

---

## COMMENT

---

---

### BLACKLISTING FOREIGN TERRORIST ORGANIZATIONS: CLASSIFIED INFORMATION, NATIONAL SECURITY, AND DUE PROCESS

---

JUSTIN S. DANIEL<sup>†</sup>

*Designations of Foreign Terrorist Organizations (FTO) by the Secretary of State under § 1189 of the Antiterrorism and Effective Death Penalty Act of 1996 provide a key means of thwarting global terror networks by isolating and stigmatizing such groups, and by depriving them of financial and human support. This Comment examines the role of classified information in the FTO designation process and analyzes whether the Secretary's reliance on classified information—to which designated FTOs do not have access—comports with the Due Process Clause of the Fifth Amendment, particularly when the classified record is essential to the Secretary's determination.*

*To answer that question, this Comment first traces a series of cases in the U.S. Court of Appeals for the District of Columbia Circuit, the tribunal charged with hearing challenges to FTO designations, and argues that—notwithstanding statements by the court evincing a reluctance to resolve the issue—D.C. Circuit precedent has likely foreclosed access to the classified record by designated groups, even when the information withheld is essential to the Secretary's designation decision.*

*This Comment then presents a constitutional due process analysis and argues that—because § 1189 targets foreign (as opposed to domestic) organizations, which must establish substantial connections with the U.S. to receive due process protection—courts should be reluctant to grant FTOs constitutional protection for interests divorced from the contacts used to establish U.S. presence. Finally, this Comment ventures*

---

<sup>†</sup> Executive Editor, Volume 166, *University of Pennsylvania Law Review*. J.D. Candidate, 2018, University of Pennsylvania Law School; B.S., 2012, United States Coast Guard Academy. The author is a Lieutenant in the United States Coast Guard. The views expressed herein are his own and do not represent the views of the Coast Guard, the Department of Homeland Security, or any other component of the United States government. I would like to thank the editors of the *Law Review* for their diligent work on this Comment, especially Kevin Wynosky and the other Executive Editors, and Comments Editor Max Linder.

*a comparative analysis by looking to a Cold War–era scheme similar to § 1189 and to the contemporary cases dealing with habeas corpus in the terrorist detainment context.*

INTRODUCTION .....	214
I. SECTION 1189 DESIGNATION SCHEME .....	215
A. <i>Generally</i> .....	216
B. <i>Criticism of § 1189</i> .....	219
C. <i>Role of Classified Information in § 1189</i> .....	221
II. A RECURRING ISSUE: RELIANCE ON CLASSIFIED INFORMATION IN FTO DESIGNATIONS.....	221
A. People’s Mojahedin I.....	222
B. National Council I.....	223
C. People’s Mojahedin II .....	225
D. Holy Land Foundation v. Ashcroft .....	226
E. National Council II.....	227
F. People’s Mojahedin III.....	229
III. CLOSING THE FILE: WHY EX PARTE, IN CAMERA SUBMISSIONS SATISFY DUE PROCESS .....	231
A. <i>As-Applied Challenges Have Been Foreclosed by Circuit Precedent</i> .....	232
B. <i>Due Process Analysis</i> .....	235
1. Step Zero: Constitutional Presence .....	236
2. Step One: Interests Implicated by FTO Designations .....	238
3. Step Two: Tailoring the Process Due to the Interests Implicated .....	241
C. <i>Comparative Analysis</i> .....	250
1. The Attorney General’s Designation of Subversive Organizations .....	251
2. Post-9/11 Habeas Cases .....	258
CONCLUSION.....	260

## INTRODUCTION

Statutory schemes for designating groups as terrorist organizations can be as powerful as any weapon in America’s fight against terrorism, because such designations can effectively cripple targeted organizations by severing sources of financial and human support. In addition to triggering a variety of legal penalties, terrorist designations—imposed by high-level officials in the Executive Branch—isolate and stigmatize terrorist groups, both from mainstream society and on the world stage. These statutory schemes are “at the interstices of

administrative law, foreign relations, national security, and counterterrorist law,”<sup>1</sup> and they pose interesting—and perhaps intractable—questions about due process, executive authority, and the role of the federal judiciary.

This Comment explores one of those questions: the reliance on classified information by the Secretary of State in designating Foreign Terrorist Organizations (FTO) under 8 U.S.C. § 1189, part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Comment first examines the role of classified information in the FTO designation process, and then analyzes whether the Secretary’s reliance on classified information—to which designated FTOs do not have access—comports with the Due Process Clause of the Fifth Amendment, especially when the Secretary’s determination is based largely or entirely on the classified record. The United States Court of Appeals for the District of Columbia Circuit, which is responsible for hearing challenges brought by FTOs to their designations, has wrestled with the latter question in a series of cases—but never squarely resolved it.

Part I provides an overview of the process by which the Secretary of State designates FTOs, including the role of classified information and some of the criticisms leveled at the process. Part II surveys a series of cases in the D.C. Circuit grappling with the nuances of the FTO designation scheme and considering the implications of the Secretary’s reliance on classified information in making designations. Part III analyzes the scenario in which an FTO designation relies upon support found *only* in classified material, such that the designation cannot stand without the classified information. As a first step, Section III.A closely scrutinizes the language of the D.C. Circuit’s opinions addressing reliance on classified information. Against this backdrop, Section III.B performs a Fifth Amendment due process analysis of the scheme. Finally, Section III.C provides a comparative analysis by looking to a Cold War-era designation system similar to § 1189 and to the contemporary line of cases dealing with habeas corpus in the terrorist detention context.

Employing these three lines of inquiry, this Comment argues that reliance on classified information by the Secretary of State in making FTO designations comports with the Fifth Amendment—even when the designation cannot be sustained without the classified information and the FTO has no access to that information.

## I. SECTION 1189 DESIGNATION SCHEME

Following the 1993 attack on the World Trade Center and the 1995 bombing of the Murrah Federal Building in Oklahoma City, AEDPA was passed by

---

<sup>1</sup> Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 644 (2008).

