations very broadly,[220] an organization with presence in the United States is also likely to have a very substantial amount of property seized.[221] Additionally, the courts have yet to address the issue in the context of FTO designations. The organization probably has a recognized property interest in its diminished ability to raise financial support due to the "material support" ban.[222] Depending on the organization, this interest may be very substantial.[223] As a result, the organization will likely have very significant property interests at stake in § 1189 designations.

Additionally, as discussed above, § 2339B prohibits the act of providing "material support" to a designated terrorist organization,[224] including the provision of "currency or monetary instruments."[225] The Supreme Court has held that making monetary contributions to an organization is a form of speech protected under the First Amendment.[226] Therefore, whether an organization is a designated FTO affects its

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[219] 8 U.S.C. § 1189(a)(2)(C) (2009).

[220] "Assets" for the purposes of 1189 includes a long list of property including "money, checks, . . . bank deposits, savings accounts, debts, . . . stocks, bonds, . . . mortgages, pledges, liens or other rights in the nature of security, . . . bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, . . . land contracts, leaseholds, ground rents, real estate . . . royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, . . . services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent." 31 C.F.R. § 597.302 (2009).

[221] In 2005 the Office of Foreign Assets Control for the U.S. Department estimated that the United States had blocked around 13 million dollars in assets between the SGDT, SDT, and FTO designation programs. This despite the policy not to conduct valuations of tangible or real property. OFFICE OF THE FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, TERRORIST ASSETS REPORT 11-12 (2005), *available at* http://www.ustreas.gov/offices/enforcement/ofac/reports/tar2005.pdf.

[222] Buchanan v. Warley, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.") (citation omitted).

[223] For example, the contributions made to the Global Relief Fund, a non-profit charitable group and a designated SDGT totaled around three million dollars in 2000. Global Relief Found., Inc. v. O'Neill, 207 F. Supp. 2d 779, 785 (N.D. Ill. 2002).

[224] 18 U.S.C. § 2339B(a)(1) (2009).

[225] *Id.* at § 2339B(g)(4) (referencing 18 U.S.C. § 2339A(b)(1)) (2009).

[226] Buckley v. Valeo, 424 U.S. 1, 16 (1976).

contributors' First Amendment rights because contributors can no longer exercise their free speech rights by donating money to the organization.[227] Moreover, once an individual is charged under § 2339B the conviction may not be challenged on First Amendment grounds. The appellate courts[228] have consistently held that the restriction is not designed to limit speech but rather to restrict the conduct of providing material support to a terrorist organization.[229] As the Ninth Circuit recognized, there is "no constitutional right to facilitate terrorism by giving terrorists . . . resources with which [they] can buy weapons and explosives."[230] Therefore, determination of whether an organization is an FTO is "crucial, because it distinguishes activities that can be criminalized from those that are protected by the First Amendment."[231]

If the designation affects the rights of the organization's members under the First Amendment, the next question is whether it is proper for those interests to be recognized in a *Mathews* analysis—not as a part of the individual's due process rights but of the *organization's* rights. There are several reasons why the interests of the individuals charged under § 2339B ought to be considered under the "private interests" prong of the organization. First, the individuals themselves are statutorily barred from collaterally attacking the validity of the organization's designation to defend against 2339B prosecution.[232] Section 1189 explicitly provides that no person charged with providing "material support" may contest the validity of the designation of the FTO.[233] Second, the courts have consistently declined to recognize the right of

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[227] U.S. v. Afshari, 446 F.3d. 915, 917 (9th Cir. 2006) (Kozinski, J., dissenting) ("It is firmly established that monetary contributions to political organizations are a form of 'speech' protected by the First Amendment . . . [we have held that] giving money to a designated terrorist organization is not protected speech. But if the organization is *not* a designated terrorist organization, then monetary contributions to it are protected by the First Amendment.").

[228] The United States Supreme Court has yet to rule on the issue. *See, e.g.*, Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001); Rahmani v. U.S., 127 S. Ct. 930 (2007).

[229] *See* Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000); U.S. v. Hammoud, 381 F.3d 316, 329 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005); U.S. v. Lindh, 212 F. Supp. 2d 541, 569 (E.D. Va. 2002); U.S. v. Assi, 414 F. Supp. 2d 707, 713 (E.D. Mich. 2006). *But see* U.S. v. Al-Arian, 329 F. Supp. 2d 1294, 1304-05 (M.D. Fla. 2004) (reading a specific intent requirement into the statute in order to avoid perceived 1st Amendment infringement).

