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## National Security and the Protection of Constitutional Liberties: How the Foreign Terrorist Organization List Satisfies Procedural Due Process

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## NATIONAL SECURITY AND THE PROTECTION OF CONSTITUTIONAL LIBERTIES: HOW THE FOREIGN TERRORIST ORGANIZATION LIST SATISFIES PROCEDURAL DUE PROCESS

*Aaron L. Schwartz\**

### INTRODUCTION

In the aftermath of the attacks perpetrated against the United States by a foreign terrorist organization on September 11, 2001, President Bush avowed that “[t]errorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America.”<sup>1</sup>

President Bush’s declaration highlights the twin role of government in safeguarding the nation and upholding its foundational liberties. Unfortunately, these goals are sometimes at odds. Vital U.S. anti-terrorism laws have been criticized for unduly infringing upon fundamental constitutional rights. This Comment will explore one of these controversial laws—the Foreign Terrorist Organizations List—and assess whether Congress effectively balanced its duty to protect the nation’s security and liberty in authorizing such legislation.

The Foreign Terrorist Organization List was created by Congress in response to the 1993 terrorist attack at the World Trade Center and the 1995 bombing of the Federal Building in Oklahoma

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<sup>1</sup> George W. Bush, President of the United States of America, Address to the Nation (Sept. 11, 2001).

City.<sup>2</sup> Buried within Section 1189 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>3</sup> Congress authorized the Secretary of State to designate international groups that threatened the U.S., its citizens, and its interests, as “Foreign Terrorist Organizations” (FTOs).<sup>4</sup> The purpose of Section 1189 is to stigmatize<sup>5</sup> and punish<sup>6</sup> rogue organizations, and “prevent persons within the [U.S.] . . . from providing material support or resources.”<sup>7</sup>

In this way, Section 1189 offers the U.S. government an effective legal tool to impede terrorist organizations that threaten U.S. national security interests.<sup>8</sup> Critics argue, however, that the legislation is unconstitutional because Section 1189 does not compel the Secretary of State to provide listed organizations adequate notice or a hearing as required by the Fifth Amendment.<sup>9</sup> This comment

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<sup>2</sup> *Threat of Terrorism: Hearing on Terrorism Before the S. Comm. on the Judiciary*, 104th Cong. 1995 WL 247423, (1995) (noting the statement of Sen. Specter, Member, Sen. Comm. on the Judiciary, who stated “I am committed, as I believe is every Senator on this Committee and in this body, to taking any and every step necessary to assure that there is never another devastation like Oklahoma City”).

<sup>3</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1247 (1996) [hereinafter “AEDPA”]

<sup>4</sup> *Id.* (finding that international terrorism is a serious and deadly problem that threatens the vital interests of the U.S.).

<sup>5</sup> AUDREY KURTH CRONIN, CONG. RESEARCH SERV., RL32120, THE “FTO LIST” AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 8 (2003) [hereinafter “CRS REPORT”].

<sup>6</sup> H.R. REP. NO. 104-383, pt. 2, at 38 (1995) (stating that “the fundamental purpose of this legislation, then, is to provide our law enforcement agencies – within carefully prescribed constitutional boundaries – with the tools necessary to prevent and punish criminal terrorist enterprises”).

<sup>7</sup> AEDPA § 301(b).

<sup>8</sup> BARACK OBAMA, THE WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM, (June 28, 2011) (finding that these organizations make it their purpose to undermine the security and stability of the U.S.), <http://1.usa.gov/19TulpH>. See also RAPHAEL F. PERL, CONG. RESEARCH SERV., RL33600, INTERNATIONAL TERRORISM, THREAT, POLICY, AND RESPONSE 3-4 (2007) [hereinafter “CRS REPORT 2”] (explaining that “policy and counterterrorism analysts are concerned that economic and political tensions throughout the Middle East might allow FTOs to gain power, legitimacy, and political clout, and if that comes to pass, the risks to American interests and security would be heightened substantially”).

<sup>9</sup> Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH.

seeks to quell this criticism by demonstrating that the FTO designation procedures satisfy contemporary due process standards.

Part I reviews the procedural background and history of Section 1189. Part II describes the “what” and “when” requirements of procedural due process. Part III discusses a series of cases challenging FTO designation on procedural due process grounds. Finally, Part IV covers due process in light of those decisions, and concludes that Section 1189 complies with Fifth Amendment standards.

## I. PROCEDURAL BACKGROUND AND HISTORY OF THE FTO LIST

### A. The Purpose of the FTO Compared to Other U.S.-Government-Maintained Terrorist Lists

The FTO List is one of several terrorism lists maintained by the U.S. Government. While there is an overlap between lists, each possesses a unique scope and purpose within the context of U.S. national security.

The FTO List is limited to *foreign organizations* that engage in terrorist activities that “threaten American security.”<sup>10</sup> Section 1189 authorizes the Secretary of State to identify and designate the organizations in consultation with the Attorney General and Secretary of Homeland Security.<sup>11</sup> Consequences of designation are social, financial, and legal.<sup>12</sup>

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L. REV. 125, 167 (2004) [hereinafter “*A Double Due Process Denial*”]; see also Eric Broxmeyer, *The Problem of Security and Freedom: Procedural Due Process and the Designation of Foreign Terrorist Organizations under the Antiterrorism and Effective Death Penalty Act*, 22 BERKELEY J. INT’L L. 439, 441 (2004).

<sup>10</sup> 8 U.S.C. § 1189(a)(1) (2004).

<sup>11</sup> *Id.*

<sup>12</sup> See *infra* Part 2.C (describing these consequences in detail).

The State Department also maintains the State Sponsors of Terrorism (SST) List.<sup>13</sup> SST only applies to *states* that support acts of international terrorism.<sup>14</sup>

A third list maintained by the State Department is the Terrorist Exclusion List (TEL).<sup>15</sup> TEL impacts *individuals* and applies strictly for *immigration* purposes, and authorizes the Secretary of State, in consultation with the Attorney General, to deny known members of terrorist organizations entry to the U.S.<sup>16</sup>

The fourth list, the Specially Designated Terrorists (SDT) List, originally targeted individuals or entities that threatened to disrupt the Middle East peace process.<sup>17</sup> Subsequent legislation, however, expanded the SDT List to allow the President to regulate international economic transactions during times of war or national emergencies.<sup>18</sup> Following the events of September 11, 2001, President Bush exercised his presidential authority to create the Specially Designated Global Terrorist (SDGT) List.<sup>19</sup> Together SDT and SDGT freeze the U.S.-based assets of any person, organization, or nation the President determines has planned, authorized, aided, or engaged in hostilities or attacks against the U.S.<sup>20</sup> The U.S. Department of Treasury is in charge of managing SDT and SDGT.<sup>21</sup>

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<sup>13</sup> See Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503, § 6(j) (1979) (as amended).

<sup>14</sup> As of July 31, 2012, the States listed as “sponsors of terrorism” included Cuba, Iran, Sudan, and Syria. U.S. DEP’T OF STATE, OFFICE OF THE COORDINATOR OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2011 (2012), <http://1.usa.gov/KnEtOF>.

<sup>15</sup> Uniting And Strengthening America By Providing Appropriate Tools To Intercept And Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter US PATRIOT Act].

<sup>16</sup> *Id.*

<sup>17</sup> See Exec. Order No. 12947, 60 C.F.R. 5079 (1995) (citing International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977)); 50 U.S.C. § 1701 (1977).