Congress and signed into law by President Clinton. The law reflected serious concern by Congress about the threat posed by international terrorism,<sup>2</sup> and took aim specifically at disrupting terrorism fundraising networks.<sup>3</sup>

In what is now 8 U.S.C. § 1189, AEDPA provides that the Secretary of State may designate an organization as an FTO if she finds: (1) it is foreign; (2) it is engaged in “terrorist activity”<sup>4</sup> or “terrorism,”<sup>5</sup> or has the “capability and intent” to do so; and (3) “the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.”

### A. Generally

Designation as an FTO under § 1189 imposes a number of serious penalties on an organization. It is a federal crime to provide “material support” to an FTO.<sup>6</sup> Financial institutions that either possess or control any funds belonging to an FTO must retain control of those funds and report them to the Secretary of the Treasury.<sup>7</sup> Financial institutions that fail to comply with this requirement may be subject to a minimum \$50,000 civil penalty.<sup>8</sup> Membership in an FTO, the solicitation of others for membership in an FTO, and the solicitation of contributions to an FTO all fall within the statutory definition of “[e]ngage[ment] in terrorist activity” and therefore constitute grounds for barring an alien from entry into the United States.<sup>9</sup> The propriety of

<sup>2</sup> See AEDPA, Pub. L. No. 104-132, § 301(a)(1), 110 Stat. 1214, 1247 (1996) (codified as amended in scattered sections of U.S.C.) (“[I]nternational terrorism is a serious and deadly problem that threatens the vital interests of the United States . . . .”); *id.* at (a)(4) (“[I]nternational terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States . . . .”).

<sup>3</sup> See *id.* at (b) (“The purpose of this subtitle is to . . . prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities.”); see also *id.* at (a)(6) (“[S]ome foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations . . . .”).

<sup>4</sup> Defined by 8 U.S.C. § 1182(a)(3)(B) (2012), “terrorist activity” includes hijacking or sabotaging any conveyance, threatening or detaining someone in order to coerce another, assassinating someone, or using (or threatening to use) chemical, biological, nuclear, explosive, or any other weapon “to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” Planning, commissioning, or inciting such activities are also included, as are gathering information and soliciting funds for such activities. *Id.*

<sup>5</sup> As defined by 22 U.S.C. § 2656f(d)(2) (2012), “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”

<sup>6</sup> 18 U.S.C. § 2339B(a)(1) (2012).

<sup>7</sup> § 2339B(a)(2); see also 8 U.S.C. § 1189(a)(2)(C) (2012) (“[T]he Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court.”).

<sup>8</sup> § 2339B(b).

<sup>9</sup> See §§ 1182(a)(3)(B)(i), (iv), (vi), cited with approval in § 2339B(a)(1).

these severe measures is premised on Congress's belief that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."<sup>10</sup>

The express terms of § 1189 do not provide a designated organization with a hearing, either pre- or post-designation. They also do not require that the Secretary notify a designated organization prior to her publication of the FTO designation in the Federal Register, though she is required to notify congressional leaders in the House of Representatives and the Senate.<sup>11</sup>

Once a group is designated as an FTO, there are three ways that the designation can be revoked: Congress may expressly remove an organization's designation;<sup>12</sup> the Secretary of State may revoke the designation;<sup>13</sup> or the D.C. Circuit may review the Secretary's decision and order revocation of the designation.<sup>14</sup>

If an FTO believes that its circumstances have sufficiently changed "from the circumstances that were the basis for the designation," it may petition the Secretary of State to revoke the designation.<sup>15</sup> After receiving a petition for revocation, the Secretary has 180 days to make a final determination,<sup>16</sup> and the Secretary must revoke the FTO designation if she determines either that "the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation," or that "the national security of the United States warrants a revocation."<sup>17</sup> And even if an organization does not petition the Secretary for revocation, § 1189 requires the Secretary to make this same inquiry for every FTO at least once every five years.<sup>18</sup>

In conducting a review of an organization's FTO designation, the Secretary of State must base her decision on a documented administrative record.<sup>19</sup> The statute is silent as to what must be included in that record. As such, courts have recognized that the Secretary's record may include third-hand accounts, information from intelligence sources, open-source information from the Internet, and other non-traditional types of evidence—all of which courts may struggle to evaluate.<sup>20</sup> In addition, the administrative record may include both unclassified and classified material.<sup>21</sup> Therefore the label "administrative record"

---

<sup>10</sup> See AEDPA, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (1996).

<sup>11</sup> § 1189(a)(2)(A)(i).

<sup>12</sup> *Id.* at (a)(5).

<sup>13</sup> *Id.* at (a)(6).

<sup>14</sup> *Id.* at (c).

<sup>15</sup> *Id.* at (a)(4)(B). In an organization's petition, it must provide supporting evidence. *Id.* at (a)(4)(B)(iii).

<sup>16</sup> *Id.* at (a)(4)(B)(iv)(I).

<sup>17</sup> *Id.* at (a)(6).

<sup>18</sup> *Id.* at (a)(4)(C)(i).

<sup>19</sup> *Id.* at (a)(3)(A).

<sup>20</sup> See *People's Mojahedin Org. of Iran v. U.S. Dep't of State (People's Mojahedin I)*, 182 F.3d 17, 19 (D.C. Cir. 1999).

<sup>21</sup> § 1189(a)(3)(B).

may be misleading in that it does not contain the sort of material that “courts and agencies [typically] think of as evidence.”<sup>22</sup> For that reason, the D.C. Circuit has recognized that § 1189 is both substantively and procedurally “unique.”<sup>23</sup>

If the Secretary of State denies an FTO’s petition for revocation, § 1189 provides that the FTO may seek review of the decision in the D.C. Circuit.<sup>24</sup> The standard of review mirrors the standard set forth in the Administrative Procedure Act (APA): the court is directed to set aside a decision by the Secretary that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or that lacks “substantial support in the administrative record taken as a whole.”<sup>25</sup> But importantly, that standard of review applies only to the Secretary’s determinations that the organization is foreign, and that it either engages or has the capability and intent to engage in terrorism—the D.C. Circuit has deemed whether the organization poses a threat to U.S. national security an unreviewable political question.<sup>26</sup>

After 9/11, America relied more heavily on the FTO designation scheme in its fight against terrorism; the number of designated organizations increased significantly.<sup>27</sup> Today, the FTO designation scheme—and the attendant penalties that flow from FTO designation—stand as central features of America’s effort to thwart international terrorism.<sup>28</sup>

---

<sup>22</sup> *People’s Mojahedin I*, 182 F.3d at 19.