[230] *Humanitarian Law Project*, 205 F.3d at 1133.

[231] U.S. v. Afshari, 446 F.3d. 915, 916 (9th Cir. 2006) (Kozinski, J., dissenting).

[232] *See* 8 U.S.C. § 1189(8); *see also* U.S. v. Marzook, 383 F. Supp. 2d 1056, 1071-72 (N.D. Ill. 2005); U.S. v. Hammoud, 381 F.3d 316, 331 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005).

[233] 8 U.S.C. § 1189(a)(8) ("If a designation under this subsection has become effective . . . a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.").

individuals to collaterally challenge the validity of the designation.[234] Consequently, the organization is the only party that is capable of asserting these constitutional interests. Because the individuals, whose rights are drastically affected by this designation, have no right to collaterally challenge the accuracy of the designation, the interests of these individuals should be considered when conducting a *Mathews* analysis.

A third reason why these interests should be considered in the *Mathews* analysis is that an organization is entitled to assert the constitutional rights of its members when there is a sufficient "nexus" between the organization's rights and the rights of the members, such that they are essentially the same.[235] As a general rule, parties may rely only "on constitutional rights which are personal to themselves."[236] This requires that (1) the party suffered some injury in fact, and (2) he is only asserting rights granted to him in a relevant constitutional or statutory provision.[237] However, courts generally waive the second requirement and allow an organization to assert the rights of its members if there is a sufficient "nexus" between the in-court representative and the person whose constitutional rights are being deprived.[238] The courts are especially likely to allow the organization to assert its members' rights when it is impossible or unlikely that the individual will be able to assert his or her own rights,[239] when the in-court representative and the individual's rights "are in every practical sense identical,"[240] or when "the Government has lumped all the members' interests in the organization so that condemnation of the one will reach all."[241]

For organizations potentially designated as FTOs, the diminished ability of the organization to collect funds and support from individuals

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[234] *See e.g.*, U.S. v. Marzook, 383 F. Supp. 2d 1056, 1071-72 (N.D.Ill. 2005) (finding that the fact that the organization was designated was the underlying element of the charge, not the validity). In *U.S. v. Afshari*, 426 F.3d 1150 (9th Cir. 2005), the court even upheld a conviction based on the very designation that was found to be an unconstitutional deprivation of due process in *NCRI* because under United States Supreme Court precedent, an unconstitutional predicate charge did not necessarily invalidate the contingent or subsequent charge. *Afshari*, 426 F.3d at 1158 (citing Lewis v. U.S., 445 U.S. 55, 100 (1980)).

[235] NAACP v. Alabama, 357 U.S. 449 (1958).

[236] *Id.* at 459.

[237] Scodari v. Alexander, 69 F.R.D. 652, 661 (E.D.N.Y. 1976).

[238] NAACP v. Alabama, 357 U.S. 449, 458 (1958).

[239] *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 257 (1953) (allowing a person sued for failure to enforce a racially restrictive covenant to assert the Equal Protection rights of the non-Caucasians who were not before the court).

[240] NAACP v. Alabama, 357 U.S. 449, 459 (1958).

[241] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 187 (1951) (Jackson, J., concurring).

will likely satisfy the first requirement.[242] As for the second, a court is likely to find a "nexus" sufficient to give the organization standing to assert its members' First Amendment rights. First, it is not only more difficult for the members to assert their own First Amendment rights—it is impossible. Second, by making it impossible for individuals to challenge the validity of the organization's FTO designation, Congress has completely intertwined the rights of the individuals and the rights of the organization. There is no greater example of where Congress has "lumped" the organization's and members' rights together such that the "condemnation of the one will reach all."[243]

Because the organization could bring a separate suit to vindicate its members' freedom of speech rights, and because the individual has no opportunity to contest the validity of the FTO designation once she is charged under § 2339B, these interests should be considered under the "private interests" prong of the *Mathews* analysis.[244] When this constitutional right is considered along with the seizure of all of the organization's property within the United States, the "private interests" affected by the designation are substantial.

b. Length of the Potential Deprivation

Originally, the FTO designation lasted for only two years.[245] Now the designation is effectively permanent. As amended in 2004, § 1189 provides that a designation will remain in effect until revoked by the Secretary.[246] Moreover, while an organization is entitled to petition for review of the designation, it may not do so until two years after the designation[247] or two years after the outcome of the last petition.[248] If the organization does not petition for review of the designation, the Secretary will not review it until five years after the designation.[249]

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[242] NAACP v. Alabama, 357 U.S. 449, 459-60 (1958) (noting that the compelled disclosure of an NAACP's membership lists which will likely affect the ability of the organization to obtain financial support "is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members.").