<sup>18</sup> *Id.*

<sup>19</sup> See Exec. Order No. 13224, 68 C.F.R. 10619 (2003).

<sup>20</sup> 50 U.S.C. § 1702(b) (2001).

<sup>21</sup> *Id.*; see also U.S. DEP’T OF TREAS., SPECIALLY DESIGNATED NATIONALS LIST (2013), <http://1.usa.gov/1ausowX> (listing the organizations and

In sum, the Executive branch maintains several avenues to categorize and sanction terrorist organizations and activities.<sup>22</sup> Among all lists, however, the FTO holds unique importance, “not only because of the specific measures undertaken to thwart the activities of designated groups but also because of the symbolic public role it plays as a tool of U.S. counterterrorism policy.”<sup>23</sup>

## B. The Process of Designating FTOs

Section 1189 of the AEDPA authorizes the Secretary of State to designate entities as “foreign terrorist organizations.”<sup>24</sup> Designation requires the Secretary to provide an administrative record reflecting that (A) the organization is foreign, (B) the organization engages in terrorist activity,<sup>25</sup> and (C) the terrorist activity directly threatens U.S. national security.<sup>26</sup>

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individuals designated under the Office of Foreign Asset Control’s economic sanctions regimes, which includes those entities designated as FTOs by the Secretary of State).

<sup>22</sup> See *supra* Part II.A. For more information on the lists and their procedural safeguards and judicial oversight visit the State Department’s Bureau of Counterterrorism, <http://1.usa.gov/JOtuMZ>.

<sup>23</sup> CRS REPORT, *supra* note 6, at 5.

<sup>24</sup> Although the Secretary of State officially designates a group, a number of agencies play important roles in helping the Secretary make the determination. See *id.* at 2.

<sup>25</sup> AEDPA at § 219(a)(1) (defining terrorist activities as: “activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following: (I) The high jacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person; (IV) An assassination; (V) The use of any— (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; (VI) A threat,

The State Department's Bureau of Counterterrorism (S/CT) is tasked with monitoring the activities of suspected terrorist groups around the world and identifying organizations that qualify for designation under the Act.<sup>27</sup> S/CT deems entities suitable for designation based on whether the organization (1) has carried out any terrorist attacks, (2) is planning or preparing to carry out possible future acts, and/or (3) retains the capability and intent to carry out such acts.<sup>28</sup> The S/CT receives support in this endeavor from the intelligence community and the Department of Homeland Security.<sup>29</sup>

The S/CT's reports and findings form the basis of the administrative record, which is presented to the Secretary of State for consideration.<sup>30</sup> If approved, the request for designation passes to the Department of Justice and the Department of Homeland Security for independent evaluation and recommendation.<sup>31</sup>

Seven days before an organization is officially designated, the Secretary is required to notify<sup>32</sup> specified members of Congress of "the intent to designate the organization . . . and the factual basis therefore."<sup>33</sup> Congress may block a designation, but if no action is taken the designation becomes final when notice is published, or "listed," in the Federal Register.<sup>34</sup>

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attempt, or conspiracy to do any of the foregoing"). *See also* 8 U.S.C.A. § 1182(a)(3)(B)(iii)(2000 & Supp. I 2001) 2013.

<sup>26</sup> 8 U.S.C. § 1189(a)(1) (2004) (stating that activities threaten U.S. national security interests when the activity impacts the "national defense, foreign relations, or economic interests of the United States").

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> CRS REPORT, *supra* note 6, at 2.

<sup>31</sup> *Id.*

<sup>32</sup> 8 U.S.C. § 1189(a)(2)(A)(i) (stating that notification occurs through classified communication).

<sup>33</sup> *Id.* (requiring notification to relevant congressional committees, the Speaker and Minority Leader of the House of Representatives, the Majority and Minority Leader, and the President *pro tempore* of the Senate).

<sup>34</sup> 8 U.S.C. § 1189(a) (requiring constructive, not actual, notice).

### C. Consequences of FTO Designation

The consequences of designation are manifold. First, the Treasury Department may block or control the funds of the organization and all known agents.<sup>35</sup> Second, the Justice Department may prosecute third parties that provide material support to the designated entity.<sup>36</sup> Third, known members of the organizations are deported, denied visas, and summarily excluded from the U.S.<sup>37</sup>

Finally, designation as an FTO allows the U.S. Government to exercise a form of soft power.<sup>38</sup> By designating an entity as a “terrorist organization,” the U.S. formally signals to the international community that the U.S. is concerned with the named organization’s activities.<sup>39</sup> Often, other nations will then react pursuant to their own law and jurisdiction to similarly curb the organization’s financing and activities.<sup>40</sup> This heightened international cognizance may also cause private citizens to abstain from donating, contributing, or otherwise engaging in economic transactions with the named organization.<sup>41</sup> Consequently, designation is said to stigmatize and isolate the entity,<sup>42</sup> acting as *de facto* economic sanctions.<sup>43</sup>

### D. Removal from the FTO List

There are several ways an entity may be removed from the FTO List. First, removal may be granted by an Act of Congress or at the discretion of the Secretary of State.<sup>44</sup>

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<sup>35</sup> CRS REPORT, *supra* note 6, at 2.

<sup>36</sup> *Id.* at 3.

<sup>37</sup> *Id.*

<sup>38</sup> See JOSEPH S. NYE, JR., SOFT POWER: THE MEANS OF SUCCESS IN WORLD POLITICS 5-11 (2004) (defining “soft power”).

<sup>39</sup> U.S. DEP’T OF STATE, OFFICE OF COUNTERTERRORISM, FACT SHEET: FOREIGN TERRORIST ORGANIZATIONS (FTOs), (2010) <http://1.usa.gov/KnGZ7r>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> CRS REPORT, *supra* note 6, at 2-3.

<sup>44</sup> 8 U.S.C. § 1189(a)(4). Prior to the Intelligence Reform and Terrorism Prevention Act of 2004 designations were effective for two years at which time the Secretary could choose to re-designate an organization or allow designation to

Second, an organization may request judicial review “within thirty days of publication in the Federal Register of a designation, an amended designation, or a determination in response to a petition for revocation.”<sup>45</sup> The request must be made to the United States Court of Appeals for the District of Columbia Circuit.<sup>46</sup> The scope of judicial review is limited to unclassified material in the administrative record, but the government may also “submit, for *ex parte* and *in camera* review, classified information.”<sup>47</sup> The court may only overturn a designation that was (A) “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law”; (B) “contrary to constitutional right, power, privilege or immunity”; (C) in “excess of statutory jurisdiction, authority or limitation or short of statutory right”; (D) “lacking substantial support in the administrative record as a whole”; or (E) not made “in accord with the procedures required by law.”<sup>48</sup>

Third, two years after the initial designation, an organization may file a petition with the State Department requesting removal.<sup>49</sup> The Secretary must review this request and respond within 180 days.<sup>50</sup> A successful petition requires the organization to demonstrate the circumstances of designation<sup>51</sup> are “sufficiently different”<sup>52</sup>—i.e., the organization no longer engages in terrorist activities. If the petition is rejected, the entity must wait two years before re-filing.<sup>53</sup> If

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lapse. *See* Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3801-03 (2004) [hereinafter IRTPA].

<sup>45</sup> 8 U.S.C. § 1189(c)(1).