<sup>23</sup> *Id.*; see also *Nat’l Council of Resistance of Iran v. Dep’t of State (Nat’l Council I)*, 251 F.3d 192, 196 (D.C. Cir. 2001) (noting that “[w]hile [§ 1189’s] statutory procedure . . . sounds like the familiar procedure normally employed by the Congress to afford due process in administrative proceedings, the similarity to process afforded in other administrative proceedings ends there” because the designated organization lacks the “procedural participation and protection” it would have in other administrative proceedings).

<sup>24</sup> § 1189(c). The exclusive assignment of review in the D.C. Circuit has survived despite occasional challenges. See, e.g., *United States v. Afshari*, 426 F.3d 1150, 1154-55 (9th Cir. 2005) (reversing a district court that allowed review outside the D.C. Circuit while noting that similar restrictions in other statutes have generally been upheld and that the “scheme avoids the awkwardness of criminalizing material support for a designated organization in some circuits but not others”).

<sup>25</sup> See also *People’s Mojahedin I*, 182 F.3d at 22 (observing § 1189(b)(3) employs “APA-like language”). Compare § 1189(c)(3), with 5 U.S.C. § 706(2) (2012) (directing a reviewing court to set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or that are “unsupported by substantial evidence”).

<sup>26</sup> *People’s Mojahedin I*, 182 F.3d at 23.

<sup>27</sup> See Donohue, *supra* note 1, at 654 (“Following 9/11, the number of designated FTOs nearly doubled [as Secretary of State Colin Powell re-designated organizations whose designations were set to expire and added new organizations to the list] . . . By April 2008, the number had grown to forty-four.”).

<sup>28</sup> See *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> [<https://perma.cc/DWJ8-KTJ8>] (“FTO designations play a critical role in our fight against terrorism and are an effective means of curtailing support for terrorist activities and pressuring groups to get out of the terrorism business.”).

## B. Criticism of § 1189

Section 1189 has been the target of much criticism, especially from the legal academy. Some have accused the FTO designation scheme of becoming “politicized” by the State Department.<sup>29</sup> Others have argued that a § 2339B “material support” defendant’s inability to challenge the underlying FTO designation by the Secretary violates the Constitution.<sup>30</sup> The Secretary of State’s role in making the determination has also been challenged,<sup>31</sup> and the judicial review procedures have been attacked as inadequate.<sup>32</sup> At least one scholar has expressed concern that the FTO designation scheme raises constitutional issues under the Equal Protection Clause and substantive due process because of the scheme’s “disparate impact on the Arab Muslim community.”<sup>33</sup> Another concern is that groups—after having their financial assets seized because of the designation—may lack the resources to effectively challenge the decision.<sup>34</sup>

Yet while § 1189—along with related provisions of law that penalize assistance to such groups—has been subject to a great deal of academic

---

<sup>29</sup> E.g., Andrew V. Moshirnia, *Valuing Speech and Open Source Intelligence in the Face of Judicial Deference*, 4 HARV. NAT’L SECURITY J. 385, 405 (2013) (suggesting “political favor, rather than actual fact-finding, may determine a group’s designation”); Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: The Effect on the Separation of Powers*, 6 CARDOZO PUB. L., POL’Y & ETHICS J. 547, 547-48 (2008) (asserting that the FTO designation scheme “defies the Constitution” and that it “has become increasingly politicized as the State Department picks and chooses which groups to designate as foreign terrorist organizations”).

<sup>30</sup> E.g., 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. L. REV. 125, 125 (2003).

<sup>31</sup> E.g., Micah Wyatt, Comment, *Designating Terrorist Organizations: Due Process Overdue*, 39 GOLDEN GATE U. L. REV. 221, 245, 259 (2009) (arguing that § 1189 is unconstitutional partly because the Secretary of State is not the “unbiased adjudicator” due process requires “preside over the organization’s opportunity to be heard prior to the FTO designation”).

<sup>32</sup> E.g., Moshirnia, *supra* note 29, at 405-06 (pointing out that “[i]n a climate where the Government may rely largely on classified (and therefore uncontested) hearsay, there are few, if any, effective avenues of correcting or overturning FTO designations through the courts” (footnote omitted)).

<sup>33</sup> See Donohue, *supra* note 1, at 672-73 (observing that “most of the groups subject to designation orders under AEDPA are Arab and/or Muslim” and that “[i]n cases involving the use of secret evidence to support allegations of material support to terrorism, almost all of the accused have been Islamic or of Arab descent”).

<sup>34</sup> See Nicole Nice-Petersen, Note, *Justice for the “Designated”: The Process That Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387, 1405 (2005) (arguing that U.S. entities whose assets are frozen “are due much greater protections” because they are “unable to mount an effective defense when their assets are frozen because blocking orders do not provide adequate notice of the charges against blocked entities, and the evidence used to justify blocking orders is often not disclosed to them”).

criticism, some commentators have rallied to its defense.<sup>35</sup> And, in any case, it has enjoyed considerably more success in the courts.<sup>36</sup>

As noted above, § 1189 prohibits “a defendant in a criminal action or an alien in a removal proceeding” from challenging the underlying FTO designation.<sup>37</sup> However, individuals prosecuted under § 2339B’s “material support” provision *have* attempted to challenge the underlying FTO designation of the group they are charged with supporting—but they have not been successful.<sup>38</sup> In *Holder v. Humanitarian Law Project*, the Supreme Court expanded the scope of the “material support” provision by expressly rejecting an as-applied challenge to § 2339B by groups seeking to provide international legal training and political advocacy assistance to FTOs.<sup>39</sup> Indeed, AEDPA itself expanded on an earlier definition of “material support” by constraining exceptions for medical and religious assistance.<sup>40</sup>

As a result of the failure of these challenges to § 1189 and related provisions, today’s FTO designation process has wide-ranging ramifications for terrorist groups. Professor David Cole, among others, has observed the interplay between the § 1189 FTO designation scheme and the § 2339B “material support” provision, and noted how the two reinforce one another in America’s war against terrorism.<sup>41</sup>

---

35 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, 487 (2004) (concluding that § 1189 “comports with procedural due process so long as designated organizations are entitled to post-designation notice and hearings”); see also Ankush Agarwal, Comment, *Obstructing Justice: The Rise and Fall of the AEDPA*, 41 SAN DIEGO L. REV. 839, 899 (2004) (describing AEDPA as “a necessary tool” in the fight against terrorism, and arguing that it “provides sufficient safeguards to assure that the constitutional rights of loyal American citizens . . . will not be compromised,” though acknowledging that “the rights of active donors and participants [in terrorist organizations] may” be).