[243] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 187 (1951) (Jackson, J., concurring).

[244] *See* Eric Broxmeyer, *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*, 22 BERKELEY J. INT'L L. 439, 462 n.193 (2004).

[245] *See* 8 U.S.C. § 1189 (2000).

[246] 8 U.S.C. § 1189(a)(4)(A) (2009).

[247] *Id.* at § 1189(a)(4)(B)(ii)(I) (2009).

[248] *Id.* at § 1189(a)(4)(B)(ii)(II) (2009).

[249] 8 U.S.C. § 1189(a)(4)(C)(i) (2009).

Therefore, once an organization is designated there is nothing the organization can do for two years. During this time, its members cannot provide support without facing fifteen years in prison.[250] In the case of non-citizens, the members may face removal and deportation.[251]

The court in *NCRI* did not fully consider the extent of the organization's property interest affected by the § 1189 designation or the First Amendment interests of its members.[252] Additionally, after the ruling in *NCRI*, § 1189 was amended to make designations last indefinitely. Therefore, both the degree of the private interests affected by this designation and the length of the deprivation weigh in favor of more procedural safeguards than were required in *NCRI*.

2. Risk of Erroneous Deprivation

The second factor in the *Mathews* analysis is the "risk of an erroneous deprivation" of the interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.[253] Here, a court considers several factors: the risk inherent in the truth finding process; the degree to which the person is given access to the information relied upon by the [government] agency in making the determination and to respond to the arguments made by the agency; and the existence of an appellate procedure after the determination, as well as the rate of success of those appeals.[254]

Each of these factors also weighs in favor of requiring an unbiased tribunal to review FTO designations. First, there are inherent risks to the truth-finding process in § 1189 designations because there is no limitation on the type of evidence that may be used in making this determination.[255] The record is often full of hearsay and second-hand accounts and information contained on the Internet.[256] Indeed, the record may be filled with anything, regardless of its accuracy or reliability.[257] While the Supreme Court has often held that agencies are not required to follow the strict evidence rules used in criminal and civil trials,[258]

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[250] *See generally* 18 U.S.C. § 2339B (2009).

[251] *See generally* 8 U.S.C. § 1182 (2009).

[252] *See generally* Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192 (D.C. Cir 2001).

[253] Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[254] *Id.* at 344-47.

[255] People's Mojahedin Org. of Iran v. U.S. Dep't of State ("*PMOI*"), 182 F.3d 17, 18-19 (D.C. Cir. 1999).

[256] *See PMOI*, 182 F.3d 17.

[257] *See id.* at 25.

[258] *See, e.g.*, Opp Cotton Mills v. Adm'r of Wage & Hour Div. of Dep't of Labor, 312 U.S.

administrative decisions are not immune from standards of evidence.[259] Such guidelines should provide guidance in evaluating the reliability of the evidence compiled in the Secretary's administrative record. Yet, without a detached decisionmaker, the same person who introduced the evidence—the Secretary—is also asked to consider its persuasiveness during the hearing. Second, the organization often is not given access to the information relied upon because an FTO designation may rely entirely on classified material.[260] An independent party could review the classified information and compare it to the evidence offered by the organization. Due to the complete absence of evidentiary standards in FTO designation, as well as the ability to base the entire designation on classified information, without an impartial adjudicator to weigh and evaluate the competing evidence, there is a very substantial risk of an erroneous deprivation of the private interests involved.[261]

126, 155 (1941) ("[I]t has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed.").