<sup>46</sup> *Id.*

<sup>47</sup> 8 U.S.C. § 1189(b)(2); *see also* BLACK’S LAW DICTIONARY 1324 (9th ed. 2009) (defining *ex parte* review as a proceeding conducted without both parties to the suit being present; and defining an *in camera* review as a proceeding where the Judge assesses confidential, sensitive, or private information outside the public’s purview in order to determine what, if any, information may be used by a party to the suit or made public).

<sup>48</sup> 8 U.S.C. § 1189(c)(2)-(3).

<sup>49</sup> 8 U.S.C. § 1189(a)(4)(B)(i). Notably, this procedure was not in the original legislation, but was added by the 2004 Amendment. IRTPA, n. 9 § 7119(a)(2).

<sup>50</sup> 8 U.S.C. § 1189(a)(4)(B)(iv).

<sup>51</sup> *See supra* Part II.B.

<sup>52</sup> 8 U.S.C. § 1189(a)(4)(B)(iii).

<sup>53</sup> 8 U.S.C. § 1189(a)(4)(B)(ii).

five years pass without review, the State Department must initiate its own review of the organization's status and determine whether continued designation is justified.<sup>54</sup>

#### E. History of the FTO List

In October 1997, the State Department released the first FTO List.<sup>55</sup> Thirty entities were designated.<sup>56</sup> In October 1999, the first review occurred.<sup>57</sup> Twenty-seven of the original groups were re-designated, three designations lapsed, and one entity was added.<sup>58</sup> Two years later, in the wake of 9/11, the total number of designated organizations grew significantly.<sup>59</sup> At the time this comment was published, fifty-seven groups were listed as FTOs and nine previously designated organizations have been de-listed.<sup>60</sup>

## II. THE CONSTITUTION, PROCEDURAL DUE PROCESS, AND 8 U.S.C. § 1189

### A. The Scope of Constitutional Protection

Prior to appearing before a federal court, a plaintiff must demonstrate Article III standing.<sup>61</sup> Standing “focuses on the party

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<sup>54</sup> 8 U.S.C. § 1189(a)(4)(C).

<sup>55</sup> CRS REPORT, *supra* note 6, at 6 (noting that the first designations took place about “eighteen months after the passage of AEDPA”).

<sup>56</sup> *Id.*

<sup>57</sup> Because the first review occurred before the 2004 amendment, the Secretary was statutorily required to review designations every two years. *See* IRTPA, at § 7119.

<sup>58</sup> CRS REPORT, *supra* note 6, at 6 (noting the group added in 1999 was al-Qaeda because of its involvement in the August 1998 bombings of the U.S. embassies in Nairobi, Kenya, and Darr Es Salaam, Tanzania).

<sup>59</sup> *See* Bureau of Counterterrorism, <http://www.state.gov/j/ct/index.htm>.

<sup>60</sup> *Id.*

<sup>61</sup> *State of Mich. v. U.S.*, 994 F.2d 1197, 1204 (6th Cir. 1993) (stating that “[s]tanding, which comes from Article III’s requirement that federal courts determine only those issues that arise in a ‘case or controversy,’ is a threshold requirement to any suit); *see also* U.S. CONST. Art. III, § 2 (stating, “The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which

seeking to get his complaint before federal court and not on issues he wishes to have adjudicated.”<sup>62</sup> The elements of standing are: (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) that the injury is likely redressed by a favorable decision.<sup>63</sup> When an entity challenges its designation as an FTO, the repercussions of designation satisfy the first and second element of constitutional standing,<sup>64</sup> and the legislation’s removal provision satisfies the third element.<sup>65</sup>

However, because Section 1189 only applies to *foreign* terrorist organizations, the entity must demonstrate a fourth element—that it has “come within the territory of the United States and develop[ed] substantial connections with this country.”<sup>66</sup> Although the U.S. Supreme Court has not clarified how “substantial” connections must be to merit protection,<sup>67</sup> the Court extends constitutional standing to any alien that voluntarily and “lawfully enters and resides in this country.”<sup>68</sup>

## B. Qualifying Entities and Procedural Due Process

Once the foreign organization proves constitutional standing,<sup>69</sup> it may challenge its designation on Fifth Amendment due process grounds.<sup>70</sup> The Fifth Amendment does not, however, have

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shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects”).

<sup>62</sup> *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

<sup>63</sup> *Lujan v. Defendants of Wildlife*, 504 U.S. 555 (1992).

<sup>64</sup> *See supra* Part I.C.

<sup>65</sup> *See supra* Part I.D.

<sup>66</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

<sup>67</sup> *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 202 (D.C. Cir. 2001) [hereinafter “PMOI II”].

<sup>68</sup> *Bridges v. Wixon*, 326 U.S. 135, 161 (1945).

<sup>69</sup> *See supra* Part III.A.1.

<sup>70</sup> The Due Process Clause of the Fifth Amendment states, “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S.

fixed technical requirements; its standards vary depending on particular situations and circumstances.<sup>71</sup>

In its most basic form, procedural due process mandates *some* notice of the impending deprivation and *some* form of a hearing.<sup>72</sup> When the notice and hearing must occur depends on the private interest affected, the risk of erroneous deprivation, the value of additional safeguards, and the government interest at stake.<sup>73</sup> Also, the type of notice and hearing depends on (1) if the notice was “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections”;<sup>74</sup> and (2) if the hearing was “appropriate to the nature of the case” and “minimizes substantively unfair or mistaken deprivations.”<sup>75</sup> Additionally, where due process and national security concerns conflict, the U.S. government is allowed wider latitude to act “because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot

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CONST. amend. V. Importantly, the Due Process clause has both procedural and substantive components. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 545-546 (3d ed. 2006) (noting that procedural due process refers to “the procedures that the government must follow before depriving a person of life, liberty, or property,” while substantive due process asks “whether the government has an adequate reason [or a sufficient justification] for taking away a person’s life, liberty, or property”).

<sup>71</sup> Verdugo-Uriqueidez, 494 U.S. at 270 (Kennedy, J., concurring) (citing Reid v. Covert, 354 U.S. 1, 75 (1957) (explaining that “the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”)).

<sup>72</sup> Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The Supreme Court originally created the Matthews test to determine the requirements of due process. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). However, recently, the Court uses the Mullane test instead of Mathews to examine the sufficiency of notice. *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 223 (2006); Dusenbery v. United States, 534 U.S. 161, 161-162 (2002) (stating, “the straightforward reasonableness under the circumstances test of Mullane, not the balancing test approach of Mathews, supplies the appropriate analytical framework for the due process analysis.”).

<sup>73</sup> Mathews, 424 U.S. at 335.

<sup>74</sup> Mullane, 339 U.S. at 313.

<sup>75</sup> Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972).

be swiftly presented to, evaluated by, and acted upon by the legislature . . . .”<sup>76</sup>

### C. Section 1189 and the Due Process Debate

Section 1189 is facially constitutional because the legislation requires the Secretary of State to provide designated organizations *some* notice of designation and *some* opportunity for judicial review.<sup>77</sup> Critics argue, however, that the legislatively prescribed notice and hearing provisions are insufficient and inappropriate.<sup>78</sup> Specifically, a *foreign* organization is unlikely to actually receive notice of the “pendency of the action,” and Section 1189 only requires constructive notice—i.e., notice through publication in the Federal Register.<sup>79</sup> Moreover, the post-deprivation hearing fails to provide putative organizations with a “meaningful opportunity to be heard” because the U.S. government is not required to disclose all evidence contained in the administrative record.<sup>80</sup> Critics also question the sincerity of the judiciary’s review, citing the court’s weariness to second-guess the Executive branch in matters of foreign policy and national security.<sup>81</sup>

This comment rebuts these assertions and demonstrates how the FTO designation procedures comport with public policy and practical due process considerations. In this manner, Section 1189 represents an effective balancing of national security interests and core foundational liberties.