36 See Shapiro, *supra* note 29, at 548 (observing “courts generally have been reluctant to scrutinize the designations and to invade what they consider the province of the Executive Branch” and that, as a result, “the Executive Branch now wields a tremendous amount of power to designate foreign organizations as terrorists”).

37 8 U.S.C. § 1189(a)(8) (2012).

38 See, e.g., *United States v. Afshari*, 426 F.3d 1150, 1158 (9th Cir. 2005).

39 See 561 U.S. 1, 36 (2010).

40 See Donohue, *supra* note 1, at 652-53 (noting AEDPA effectively expanded the definition of material support by replacing an exception for “humanitarian assistance to persons not directly involved in [such] violations” with the phrase “except medicine or religious materials”).

41 See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.—C.L. L. REV. 1, 8-9 (2003) (“Virtually every criminal ‘terrorism’ case that the government has filed since September 11 has included a charge that the defendant provided material support to a terrorist organization.”); see also Wyatt, *supra* note 31, at 256 n.261 (“[T]here is tremendous pressure to designate as many organizations as FTOs as possible, because the only way to prevent ‘material support’ to these organizations is to pre-designate them.”).

### C. Role of Classified Information in § 1189

Section 1189 provides that the Secretary of State “may consider classified information” in reaching her decision to designate an FTO.<sup>42</sup> Section 1189 further specifies that such “[c]lassified information shall not be subject to disclosure for such time as it remains classified.”<sup>43</sup>

In subsequent judicial proceedings challenging an FTO designation, the court is directed to conduct its review “based solely upon the administrative record.”<sup>44</sup> The Government is allowed to provide, for ex parte and in camera review by the court, any classified information that was used by the Secretary in making her decision.<sup>45</sup> As noted above, the standard of review set forth in § 1189 is similar to that used in review of administrative proceedings: the court is authorized to set aside the Secretary’s decision only when it “lack[s] substantial support in the administrative record taken as a whole *or in classified information submitted to the court.*”<sup>46</sup> Thus by its terms § 1189 directs the court to uphold a determination by the Secretary when substantial support for the designation exists in the classified record, regardless of whether the unclassified portion of the record also contains supportive information.

Section 1189 does not provide any mechanism by which an FTO challenging the Secretary’s decision may gain access to classified information—either in original form or in any modified form. Thus, as the D.C. Circuit has recognized, any classified material on which the Secretary based her decision to designate an organization “may continue to remain secret, except from certain members of Congress and this court.”<sup>47</sup>

## II. A RECURRING ISSUE: RELIANCE ON CLASSIFIED INFORMATION IN FTO DESIGNATIONS

The law governing the designation of FTOs developed almost entirely in the D.C. Circuit, owing to that court’s exclusive responsibility to review the Secretary of State’s designation determinations. That body of law in turn developed largely from challenges by a handful of organizations to their FTO designations—most notably an Iranian resistance group known as the People’s Mojahedin Organization of Iran (People’s Mojahedin). This Part will examine a series of challenges made by People’s Mojahedin and a few other organizations to their FTO designations, with a focus on the role that classified information played in those challenges.

---

<sup>42</sup> § 1189(a)(3)(B).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at (c)(2).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at (c)(3)(D) (emphasis added); *see also supra* note 25 and accompanying text.

<sup>47</sup> *People’s Mojahedin I*, 182 F.3d 17, 19 (D.C. Cir. 1999).

## A. People's Mojahedin I

In what would prove to be a long journey to shed its FTO designation,<sup>48</sup> People's Mojahedin made its first visit to the D.C. Circuit in October 1997.<sup>49</sup> Together with the separatist Liberation Tigers of Tamil Eelam (Tamil Tigers)—both of which had been designated as FTOs by Secretary of State Madeline Albright<sup>50</sup>—People's Mojahedin challenged its designation,<sup>51</sup> which placed it alongside notorious organizations like Shining Path, the Revolutionary Armed Forces of Columbia (FARC), Khmer Rouge, and Hizballah.<sup>52</sup>

Confronting People's Mojahedin's FTO challenge for the first time, the court acknowledged that the language of § 1189 was couched in administrative law terminology, but nonetheless recognized that the scheme was unlike a “run-of-the-mill administrative proceeding.”<sup>53</sup> The court also observed that the information relied upon by the Secretary in making her designation, and included in her administrative record, “may or may not be facts” because § 1189 plainly did not prevent the Secretary from using “third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities.”<sup>54</sup> The public record used by the Secretary included information about the Tamil Tigers gathered from the news media, Sri Lankan intelligence units, the U.S. military, and the State Department.<sup>55</sup> For People's Mojahedin, the Secretary relied heavily on a Central Intelligence Agency research paper.<sup>56</sup>

Due to the fact that both People's Mojahedin and the Tamil Tigers were clearly foreign entities—with no property and no presence in the United States whatsoever—the court easily concluded that neither organization had any constitutional due process rights.<sup>57</sup> The court reasoned that organizations are only entitled to due process after they both “come within the territory of the United States” and develop “substantial connections” with the United States.<sup>58</sup> Consequently, People's Mojahedin and the Tamil Tigers were only allowed to

---

48 See *Foreign Terrorist Organizations*, *supra* note 28 (referring to People's Mojahedin by its alternate name, the Mojahedin-e Khalq Organization, and noting it was not removed from the FTO list until September 28, 2012).