[259] The APA, for instance, requires that agency hearings exclude "irrelevant, immaterial, or unduly repetitious evidence" and must be "supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d) (2009). Additionally, the Supreme Court has been wary of upholding decisions based on hearsay; in fact, the Court used to require that administrative rulings be set aside unless supported by at least some evidence that could be admissible in a jury trial. *See* Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 435 (N.Y. 1916). This was known as the "residuum rule." Johnson v. U.S., 628 F.2d 187 (D.C. Cir. 1980). Gradually the Court retreated from this per se rule but still remained hesitant to rely on hearsay evidence for findings of fact. In *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938), the Court held that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co.*, 305 U.S. at 230. Then, in *Richardson v. Perales*, 402 U.S. 389 (1971), the Court qualified the holding in *Consolidated* by noting that "the contrast the . . . [Court] was drawing . . . was not with material that would be deemed formally inadmissible in judicial proceedings but with material 'without a basis in evidence having rational probative force.' This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value. The opposite was the case." *Richardson*, 402 U.S. at 407. Now there is no per se rule and the courts "evaluate the weight each item of hearsay should receive according to the item's truthfulness, reasonableness, and credibility." Johnson v. United States, 628 F.2d 187, 190 (D.C. Cir. 1980).

[260] 8 U.S.C. § 1189(a)(3)(B) (2009).

[261] Also, there is tremendous pressure to designate as many organizations as FTO's as possible, because the only way to prevent "material support" to these organizations is to pre-designate them. *See* 18 U.S.C. § 2339B(a)(1). Without a detached and unbiased adjudicator, this provision could be "applied in a selective and politically biased manner." *On the Constitutionality of Counterterrorism Legislation: Hearing on S. 390 and S. 735 Before the S. Comm. on the Judiciary, Subcomm. on Terrorism, Technology, and Government*, 104th Cong. (1995) (statement of David Cole, Professor Georgetown University Law Center), *available at* 1995 WL 261360 (F.D.C.H.) ("by providing such open-ended designation authority, the Congress has essentially invited this law to be applied in a selective and politically biased manner. As President George Bush once stated, 'one man's terrorist is another man's freedom fighter.' Our history has demonstrated that groups engaged in the same violent acts are designated 'terrorist' when the Administration disagrees with their political ends, and deemed 'freedom fighters' when the Administration supports their political ends. Thus, the Nicaraguan contras and the Afghanistan Mujahedin were never designated as 'terrorist'

3. Government Interests/Cost of Providing the Procedural Safeguard

The third and final factor that must be considered under the *Mathews* balancing test is the government/public interests. This includes the "administrative burden and other societal costs" that would be incurred in using a neutral decisionmaker.[262] Requiring a neutral and detached decisionmaker in FTO designations would impose little to no fiscal burden. Due process does not require "the neutral and detached trier of fact be law trained or a judicial or administrative officer."[263] Thus, any officer or agent within the Department of State could act as the neutral decisionmaker in these determinations. An increase in the amount, length, or cost of an administrative hearing will sometimes justify denying the procedural protection.[264] However, there is no indication that any of these considerations would be present if the court required the Secretary to appoint a qualified, yet detached State Department employee to hear the contested designations.

The most significant government interest that may be implicated in FTO designations is the government's interest in national security. However, requiring a detached magistrate to review the FTO designation would not implicate the government's interest in national security. In *NCRI,* the court acknowledged that "no governmental interest is more compelling than the security of the nation," yet it could not see how requiring notice and an opportunity to be heard implicated that interest.[265] Similarly, while the government still has an extremely important interest in the security of this nation, providing a fair and unbiased adjudicator does not implicate that concern. Again, agents of the Department of State who already have access to classified information, but who are detached from FTO designations, could fill this role. Additionally, the statute itself provides for *ex parte* judicial review of the information relied upon.[266] A neutral decisionmaker could similarly conduct an *ex parte* review without implicating national

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groups by the State Department, while the African National Congress, the FMLN in El Salvador, and the Irish Republican Army were so designated, notwithstanding that all of these groups engaged in conduct that would qualify as 'terrorism.'").

[262] Mathews v. Eldridge, 424 U.S. 319, 347 (1976).

[263] Parham v. J. R., 442 U.S. 584, 607 (1979).

[264] *See, e.g.,* Mathews v. Eldridge, 424 U.S. 319, 347 (1976) (requiring a pre-deprivation hearing prior to depriving disability beneficiaries of disability checks was too burdensome in part because of the "increased number of hearings and the expense of providing benefits to ineligible recipients pending decision.").