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<sup>76</sup> *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

<sup>77</sup> 8 U.S.C. § 1189.

<sup>78</sup> *A Double Due Process Denial*, *supra* note 9, at 167-172.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (noting that the Secretary may rely on confidential evidence that does not have to be disclosed to putative organizations in the administrative record).

<sup>81</sup> *See, e.g.*, *PMOI II*, 251 F.3d at 208-209; *People’s Mojahedin Org. of Iran v. State Dep’t*, 613 F.3d 220, 229 (D.C. Cir. 2010) [hereinafter “PMOI V”]; *In re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012) [hereinafter “PMOI VI”].

### III. SECTION 1189, PROCEDURAL DUE PROCESS, AND THE CASE OF THE PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN

One organization—the People's Mojahedin Organization of Iran (PMOI)—has challenged its FTO designation on six different occasions, most recently in May 2012. The PMOI cases provide insight into how courts review a designated organization's challenge, and how Section 1189 satisfies contemporary procedural due process requirements.

#### A. A Short History of the PMOI

The PMOI (also known as the Mujahedeen-e- Khalq (MEK)) is a Marxist-Islamic organization that was founded in 1963 in order to overthrow the Shah of Iran and his Western-backed allies.<sup>82</sup> At its inception, the PMOI possessed a militant wing (the National Liberation Army (NLA)) and a political front (the National Council of Resistance of Iran (NCRI)).<sup>83</sup>

In the 1970s, the PMOI began an active, worldwide campaign of propaganda and terror, claiming responsibility for bombing the U.S. Information Service office in Iran (part of the U.S. Embassy), the Iran-American Society, and the offices of several U.S. companies.<sup>84</sup> According to the U.S. government, the PMOI also played an important role in the 1979 takeover of the U.S. Embassy in Tehran.<sup>85</sup>

In 1981, displeased with the new Islamic regime implemented after the Shah's fall, the PMOI began to attack Iranian security

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<sup>82</sup> U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM, (2012), <http://www.state.gov/j/ct/rls/crt/2011/195553.htm> - MEK [hereinafter COUNTRY REPORTS] (noting that the founders were six leftist students from Tehran University).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (noting that the PMOI was also held answerable for the assassination of U.S. military personnel and civilians working in the region, notably the deputy chief of the U.S. Military Mission in Tehran, members of the U.S. Military Assistance Advisory Group, and an American Texaco executive).

<sup>85</sup> COUNTRY REPORTS, *supra* note 78.

forces.<sup>86</sup> The Iranian government responded harshly, executing the organization's original leadership and forcing the remaining known members to flee to France.<sup>87</sup>

In 1986, France expelled the PMOI in an attempt to improve relations with Iran.<sup>88</sup> The organization relocated to Iraq, where it found an ally in Saddam Hussein.<sup>89</sup> Hussein provided the PMOI with military bases and financial support.<sup>90</sup> In return, the PMOI supported Baghdad in the Iran-Iraq War and the bloody crackdown on Iraqi Shia and Kurds that rose up against Hussein's regime.<sup>91</sup>

With Hussein's blessing, the PMOI continued its campaign of terror against the Iranian regime. In 1992, the PMOI attacked Iranian embassies and consular missions in thirteen different countries; including the Iranian mission at the United Nations in New York.<sup>92</sup> In 1997, in response to the PMOI's history of terror and violence, the U.S. State Department designated the organization as an FTO in the first FTO List.<sup>93</sup>

In 2003, the U.S. invaded Iraq and overthrew Saddam Hussein's regime. Without Hussein, the PMOI lost its financial and military support.<sup>94</sup> In short order, the PMOI negotiated a cease-fire and surrendered its heavy arms to coalition forces.<sup>95</sup>

As of 2011, the U.S. State Department estimates global PMOI membership of between 5,000 and 13,500 persons scattered throughout Europe, North America, and Iraq.<sup>96</sup> The State

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<sup>86</sup> *Id.* (noting that "the [PMOI] instigated a bombing campaign, including an attack against the head office of the Islamic Republic Party and the Prime Minister's office, which killed some 70 high-ranking Iranian officials").

<sup>87</sup> *Id.*

<sup>88</sup> ALBERT V. BENLIOT, IRAN: OUTLAW, OUTCAST OR NORMAL COUNTRY? 101 (2001).

<sup>89</sup> COUNTRY REPORTS, *supra* note 78.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> COUNTRY REPORTS, *supra* note 78.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

Department also officially recognizes that most of the PMOI's current efforts are political in nature—citing the entity's “well-developed media communications strategy” and “active lobbying and propaganda efforts.”<sup>97</sup>

#### B. The First Challenge: PMOI I

In 1997, the PMOI filed the first request for judicial review of its designation as an FTO.<sup>98</sup> In the complaint, the PMOI urged the D.C. Circuit to assess the administrative record and decide whether sufficient evidence existed to demonstrate that the PMOI engaged in “terrorist activities that threatened the national security of the United States.”<sup>99</sup>

After reviewing the PMOI's complaint,<sup>100</sup> the court held the administrative record contained sufficient evidence the PMOI was a foreign organization that “engaged in bombing[s] and killing[s] in order to further their political agenda.”<sup>101</sup> Moreover, the court did not find the presence of any actionable rights violation because the PMOI lacked constitutional standing,<sup>102</sup> and because the unique procedures provided by AEDPA did not require an adversarial hearing, general agency presentation of evidence, or advanced notice provided to the entity.<sup>103</sup>

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<sup>97</sup> COUNTRY REPORTS, *supra* note 78.

<sup>98</sup> *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 19 (D.C. Cir. 1999) [hereinafter “PMOI I”] (noting that, the PMOI's designation was considered alongside the Liberation Tigers of Tamil Elam because “the separate petitions involved the same statute and similar claims”).

<sup>99</sup> *Id.*; *see also supra* Part II.D.

<sup>100</sup> The court noted that AEDPA limits the scope of its review to evaluating whether the designation was arbitrary or capricious, contrary to a constitutional right, in excess of authority, lacked support in the administrative record, or violated procedures. *See PMOI I*, 182 F.3d at 22; *see also* 8 U.S.C. § 1189(b)(3); *supra* Part III.B.1.

<sup>101</sup> *PMOI I*, 182 F.3d at 25.

<sup>102</sup> *PMOI I*, 182 F.3d at 22 (noting that similar to a foreign nation opposing “an embargo on it for the purpose of coercing a change in policy” the PMOI may not claim a constitutional right to due process).

<sup>103</sup> *PMOI I*, 182 F.3d at 25.

## C. Satisfaction of Constitutional Standing: PMOI II

In 2001, two years<sup>104</sup> after the court decided *PMOI I*, the PMOI again requested that the D.C. Circuit review its FTO designation.<sup>105</sup> This time, the court determined that the PMOI passed constitutional muster<sup>106</sup> because its “alter-ego,” the NCRI, owned a U.S. bank account and had “an overt presence within the National Press Building in Washington D.C.”<sup>107</sup>

Having demonstrated constitutional standing, the court found the PMOI had an actionable due process claim because FTO designation stigmatized the PMOI,<sup>108</sup> limited the mobility of PMOI members already in the U.S.,<sup>109</sup> and restricted PMOI access to its U.S. bank accounts.<sup>110</sup> The Fifth Amendment therefore required the Secretary of State to provide the PMOI pre-designation notice, access to any “unclassified items upon which [the Secretary] proposes to rely,”<sup>111</sup> and an opportunity “to present, at least in written form, such evidence . . . to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations.”<sup>112</sup>

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<sup>104</sup> See *supra* Part II.D.