49 *People's Mojahedin I*, 182 F.3d 17, *petition for review filed*, No. 30-4406 (D.C. Cir. Oct. 22, 1997).

50 Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997).

51 *People's Mojahedin I*, 182 F.3d at 18-19.

52 Designation of Foreign Terrorist Organizations, 62 Fed. Reg. at 52,650-51.

53 *People's Mojahedin I*, 182 F.3d at 19.

54 *Id.*

55 *Id.* at 19-20.

56 *Id.* at 20.

57 *Id.* at 22.

58 *Id.* (internal quotation marks omitted) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

contest the Secretary of State's designations under the procedures specified in § 1189—in other words, the statutory rights that Congress chose to provide.<sup>59</sup>

Turning to the statutory text, the court identified a problem with § 1189: the Secretary's finding under § 1189(a)(1)(C) that an organization “threatens the security of United States nationals or the national security of the United States” is a nonjusticiable political question, despite the fact that Congress apparently directed the court to review that finding.<sup>60</sup> To avoid wading into the political arena, the court confined its review to the Secretary's findings that the organizations were “foreign,” and that they either engage in terrorism or have the ability and intent to do so.<sup>61</sup>

Without the need to address any constitutional challenges, the court concluded that the “administrative record” supplied by the Secretary of State contained “substantial support” for her findings.<sup>62</sup> In so holding, the court recognized that the information in the record had not been “subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected,” but the court nonetheless performed what it considered to be its very limited function under the statutory terms of § 1189.<sup>63</sup>

#### B. National Council I

People's Mojahedin made its second trip to the D.C. Circuit in November 1999, this time alongside the National Council of Resistance of Iran, which the Secretary had deemed an “alias” of People's Mojahedin.<sup>64</sup> The challenge was to the Secretary of State's October 1999 redesignation of People's Mojahedin as an FTO.<sup>65</sup> The court concluded that the Secretary had complied with § 1189 in making her redesignation, but that the redesignation nonetheless violated the Fifth Amendment's Due Process Clause.<sup>66</sup>

The *National Council I* court, like the *People's Mojahedin I* court before it, noted that the statutory terms of § 1189 make no provision for the designated organization “to access, comment on, or contest the critical material,” and that therefore “the entity does not have the benefit of *meaningful* adversary proceedings on any of the statutory grounds.”<sup>67</sup>

This time around, however, the court determined that the organizations *did* have sufficient contacts with the United States to invoke procedural

---

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 23.

<sup>61</sup> *Id.* at 24.

<sup>62</sup> *Id.* at 24-25.

<sup>63</sup> *Id.*

<sup>64</sup> *Nat'l Council I*, 251 F.3d 192, 197 (D.C. Cir. 2001), *petition for review filed*, No. 99-1439 (Nov. 8, 1999).

<sup>65</sup> See Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112 (Oct. 8, 1999).

<sup>66</sup> *Nat'l Council I*, 251 F.3d at 196.

<sup>67</sup> *Id.* at 197 (emphasis added).

due process protection under the Fifth Amendment: National Council's ownership of a "small bank account" in the U.S., and its presence at the National Press Building in Washington, D.C.<sup>68</sup> And because the Government argued People's Mojahedin and National Council were effectively the same organization, the court determined both organizations had constitutional presence.<sup>69</sup>

Having decided the organizations were entitled to procedural due process, the court next considered whether the organizations were denied it. The court looked to *Paul v. Davis*, a 1976 Supreme Court case holding the stigmatic injury resulting from police officers distributing flyers with the plaintiff's name and photo was insufficient to trigger a due process violation.<sup>70</sup> The *Paul* Court distinguished an earlier case, *Wisconsin v. Constantineau*, which held posting a notice prohibiting the sale of liquor to a plaintiff accused of excessive drinking *did* amount to a procedural due process violation since—in addition to imposing a stigmatic injury—the notice deprived the plaintiff of his right to purchase liquor without a hearing.<sup>71</sup> In like manner, because People's Mojahedin and National Council suffered more than just stigmatic injury as a result of their designation, the *National Council I* court found the situation of the FTOs more analogous to *Constantineau*, and thus concluded a procedural due process violation had occurred.<sup>72</sup>

But the court's analysis was not complete: it next considered *what* process was due and *when* it was due.<sup>73</sup> The court quoted *Mathews v. Eldridge's* famous three-factor test for identifying the relevant considerations:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest of the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>74</sup>

In light of the *Mathews* factors, the *National Council I* court weighed the interests on both sides and held the Secretary had to provide both notice and access to the unclassified record on which her decision was to be based.<sup>75</sup> Still, recognizing "the foreign policy and national security concerns" presented by the designations, the court left the designations of People's Mojahedin and National Council in place

---

<sup>68</sup> *Id.* at 201.

<sup>69</sup> *Id.* at 202.

<sup>70</sup> 424 U.S. 693, 712.

<sup>71</sup> *Id.* at 707-09 (discussing 400 U.S. 433 (1971)).

<sup>72</sup> *Nat'l Council I*, 251 F.3d at 204.

<sup>73</sup> *Id.* at 205-09.

<sup>74</sup> *Id.* at 206 (quoting 424 U.S. 319, 335 (1976)).

<sup>75</sup> *Id.* at 208-09.

and remanded to the Secretary to provide the required process.<sup>76</sup> Thus, unlike their first attempt, the organizations' second trip to the D.C. Circuit resulted in the first layer of judicial gloss being applied to the § 1189 FTO designation scheme.

### C. People's Mojahedin II

After the D.C. Circuit remanded the designations of People's Mojahedin and National Council to the Secretary of State with directions to make the unclassified record available to the organizations to contest, the Secretary re-entered the FTO designation in September 2001 and subsequently entered another two-year designation in October 2001.<sup>77</sup>

Back in court to challenge the Secretary's redesignation, People's Mojahedin attacked the use of classified information by the Secretary, arguing that use of such material prevented People's Mojahedin from "effectively defend[ing]" against the Secretary's determination.<sup>78</sup> Analyzing this argument, the court considered the two justiciable elements required for FTO designation: (1) that the organization is foreign; and (2) that it either engages or has the capability and intent to engage in terrorism.<sup>79</sup> With respect to the first, the court dismissed the classified information argument out-of-hand, noting that "there is not and cannot be any dispute" about the foreign status of People's Mojahedin.<sup>80</sup> In other words, the use of classified information for this element was not needed.