[265] Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192, 207 (D.C. Cir 2001).

[266] 8 U.S.C. § 1189(c)(2) (2009).

security concerns.

B. THE *MATHEWS* FACTORS TIP THE SCALES IN FAVOR OF AN UNBIASED TRIBUNAL TO PRESIDE OVER DESIGNATION HEARINGS

The private interests implicated by § 1189 are substantial. While the amount of the property interest seized may vary depending on the organization, the First Amendment rights are almost always at stake. Without a neutral decisionmaker, the risk that these interests may be denied wrongly or unjustly is unreasonably high. While the government has an overwhelmingly strong interest in ensuring that the United States remains safe and secure, this interest would not be implicated by a requirement that an organization be provided an unbiased tribunal for its *NCRI*-mandated hearing. Given these considerations, the *Mathews* analysis requires that basic due process be afforded in all FTO designations of organizations with presence within the United States. If due process is required, the only remaining question is when due process should be required.

C. DUE PROCESS REQUIRES AN IMPARTIAL TRIBUNAL PRIOR TO THE FTO DESIGNATION

The U.S. Supreme Court has held that an impartial decisionmaker may not always be required during a pre-deprivation hearing.[267] However, this is only when there is a mandated full administrative review post-deprivation.[268] A full administrative review includes a long list of procedural safeguards, including notice, an oral evidentiary hearing, standards for proof, burdens of proof, and cross-examination, among other things.[269] Section 1189 does not provide a full administrative review post-designation.[270] Indeed, at no time does § 1189 provide for a full administrative review. Although § 1189 does allow an organization to petition for revocation two years later, this is insufficient to justify denying an unbiased adjudicator in the pre-designation hearings, because this is not a review of the original designation.[271] The petition procedure does not contemplate review of

[267] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547-548 (1988).

[268] *Id.* 545.

[269] *See, e.g.*, 5 U.S.C. § 554 et seq (2009).

[270] *See generally* 8 U.S.C. § 1189 (2009).

[271] 8 U.S.C. § 1189(a)(6)(A)(i) (2009) ("[T]he circumstances that were the basis for the designation have changed in such a manner as to warrant revocation . . . .").

the accuracy of the original determination; instead, it assumes the original designation was proper and is an opportunity to show changed circumstances.

In *NCRI,* the court found that in most cases there was no reason to delay a hearing until after the deprivation has already taken place.[272] As previously discussed, the court arrived at this conclusion on the basis of a "private interest" of two hundred dollars and despite the fact that the designation was temporary, lasting only two years.[273] Section 1189 is, for all intents and purposes, now permanent, and the full scope of the "private interests" affected by the designation is now evident. Given the severe consequences of this designation and the insubstantial burden the procedural safeguard would impose on the designation process, an impartial adjudicator should preside over the organization's opportunity to be heard prior to the FTO designation.[274]

V. CONCLUSION

Due process is "compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess."[275] While the United States Government has courageously taken a stance against terrorist organizations, we must ensure that in so doing we do not sweep too broadly and destroy the very freedoms that we are fighting to protect. One of the most powerful tools for ensuring truth, accuracy and justice is the procedural due process guarantee of the Fifth Amendment Due Process Clause. Its protections must not be forgotten or diminished, especially in times of turmoil.[276] The *Mathews* test was designed to facilitate a balance between the legitimate needs of the government and the freedom of individuals, and these considerations expand and contract in direct proportion to the gravity of the times and the seriousness of the infraction. Though these are certainly extraordinary times, the basic protections of the due process clause must be respected. This Comment will close as it began, with the wise words of Justice Frankfurter: "Man being what he is cannot safely be trusted with complete immunity from outward responsibility in

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[272] Nat'l Council of Resistance of Iran v. Dep't of State (*NCRI*), 251 F.3d 192, 208 (D.C. Cir 2001).

[273] *NCRI*, 251 F.3d 192.

[274] Of course, should the Secretary demonstrate "the necessity of withholding" notice and opportunity to be heard until after the designation, as forecasted by *NCRI*, the requirement of a neutral decisionmaker should be implemented at that later time as well.

[275] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

[276] *Id.* at 171-72.

depriving others of their rights."[277]

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