<sup>105</sup> PMOI II, 251 F.3d at 195-196.

<sup>106</sup> *Id.* (refusing to assess how “substantial” a connection there must be in order to merit protection, but stating that the PMOI satisfies this requirement).

<sup>107</sup> *Id.* at 201 (reaching this conclusion despite the PMOI and NCRI’s insistence that the two are separate entities).

<sup>108</sup> *Id.* at 204, (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (finding that stigmatization in a community without process is a deprivation of one’s liberty)).

<sup>109</sup> PMOI II, 251 F.3d at 204 (finding that if such individuals left the country, they would be denied readmission).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 206 (citing *Mathews*, 424 U.S. at 334-335 (holding that prior to a deprivation, due process requires the government to weigh: the private interest affected by the official action; the risk of “erroneous deprivation of such interest . . . and the probable value . . . of additional or substitute procedural safeguards”; and “the government’s interest, including the function and fiscal and administrative burdens that the additional or substitute procedural requirement would entail”)).

<sup>112</sup> *Id.*

Consequently, the court concluded that the PMOI's due process rights were violated because the government failed to provide the PMOI with (1) an opportunity to file evidence that rebutted the non-classified evidence, and (2) a meaningful opportunity to be heard by the Secretary upon the relevant findings.<sup>113</sup> The court, however, refused to vacate the PMOI's designation due to U.S. foreign policy and national security concerns.<sup>114</sup> The court instead remanded the complaint and instructed the Secretary to follow the procedures outlined herein.<sup>115</sup> The Secretary complied with the order, and in 2001 re-designated the PMOI as an FTO.<sup>116</sup>

#### D. The Use of Classified Information: PMOI III

On January 17, 2003, the D.C. Circuit again entertained the PMOI's request for judicial review.<sup>117</sup> This time, the PMOI argued the Secretary of State's reliance on "secret evidence"—i.e., "the classified information that the respondents refused to disclose and against which *PMOI* could therefore not effectively defend"—violated its due process rights.<sup>118</sup> In support of its position, the PMOI cited D.C. Circuit precedent that held "a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions."<sup>119</sup>

The court acknowledged the persuasiveness of the PMOI's argument, but denied the PMOI's appeal because holding otherwise would violate constitutional separation of powers.<sup>120</sup> The court

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<sup>113</sup> *Id.*

<sup>114</sup> PMOI II, 251 F.3d at 208.

<sup>115</sup> *Id.*

<sup>116</sup> *See* Re-designation of Foreign Terrorist Organizations, 66 Fed. Reg. 51,088 (Oct. 5, 2001) (re-designating PMOI and its aliases as FTOs).

<sup>117</sup> *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238 (D.C. Cir. 2003) [hereinafter "PMOI III"].

<sup>118</sup> *Id.* at 1242.

<sup>119</sup> *Id.* (discussing *Abourzek v. Reagan*, 785 F.2d 1043, 1060-1061 (D.C. Cir. 1986) (emphasizing that "judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts" and it is therefore a "firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions" except "in the most extraordinary circumstances")).

<sup>120</sup> *Id.* at 1243.

explained that “the Executive Branch has control and responsibility over access to classified information and [a] compelling interest in withholding national security information from unauthorized persons in the course of executive business.”<sup>121</sup> The court also emphasized that courts are “often ill-suited to determine the sensitivity of classified information.”<sup>122</sup>

#### E. We’re Different Entities: PMOI IV

On April 2, 2004, the PMOI, through the NRCI, again requested judicial review of its designation.<sup>123</sup> This petition contended the PMOI and NRCI were separate entities, which made simultaneous designation improper.<sup>124</sup> The court disagreed, citing substantial evidence on the record that the NRCI was “dominated and controlled by” the PMOI.<sup>125</sup>

#### F. A Winning Argument: PMOI V

On July 15, 2008, the PMOI again requested the Secretary of State review its FTO designation, citing a fundamental change in circumstances.<sup>126</sup> The request emphasized that since its designation as an FTO in 1997, the PMOI had: (1) ended its military campaign against the Iranian Regime; (2) renounced violence; (3) handed over arms to U.S. forces in Iraq; (4) cooperated with U.S. officials at Camp Ashraf and obtained “protected person” status for all PMOI

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<sup>121</sup> PMOI III, 327 F.3d at 1242.

<sup>122</sup> *Id.* (explaining that the role of the court is to determine “that process which is due under the circumstances of the case”) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (explaining that “due process is flexible and calls for such procedural protections as the particular situation demands”)); *see also* *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (explaining that “[t]hings that did not make sense to [a judge] would make all too much sense to a foreign counter intelligence specialist . . .”).

<sup>123</sup> *Nat’l Council of Resistance of Iran v. Dep’t of State*, 373 F.3d 152 (D.C. Cir. 2004) [hereinafter “PMOI IV”].

<sup>124</sup> *Id.* at 157.

<sup>125</sup> *Id.* at 159.

<sup>126</sup> *See* In the Matter of the Review of the Designation of the Mujahedin-el Kalq Organization (MEK), and All Designated Aliases, as a Foreign Terrorist Organization, 74 Fed. Reg. 1273, 1273-74 (Jan. 12, 2009) (hereinafter Review of Designation).

members under the Fourth Geneva Convention; (5) shared intelligence with the U.S. government regarding Iran's nuclear program; and (6) been de-listed as a terrorist organization by the United Kingdom and European Union.<sup>127</sup>

On January 12, 2009, the Secretary dismissed the PMOI's appeal without explanation, and re-listed the PMOI as an FTO the following day.<sup>128</sup> The PMOI then filed an appeal in the D.C. Circuit.<sup>129</sup>

Citing the PMOI's petition to the Secretary and the alleged change of circumstances, the court held that the U.S. government violated the PMOI's due process rights<sup>130</sup> because the Secretary's notice failed to (1) specify the unclassified material "on which the Secretary proposes to rely" and (2) allow the PMOI an opportunity for rebuttal prior to re-designation.<sup>131</sup> The court again hesitated to vacate the PMOI's designation because of the realities of U.S. foreign policy and national security.<sup>132</sup> The court, therefore, remanded the decision and allowed the Secretary 180 days to amend the administrative record and provide the PMOI with an opportunity to respond.<sup>133</sup>

#### G. The Government's Failure to Respond: PMOI VI

The Secretary of State failed to comply with the court's order.<sup>134</sup> Consequently, two years later, on May 8, 2012, the PMOI

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<sup>127</sup> PMOI V, 613 F.3d at 225.

<sup>128</sup> PMOI V, 613 F.3d at 220; *see also* Review of Designation, *supra* note 124.

<sup>129</sup> PMOI V, 613 F.3d at 226.

<sup>130</sup> *Id.* at 228; *see also supra* note 123 (listing the alleged changed circumstances).

<sup>131</sup> *Id.* at 227-228.

<sup>132</sup> *Id.* at 229.

<sup>133</sup> *Id.* at 232 (Henderson, J., concurring) (emphasizing that the Secretary needs not disclose any confidential information and the Secretary appears to recognize the ambiguity of the record by "recommending a sua sponte reexamination of the PMOI's status in two years").