For the second element, however, the court recognized a "colorable argument" to the contrary.<sup>81</sup> Looking to language in *Abourezk v. Reagan* stating that "the firmly held main rule [of our adversary system] that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions,"<sup>82</sup> the court recognized that § 1189's provision for *ex parte* and *in camera* submissions to the tribunal was arguably problematic.<sup>83</sup>

In analyzing this argument, however, the court equivocated. Essentially relying on *National Council I*, the court simply stated that because the Secretary complied with the requirements specified in that case—notice and a chance to be meaningfully heard—nothing more was required.<sup>84</sup> Yet in reaching this conclusion, the court proceeded to offer two statements that are seemingly in tension. First, the court recounted its *National Council I*

---

<sup>76</sup> *Id.* at 209.

<sup>77</sup> *People's Mojahedin Org. of Iran v. Dep't of State (People's Mojahedin II)*, 327 F.3d 1238, 1241 (D.C. Cir. 2003).

<sup>78</sup> *Id.* at 1241-42.

<sup>79</sup> *Id.* at 1241-44 (citing 8 U.S.C. § 1189(a)(1)(A)-(C) (2012)).

<sup>80</sup> *Id.* at 1242.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (citing 785 F.2d 1043, 1061 (D.C. Cir. 1986)).

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

<sup>84</sup> *Id.* at 1242-43.

decision, asserting that case “decided . . . due process required the disclosure of *only* the unclassified portions of the administrative record.”<sup>85</sup>

But then, in the paragraph immediately following, the court rendered that analysis dicta by flatly concluding that “even the unclassified record taken *alone* is quite adequate to support the Secretary’s determination . . . that the organization engages in terrorist activities.”<sup>86</sup> Indeed, the court stated that even if no classified information had been provided to the court at all, it still would have concluded the Secretary’s decision satisfied the “substantial support” standard based on the unclassified record.<sup>87</sup>

#### D. Holy Land Foundation v. Ashcroft

In April 2003, a Muslim charity known as the Holy Land Foundation, which had been incorporated first in California and then in Texas, brought suit in the D.C. Circuit challenging its designation as a terrorist group.<sup>88</sup> Holy Land Foundation had been designated a “Specially Designated Global Terrorist” under the International Emergency Economic Powers Act (IEEPA)—a scheme similar to the FTO designation process.<sup>89</sup> Its designation resulted from President Bush’s response to the 9/11 terrorist attacks and was based largely on information that the organization was “closely linked to Hamas.”<sup>90</sup> As the result of a Treasury Department order that flowed from the designation, Holy Land Foundation’s assets were blocked.<sup>91</sup>

After concluding the Treasury Department’s designation of Holy Land Foundation satisfied the standard of review required under the APA, the D.C. Circuit considered the organization’s due process argument.<sup>92</sup> Applying the procedural requirements articulated in *National Council I*, the court assessed whether the organization received notice and an opportunity to be meaningfully heard.<sup>93</sup> Observing that the Treasury Department notified Holy Land Foundation of its intent to issue a redesignation and gave it

---

<sup>85</sup> *Id.* at 1242.

<sup>86</sup> *Id.* at 1243 (emphasis added).

<sup>87</sup> *Id.* at 1244 (citing 8 U.S.C. § 1189(c)(3)(D) (2012)).

<sup>88</sup> *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 159-60 (D.C. Cir. 2003).

<sup>89</sup> *Id.* (explaining IEEPA “authorizes the President to declare a national emergency when an extraordinary threat to the United States arises that originates in substantial part in a foreign state” and, in the course of such an emergency, to specially designate entities as terrorist groups, a designation that “carries similar implications” to a designation under § 1189). IEEPA, Pub. L. No. 95-223, 91 Stat. 1625 (1977) is codified at 50 U.S.C. §§ 1701–1707 (2012).

<sup>90</sup> *Holy Land Found. for Relief & Dev.*, 333 F.3d at 159-60.

<sup>91</sup> *Id.* at 160.

<sup>92</sup> *Id.* at 162-63 (stating the “Treasury’s decision to designate [Holy Land Foundation] . . . was based on ample evidence in a massive administrative record” and was “clearly rational”).

<sup>93</sup> *Id.* at 163-64.

thirty-one days to respond to evidence linking the organization to Hamas, the court held the Department complied with procedural due process.<sup>94</sup>

Like § 1189, IEEPA—under which Holy Land Foundation had been designated—makes provision for ex parte and in camera submission of classified information to the court in judicial review proceedings.<sup>95</sup> Referring to the dicta from *People’s Mojahedin II*, the *Holy Land Foundation* court recalled that it had recently rejected a claim that ex parte and in camera submission of classified material violated due process.<sup>96</sup> But the court explained it “makes no difference” that the decisions were made under different designation schemes and that therefore Holy Land Foundation’s argument “that due process prevents its designation based upon classified information to which it has not had access is of no avail.”<sup>97</sup> Only a few paragraphs later in its opinion, however, the court stated that “[t]he ample record evidence (*particularly taking into account the classified information presented to the court in camera*) establishing [Holy Land Foundation’s] role in the funding of Hamas and of its terrorist activities is incontrovertible.”<sup>98</sup>

It would thus appear that the court reached a question which it had not previously had occasion to address—whether the submission of ex parte and in camera evidence comports with the Fifth Amendment’s due process requirement. Unlike *People’s Mojahedin II*, in which enough support for the Secretary of State’s designation was clearly furnished by the unclassified record *standing alone* (rendering the court’s discussion of the Fifth Amendment hypothetical) here the court was confronted with a situation in which the classified record apparently furnished at least a very significant basis for the terrorist designation. Additionally, here the court first addressed, and rejected, Holy Land Foundation’s statutory arguments under the APA before reaching the constitutional due process question. Because Holy Land Foundation’s APA claim failed, the court *necessarily* reached—and answered—the constitutional question.<sup>99</sup>

#### E. National Council II

After the D.C. Circuit’s 2001 remand to the Secretary of State in *National Council I*—where the court upheld the joint designations of People’s Mojahedin and of National Council as an alias, but found procedural due process violations in the § 1189 scheme—the Secretary

---

<sup>94</sup> *Id.* at 164.

<sup>95</sup> See 50 U.S.C. § 1702(c) (2012).

<sup>96</sup> *Holy Land Found. for Relief & Dev.*, 333 F.3d at 164 (citing 327 F.3d 1238, 1242 (D.C. Cir. 2003)).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 165 (emphasis added).

<sup>99</sup> See also *Kadi v. Geithner*, 42 F. Supp. 3d 1, 5, 29 (D.D.C. 2012) (interpreting *Holy Land Foundation* to have “squarely rejected the proposition that due process requires . . . [an] automatic right to access classified evidence”).

decided to retain National Council's FTO designation.<sup>100</sup> In November 2001, National Council returned to court to challenge that decision.<sup>101</sup>

Following the court's earlier remand, both People's Mojahedin and National Council "availed themselves of [the] opportunities" to rebut the Secretary's unclassified record and argue the evidence.<sup>102</sup> Despite that effort, in October 2001 the Secretary of State redesignated National Council as an alias of People's Mojahedin, though he noted he would review that determination *de novo* after reviewing further submissions from National Council and from the intelligence community.<sup>103</sup> By May 2003 the Secretary decided to retain the alias designation.<sup>104</sup>

The administrative record by now contained largely the same materials from National Council's earlier designation challenge along with new materials added by the Secretary and by National Council.<sup>105</sup> After reviewing the record, the court determined that the Secretary *still* had enough information to justify his decision.<sup>106</sup> Looking to the laws of agency, the court reasoned that the crucial question in assessing the alias designation was whether the Secretary of State had enough information to conclude People's Mojahedin "so dominates and controls [National Council] that the latter can no longer be considered meaningfully independent from the former."<sup>107</sup>

In answering that question, the court reviewed both the classified and unclassified records.<sup>108</sup> Although the court declined to disclose information gleaned from the classified material submitted *ex parte* and *in camera*, the court noted that "the voluminous unclassified materials contained in the administrative record *by themselves and by a comfortable margin* provide sufficient support for the Secretary's conclusion."<sup>109</sup> Among the unclassified information supporting the Secretary's determination was an FBI report stating National Council functioned as a political wing for People's Mojahedin, as well as evidence that the organizations had overlapping leadership.<sup>110</sup>

Having found that the Secretary had substantial support in the record to justify the alias finding, the court next proceeded—necessarily—to consider National Council's constitutional challenge. National Council argued due process

---

100 Nat'l Council of Resistance of Iran v. Dep't of State (*Nat'l Council II*), 373 F.3d 152, 153-54 (D.C. Cir. 2004).

101 *Id.*, petition for review filed, No. 01-1480 (Nov. 2, 2001).

102 *Id.* at 155.

103 Redesignation of Foreign Terrorist Organization, 66 Fed. Reg. 51,088 (Oct. 5, 2001).

104 *Nat'l Council II*, 373 F.3d at 156.

105 *Id.*

106 *Id.*

107 *Id.* at 158.

108 *Id.*

109 *Id.* (emphasis added).

110 *Id.* at 159.

required access to the classified record and the ability to confront witnesses.<sup>111</sup> Rejecting National Council's request, the court reiterated its position from *People's Mojahedin II*, stating that the *National Council I* process requirements "established the constitutional baseline for fair process."<sup>112</sup> But, as in *People's Mojahedin II*, the court need not have ventured an analysis of the constitutionality of ex parte and in camera classified information submissions under § 1189 because such analysis—by its own clear assessment—was not necessary to resolve the case. Having found unclassified information sufficient to support the Secretary's determination, the court should have held its tongue.<sup>113</sup>

#### F. People's Mojahedin III

Following *National Council II*, Congress amended § 1189 by eliminating the need for the Secretary to redesignate an organization every two years.<sup>114</sup> In its third and final challenge to its designation, People's Mojahedin filed a petition in July 2008 asking the Secretary to review its most recent redesignation.<sup>115</sup> It argued that revocation was warranted by "dramatically changed circumstances" in the organization's activities.<sup>116</sup> Specifically, People's Mojahedin asserted it had taken a number of actions, including that it "ceased its military campaign against the Iranian regime and renounced violence," "shared intelligence with the U.S. government regarding Iran's nuclear program," and had also been removed from the United Kingdom's list of terrorist groups.<sup>117</sup> The Secretary denied the petition.<sup>118</sup>

During her review of the petition, the Secretary provided People's Mojahedin with a "heavily redacted 20-page administrative summary of State's review of the record, which . . . referred to 33 exhibits, many of which were also heavily or entirely redacted."<sup>119</sup> She also only notified People's Mojahedin one day prior to the redesignation's publication in the Federal

---

<sup>111</sup> *Id.* at 159.

<sup>112</sup> *Id.* (citing 327 F.3d 1238, 1242 (D.C. Cir. 2003) (citing 251 F.3d 192, 208 (D.C. Cir. 2003))).

<sup>113</sup> Two years later, the court confronted another FTO challenge in which it declined to address the same attempt to access classified information. *See Chai v. Dep't of State*, 466 F.3d 125, 127 (D.C. Cir. 2006) (declining to resolve a claim that the Secretary's use of classified information violated due process because the court was able to "uphold the designations based solely upon the unclassified portion of the administrative record").

<sup>114</sup> *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7119, 118 Stat. 3638, 3801 (2004).

<sup>115</sup> *People's Mojahedin Org. of Iran v. U.S. Dep't of State (People's Mojahedin III)*, 613 F.3d 220, 225 (D.C. Cir. 2010).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (citing *In the Matter of the Review of the Designation of Mujahedin-e Khalq Organization (MEK), and All Designated Aliases, as a Foreign Terrorist Organization Upon Petition Filed Pursuant to Section 219 of the Immigration and Nationality Act, as Amended*, 74 Fed. Reg. 1273, 1274 (Jan. 12, 2009)).