<sup>134</sup> PMOI VI, 680 F.3d at 834 (citing PMOI III, 613 F.3d at 225).

petitioned the court to issue a writ of mandamus<sup>135</sup> that ordered “the delisting of the PMOI or, alternatively, required the Secretary to make a decision on the PMOI’s petition.”<sup>136</sup>

In support of its petition the PMOI offered the following evidence. In September 2010, two months after the court remanded the case, the U.S. government provided the PMOI all unclassified material contained in the administrative record and indicated that the State Department would follow up with additional materially relevant information.<sup>137</sup> In October, the Department of Justice notified the PMOI that the State Department was still updating the record but had nothing more to add at that time.<sup>138</sup> The Department of Justice also requested that the PMOI respond to the September 2010 material by December 29, 2010, which the PMOI did.<sup>139</sup> In April 2011, counsel for the PMOI met with officials from the Department of Justice and the State Department and submitted further information in support of its cause.<sup>140</sup> In May 2011, the government added ten documents to the record, and the PMOI responded to each.<sup>141</sup> On August 4, 2011, the Department of Justice informed the PMOI that the declassifying process was complete and that the State Department was working “as quickly as possible on their review of the designation.”<sup>142</sup> On September 27, 2011, two more documents were added to the record, which the PMOI cited as duplicative.<sup>143</sup> After this request, the Department of Justice did not ask the PMOI

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<sup>135</sup> A writ of mandamus requires that the requesting entity prove that the Secretary had a duty to act and unreasonably delayed in acting. PMOI V, 613 F.3d at 226.

<sup>136</sup> PMOI VI, 680 F.3d at 834 (citing PMOI III, 613 F.3d at 225).

<sup>137</sup> PMOI VI, 680 F.3d at 835.

<sup>138</sup> *Id.* at 836.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (describing that the “allegedly deteriorating conditions at Camp Ashraf and letters and affidavits in support [of its petition were] written by American and Foreign leaders”).

<sup>141</sup> PMOI VI, 680 F.3d at 836.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

for any additional information, nor did the Secretary take any final action on the PMOI's petition.<sup>144</sup>

The court found these facts demonstrated that the Secretary egregiously delayed in responding to the PMOI's petition.<sup>145</sup> Noting the breach of a Congressional timetable "does not, alone, justify judicial intervention,"<sup>146</sup> the court held the Secretary's twenty-month failure to act "plainly frustrates the congressional intent and cuts strongly in favor of granting PMOI's mandamus petition."<sup>147</sup>

The government responded by arguing that the "demands placed upon the Secretary" should allow for greater flexibility.<sup>148</sup> The court found this unpersuasive, explaining, "Congress undoubtedly knew of these demand[s]" and chose to limit the Secretary's response time to 180 days.<sup>149</sup> Moreover, if the court upheld the Secretary's actions, it would effectively nullify the court order and insulate the agency from review "by making it impossible for the petitioners to 'mount a challenge to the rules.'"<sup>150</sup>

Despite strongly condemning the government's actions the court denied the writ and remanded the decision to the State Department, citing U.S. foreign policy and national security concerns.<sup>151</sup> The court's order warned the Secretary that any failure to comply with this 180-day deadline would result in the issuance of a writ of mandamus that sets aside the PMOI's designation.<sup>152</sup>

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<sup>144</sup> PMOI VI, 680 F.3d at 837.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* (citing *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991)).

<sup>147</sup> *Id.* at 837.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> PMOI VI, 680 F.3d at 838 (citing *In re Core Communications, Inc.*, 455 F.3d 267 (D.C. Cir. 2006) (invalidating the Federal Communications Commission's inter-carrier compensation rules after finding six years passed without the agency adhering to a court order)). In this case the court noted that the Secretary's inability to provide a decision within the last 600 days exemplifies the nullification of the court's decision and deprivation of an organization's right to judicial review under AEDPA. PMOI IV, 190 F.3d at 837.

<sup>151</sup> PMOI VI, 680 F.3d at 836.

<sup>152</sup> *Id.*

#### H. De-Listing the PMOI

On September 28, 2012, three days before the court’s deadline, the U.S. Department of State, Office of the Spokesperson, issued a media note stating that, effective immediately, the PMOI was delisted as an FTO under Executive Order 13224.<sup>153</sup> Pursuant to this order, the organization’s property was no longer blocked, and U.S. entities could “engage in transactions with the [PMOI] without obtaining a license.”<sup>154</sup>

The Secretary explained the decision by citing the PMOI’s “public renunciation of violence, absence of confirmed acts of terrorism for more than a decade, and their cooperation in the peaceful closure of Camp Ashraf, their historic paramilitary base,”<sup>155</sup> as evidence of changed circumstances.<sup>156</sup> The release also noted that the State Department continued to have “serious concerns about the [PMOI] as an organization,” and the Secretary of State’s decision did not overlook the PMOI’s past—specifically, the organization’s “involvement in the killing of U.S. citizens in Iran in the 1970s and an attack on U.S. soil in 1992.”<sup>157</sup>

#### IV. SECTION 1189 AND DUE PROCESS IN LIGHT OF THE PMOI CASES

There are three primary considerations when reviewing the constitutionality of Section 1189 in light of due process requirements. First, due process is not a fixed technical concept—requirements vary depending on particular situations and circumstances.<sup>158</sup> Second, where an organization demonstrates constitutional standing, the

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<sup>153</sup> Press Release, U.S. Dep’t of State, Office of the Secretary, Delisting of the Mujahedin-e Khalq (Sept. 28, 2012) <http://www.state.gov/r/pa/prs/ps/2012/09/198443.htm>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* Regarding Camp Ashraf, the press release also specifically noted that the U.S. “has consistently maintained a humanitarian interest in seeking the safe, secure, and humane resolution of the situation at Camp Ashraf, as well as in supporting the United Nations-led efforts to relocate eligible former Ashraf residents outside of Iraq.” *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* For a review of the holdings discussed, see *infra* Appendix.

<sup>158</sup> See *supra* Part III.B.

entity automatically possesses an actionable due process claim because of the stigma that attaches to designation constitutes a legally cognizable injury.<sup>159</sup> Third, where due process rights and national security interests overlap, courts permit the U.S. government wider latitude in its actions.<sup>160</sup> With these considerations in mind, the remainder of this comment analyzes the PMOI cases in light of the Fifth Amendment's procedural due process clause.

#### A. Due Process and Section 1189: The Notice Requirement

Procedural due process requires that affected parties be given notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>161</sup> In other words, the notice must inform the recipient what is being proposed, and what must be done to prevent the deprivation of rights.<sup>162</sup> Post-deprivation notice is only permissible where pre-deprivation notice is impractical or impossible, and post-deprivation remedies exist.<sup>163</sup>

In the initial designation of an FTO, the U.S. government provides notice of designation when the entity is “listed” in the Federal Register.<sup>164</sup> This post-deprivation notice informs the putative organization of its designation and cites to Section 1189, which outlines the proper methods of appeal.<sup>165</sup> Requiring pre-deprivation notice would plainly frustrate the purpose of Section 1189 because it would inform putative organizations that the U.S. is investigating its clandestine activities. The organization would then (1) tighten up its network—which negatively impacts the ability of the U.S. to gather

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<sup>159</sup> See PMOI II, 251 F. 3d at 204, (citing *Constantineau*, 400 U.S. at 436 (holding that stigmatization in a community without process is a deprivation of ones liberty)).

<sup>160</sup> See *id.*

<sup>161</sup> *Mullane*, 339 U.S. at 314.

<sup>162</sup> *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

<sup>163</sup> See *Hudson v. Palmer*, 468 U.S. 517, 531 (1984) (quoting *Parratt v. Taylor*, 451 U.S. 527, 539 (1981)).

<sup>164</sup> 8 U.S.C. § 1189.

<sup>165</sup> See, e.g., *Review of Designation*, *supra* note 124.

information on the organization—and (2) withdraw all funds from U.S. controlled banks.<sup>166</sup>

Alternatively, when re-designating an FTO, the Fifth Amendment's burdens adjust. Here, the U.S. government must provide putative organizations with pre-deprivation notice and access to all unclassified material on the record.<sup>167</sup> Post-deprivation hearings are not permissible because national security and public policy concerns are diminished; the organization has already been notified of its designation, and its assets are already frozen.

By applying a heightened standard for re-designated organizations satisfying constitutional muster, the FTO designation process properly conforms to the “what” and “when” notice requirements of procedural due process.<sup>168</sup> In fact, the Act's adaptability to particular situations and circumstances underscores why due process is an adaptable concept.<sup>169</sup>

#### B. Due Process and Section 1189: The Hearing Requirement

The essence of the hearing requirement is to ensure that designated entities are given a meaningful opportunity to “be heard in [its] defense.”<sup>170</sup> In order to satisfy this requirement, the hearing must be commensurate with the interest affected, taking into account the State's administrative needs.<sup>171</sup>

In *PMOI II*, the court properly used the test developed by the Supreme Court in *Mathews v. Eldridge*<sup>172</sup> to determine whether due

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<sup>166</sup> See *supra* Part I.C. (discussing the purpose and consequences of designation).

<sup>167</sup> See *id.* (discussing *PMOI II*, 251 F.3d at 205).

<sup>168</sup> See *supra* Part IV.B.

<sup>169</sup> *Verdugo-Uriqueidez*, 494 U.S. at 271 (Kennedy, J., concurring) (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957) (explaining that “the question of which specific safeguards . . . are appropriate to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”)).

<sup>170</sup> *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

<sup>171</sup> *Mathews*, 424 U.S. at 349.

<sup>172</sup> While *Mullane's* reasonableness standard could address all of these concerns, the court in *PMOI II* applied the *Mathews* test. *PMOI II*, 251 F.3d at

process is satisfied when a putative organization is given a post-deprivation hearing “in written form.”<sup>173</sup> The *Matthews* test balances (1) the private interest affected by the government’s action, (2) the risk of erroneous deprivation of that interest by the procedures employed by the government as well as the probable value of any additional procedural safeguards, and (3) the government’s interests, including the administrative burden of any additional procedural requirements.<sup>174</sup> The weighing of these interests indicates that procedural due process does not require the government to give putative organization more than a post-deprivation hearing in written form.

### 1. *The private interest*

Putative organizations always have at least two significant liberty interests at stake.<sup>175</sup> The organization has an interest in the stigma that attaches to designation,<sup>176</sup> and in the right of members to travel or make contributions to its cause.<sup>177</sup> However, in addition to assessing the private interest at stake,<sup>178</sup> *Matthews* also instructs courts to consider (1) “the possible length of wrongful deprivation of . . . benefits”,<sup>179</sup> and (2) “the degree of potential deprivation that may be created by a particular decision.”<sup>180</sup>

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208; *see also supra* note 69. Further, the *Matthews* test is arguably better suited to determine the specific factors that should be examined in conducting this particular type of due process analysis. PMOI II, 251 F.3d at 208; *see also* Broxmeyer, *supra* note 9, at 464-65.

<sup>173</sup> PMOI II, 251 F.3d at 208.

<sup>174</sup> *Matthews*, 424 U.S. at 335.

<sup>175</sup> *See, e.g.*, *Zinermon v. Burch*, 494 U.S. 113, 113; *Boddie*, 401 U.S. at 380-81; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160-61.

<sup>176</sup> *See* PMOI II, 251 F. 3d at 204, (citing *Constantineau*, 400 U.S. at 436 (holding that stigmatization in a community without process is a deprivation of one’s liberty)).

<sup>177</sup> *See* PMOI II, 251 F. 3d at 208.

<sup>178</sup> *See supra* Part IV.C; *cf. Dixon v. Love*, 431 U.S. 113, 113-14 (holding that a “driver’s license may not be so vital and essential” as to be considered “significant”).

<sup>179</sup> *Id.* (citing *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975)).

<sup>180</sup> *Matthews*, 424 U.S. at 341.

An FTO's deprivation lasts a minimum of two years and a maximum of five.<sup>181</sup> The degree of deprivation also varies from case to case, depending on the putative organization's presence and membership in the U.S. Consequently, while the liberty interests at stake might first appear to favor providing more than a post-deprivation hearing "in written form," further exploration demonstrates that this factor fails to provide a stable guide for the type of hearing required or when the hearing should take place.

## 2. *The risk of erroneous deprivation*

"Procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases."<sup>182</sup> In this manner, the "risk of erroneous deprivation" factor focuses on the "fairness and reliability" of the procedure.<sup>183</sup>

Critics may point to PMOI VI as evidence that the FTO designation process carries a high risk of erroneous deprivation. That argument, however, ignores the PMOI's long history of violence and terror. During the 1970's the PMOI bombed U.S. targets in Iran and assisted in the takeover of the U.S. Embassy in Tehran.<sup>184</sup> Further, when the PMOI was first designated as an FTO in 1997, the organization was only five years removed from a terrorist attack on U.S. soil.<sup>185</sup> Finally, the PMOI supported Saddam Hussein in bloody crackdowns on Iraqi Shia and Kurds, and only reformed after Saddam Hussein's fall in 2003.<sup>186</sup>

Meanwhile, the U.S. government expends a great deal of resources and effort to ensure that C/STI, with the support of the intelligence community and the Department of State, properly identifies organizations that are foreign, engage in terrorist activities, and threaten American national security.<sup>187</sup> Section 1189 also employs

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<sup>181</sup> See 8 U.S.C. § 1189(a)(4)(C) (explaining that the State Department must review designations every five years).

<sup>182</sup> Matthews, 424 U.S. at 344.

<sup>183</sup> *Id.*

<sup>184</sup> See supra Part IV.A.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See 8 U.S.C. § 1189(a)(1).

procedural safeguards that permit the review of a designated organization's status every two years, and require review every five.<sup>188</sup> Erroneous deprivations are atypical and highly unlikely because the designation of an entity as an FTO follows carefully prescribed procedures and is neither random nor arbitrary.

### 3. *The government interest*

The last *Mathews* factor assesses the government's interest, including the fiscal and administrative burden of any additional procedural requirements.<sup>189</sup>

Trial type hearings are a massive expenditure both in terms of time and resources. A Congressional Service Report on the FTO List suggests that, “[i]t is a significant bureaucratic burden to ensure that the designations are appropriately reviewed, investigated, the administrative records updated, the appropriate agencies consulted, and the public statement of renewal made every two years after the initial designation.”<sup>190</sup> Moreover, the number of designated organizations has almost doubled since 1997, and continues to grow.<sup>191</sup>

The nature of foreign affairs and the purpose of this legislation also favor construing due process requirements in a manner that grants deference to the “changeable and explosive nature of contemporary international relations.”<sup>192</sup> In other words, the executive branch should be given a “brush broader than that it customarily wields in domestic areas.”<sup>193</sup> This ensures that the U.S. government is not bogged down in administrative procedures when it must react quickly to developments abroad.

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<sup>188</sup> 8 U.S.C. § 1189(a)(4)(C).

<sup>189</sup> *Mathews*, 424 U.S. at 344.

<sup>190</sup> AUDREY KURTH CRONIN, CONG. RESEARCH SERV., RL32120, THE “FTO LIST” AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 10 (2003).

<sup>191</sup> CRS REPORT, *supra* note 6, at 6.

<sup>192</sup> *See supra* Part II.B (citing *Zemel*, 381 U.S. at 17, 85).

<sup>193</sup> *Zemel*, 381 U.S. at 17, 85).

4. *What kind of hearing is appropriate and when should it occur?*

In light of the small risk of erroneous deprivation and the onerous burden of oral hearings (and because private interests may vary substantially), the court in *PMOI II* was correct to suggest that FTO designations satisfy the requirements of procedural due process when putative organizations are given a post-deprivation hearing “in written form.”<sup>194</sup>

The U.S. government has a considerable interest in fighting terrorism.<sup>195</sup> Similar to requiring pre-deprivation notice,<sup>196</sup> requiring a pre-deprivation hearing would allow an organization to withdraw its funds and supporters from the U.S. This would frustrate the purpose and effectiveness of the legislation.<sup>197</sup> Moreover, the procedures described herein provide designated organizations with the opportunity to be heard “at a meaningful time and in a meaningful manner.”<sup>198</sup>

C. Does the Use of Undisclosed Classified Information Raise Any Due Process Concerns?

Closely related to the hearing requirement is the right of a party to be confronted with the evidence against it. Critics argue that the government’s reliance on *ex parte* and *in camera* submissions impermissibly deprives organizations of due process.<sup>199</sup> While there is certainly some precedent and credence to this argument,<sup>200</sup> the importance of national security overrides any limited benefits of disclosure.

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<sup>194</sup> *PMOI II*, 251 F.3d at 208.

<sup>195</sup> See AEDPA, Pub. L. No. 104-132 (stating that deterring terrorism is the purpose of the law); see also *supra* note 2.

<sup>196</sup> See *supra* Part IV.A.

<sup>197</sup> AEDPA at § 301(b).

<sup>198</sup> *Id.* at 1242.

<sup>199</sup> *Reagan*, 785 F.2d at 1061.

<sup>200</sup> See *PMOI III*, 327 F.3d at 1243 (emphasizing that “judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts” and it is therefore a “firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions” except “in the most extraordinary circumstances”).

In *PMOI III*, the court emphasized the importance of allowing the Executive to control access to classified information, and that courts are “ill-suited to determine the sensitivity of classified information.”<sup>201</sup> Perhaps more persuasive is the fact that the organizations requesting access to classified materials are the very organizations the U.S. government believes to be engaging in operations adverse to U.S. interests. Requiring the disclosure of classified information is akin to asking the U.S. to hand over its secrets to the “enemy.” Not only would such a requirement frustrate the purposes of the law, but it would also jeopardize national security. Because of these considerations, the Supreme Court properly recognizes that “confidentiality is essential to the effective operation of our foreign intelligence services,”<sup>202</sup> and the government must be able to “tender as absolute an assurance of confidentiality as it can.”<sup>203</sup>

While it is easy to consider the unfortunate organization that is wrongfully designated, every organization listed as an FTO has raised a legitimate flag in the eyes of the U.S. government. A wrongfully designated organization should be able to demonstrate its innocence without access to classified information, as exemplified by the PMOI.<sup>204</sup>

## CONCLUSION

Foreign terrorist organizations pose a real and constantly evolving threat to U.S. national security. The AEDPA tempers that threat by allowing the U.S. government to bring “legal clarity to efforts to identify and prosecute members of terrorist organizations and those who support them.”<sup>205</sup> At the same time, the U.S. must not lose sight of foundational principles upon which it was established. As Justice Hand noted, “[j]ustice is the tolerable accommodation of

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<sup>201</sup> *PMOI III*, 327 F.3d at 1242; *see also* *Yunis*, 867 F.2d at 623 (explaining that “[t]hings that did not make sense to [a judge] would make all too much sense to a foreign counter intelligence specialist. . .”).

<sup>202</sup> *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980).

<sup>203</sup> *CIA v. Simms*, 471 U.S. 159, 175 (1985).

<sup>204</sup> *See supra* Part IV.F.

<sup>205</sup> CRS REPORT, *supra* note 6, at 7.

the conflicting interests of society.”<sup>206</sup> The government must walk a fine line between protecting the rights of its citizens and protecting their safety.

While there may have been initial due process concerns raised by the enactment of Section 1189, the PMOI cases illustrate how the FTO designation processes effectively balance the government’s twin interests. If the government missteps, *PMOI VT* demonstrates that the judiciary is willing to involve itself, remedy the deprivation, and reset the precarious balance between freedom and security.

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<sup>206</sup> Philip Hamburger, *The Great Judge*, LIFE, Nov. 4, 1946, at 117 (quoting Judge Hand).

### Appendix: A Synthesis of the PMOI Decisions

Case	Year	Issue	Holding
<i>PMOI I</i>	1999	Whether there is sufficient evidence demonstrating the PMOI conducts terrorist activities and threatens the security of the U.S.	In denying the petition for review, the court held that FTO designation procedures did not require adversarial hearings or advance notice because the PMOI lacked constitutional standing and the administrative record contained sufficient evidence.
<i>PMOI II</i>	2001	Whether there is sufficient evidence demonstrating the PMOI conducts terrorist activities and threatens the security of the U.S.	In remanding the petition for review, the court found (1) the PMOI satisfied constitutional standing, (2) the U.S. government deprived the PMOI of liberty and property, and (3) the U.S. government did not provide the PMOI with adequate process. However, foreign policy and national security concerns required the court to remand the complaint and afford the Secretary of State an opportunity to remedy these violations.
<i>PMOI III</i>	2003	Whether the Secretary of State's reliance on classified information violates procedural due process.	In denying the petition for review, the court held the Act only required disclosure of unclassified information because the executive branch has a compelling interest in controlling access to classified information and courts are ill-equipped to make such decisions.

### Appendix: A Synthesis of the PMOI Decisions (cont'd)

Case	Year	Issue	Holding
<i>PMOI IV</i>	2004	Whether the PMOI and the NCRI are separate entities, making simultaneous designation improper.	In denying the petition for review, the court held that substantial evidence on the record demonstrated the NCRI is controlled by the PMOI.
<i>PMOI V</i>	2009	Whether there is sufficient evidence demonstrating the PMOI conducts terrorist activities and threatens the security of the U.S.	In remanding the petition for review, the court held the Secretary of State violated the PMOI's procedural due process rights by failing to consider the PMOI's allegations of a change in circumstances prior to re-designation. However, foreign policy and national security concerns required the court to remand the petition and afford the Secretary of State an opportunity to remedy these violations.
<i>PMOI VI</i>	2012	Whether a <i>writ of mandamus</i> is an appropriate remedy.	In remanding the petition for review, the court condemned the Secretary for failing to respond to the PMOI's petition. However, the court again deferred to foreign policy and national security considerations and demanded the Secretary respond to the petition within 180 days or the writ would be granted.
Delisting the PMOI	2012	On September 28, 2012 the U.S. State Department delisted the PMOI as a FTO.	.