<sup>119</sup> *Id.* at 226.

Register, and did not give the organization access to even the unclassified record.<sup>120</sup> In its suit before the D.C. Circuit, People's Mojahedin again asserted that the record lacked substantial support and also claimed several procedural violations: failure to give advance notice; failure to provide the unclassified record; and failure to disclose the classified record.<sup>121</sup>

The court agreed that due process had been violated and thus remanded to the Secretary.<sup>122</sup> Recognizing the Secretary had failed to provide even the basic notice and access to the unclassified record required by *National Council I*, the court determined that it need not even consider whether the administrative record contained substantial support for the designation. It reasoned that because the Secretary only told People's Mojahedin of the pending designation the day before it was made, the organization only had a chance to contest the record once the decision was already finalized.<sup>123</sup> The court also indicated that in some instances the Secretary noted that a particular piece of information was "credible," but did not specify the element of the determination to which it was relevant, leaving the court unable to effectively review the record for substantial support.<sup>124</sup>

On remand, the court instructed the Secretary to give People's Mojahedin an opportunity to contest the unclassified record, but emphasized that § 1189 does not provide an opportunity for the organization to access the classified record.<sup>125</sup> However—perhaps aware of the fact that, as discussed above, much of the court's precedent purporting to bar any access to the classified record was unquestionably dicta—the court also stated that its precedent "suggested that this procedure can satisfy due process requirements, at least where the Secretary has *not relied critically* on classified material and the unclassified material provided to the FTO is sufficient to justify the designation."<sup>126</sup> In other words, the court determined that the classified record could be withheld—at least where it didn't matter, anyway.

The court explained that "none of the AEDPA cases decides [sic] whether an administrative decision *relying critically* on undisclosed classified material would comport with due process because in none was the classified record *essential* to uphold an FTO designation."<sup>127</sup> In somewhat cryptic terms, the court concluded that a grant of access to the unclassified record alone on remand "*may* be sufficient to provide the requisite due process."<sup>128</sup>

---

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

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 222.

<sup>123</sup> *Id.* at 228 ("[W]e have held due process requires that the [organization] be notified of the unclassified material on which the Secretary proposes to rely and an opportunity to respond to that material *before* its redesignation . . .").

<sup>124</sup> *Id.* at 230.

<sup>125</sup> *Id.* at 230-31.

<sup>126</sup> *Id.* (emphasis added).

<sup>127</sup> *Id.* at 231.

<sup>128</sup> *Id.* (emphasis added).

In attempting to convince the court that her failure to give adequate notice and access to the unclassified record was harmless error, the Secretary asserted the “heart” of the basis for the designation was in the classified record—her logic being that such information “could not have been shared in any event,” making the procedural error inconsequential.<sup>129</sup> But the court rejected that argument on the grounds that the State Department had previously conceded the Secretary used the “whole” record—both classified and unclassified—in reaching her decision.<sup>130</sup>

In a concurring opinion, Judge Henderson agreed the case should be remanded to the Secretary, but only because the Secretary had conceded that she had relied on the “whole” record and People’s Mojahedin had not had access to the unclassified record.<sup>131</sup> Thus the Secretary’s own admission, or suggestion, that the unclassified record had some bearing on her decision is what justified the remand for Judge Henderson. Having reviewed the classified part of the record during litigation, Judge Henderson believed the classified record *alone* provided the substantial support needed to sustain the designation, and stated that she would have affirmed the designation if the Secretary had merely stated that she relied *only* on the classified record.<sup>132</sup> Expressing disagreement with the other judges on the panel, Judge Henderson read the precedent to have “repeatedly emphasized” that the designated organization has no right to access classified information *under any circumstances*.<sup>133</sup> For support, she pointed to *National Council II*, although she recognized that court “acknowledged later in [its] opinion that the unclassified record alone would have sufficed to support the designation.”<sup>134</sup>

### III. CLOSING THE FILE: WHY EX PARTE, IN CAMERA SUBMISSIONS SATISFY DUE PROCESS

Against the backdrop of case law surveyed in Part II, this Part employs three lines of inquiry to assess whether the crucial reliance on classified information by the Secretary of State satisfies due process under the Fifth Amendment. First, it critically evaluates the relevant precedent discussed in Part II. Next, it analyzes the issue using conventional due process principles by considering the interests implicated by FTO designation and the procedural requirements necessary to protect them. Finally, this Part considers two other situations that illuminate the analysis by way of comparison: the Government’s blacklisting of subversive

---

<sup>129</sup> *Id.* at 228-29; *see also* Brief for Respondents at 45-46, *People’s Mojahedin III*, 613 F.3d 220 (No. 09-1059) (arguing that any error in failing to disclose the record was harmless because “the intelligence information at the heart of the Secretary’s decision is classified and could not have been shared with [People’s Mojahedin] anyway”).

<sup>130</sup> *People’s Mojahedin III*, 613 F.3d at 228-29.

<sup>131</sup> *Id.* at 232 (Henderson, J., concurring).

<sup>132</sup> *Id.* at 231-32.

<sup>133</sup> *Id.* at 231.

<sup>134</sup> *Id.* (citing 251 F.3d 192, 202, 208-09 (D.C. Cir. 2001)).

organizations following the Second World War; and the Government's more recent use of classified information in post-9/11 habeas corpus proceedings.

A. *As-Applied Challenges Have Been Foreclosed by Circuit Precedent*

In its final appearance before the D.C. Circuit, People's Mojahedin argued that although the court had previously rejected arguments that § 1189 was facially unconstitutional, it nonetheless had never "considered an as-applied challenge where the entire basis for the Secretary's conclusion lies . . . in the undisclosed portion of the record."<sup>135</sup> As noted earlier, the court apparently accepted this statement when it asserted that "none of the AEDPA cases decides [sic] whether an administrative decision *relying critically* on undisclosed classified material would comport with due process because in none was the classified record essential to uphold an FTO designation."<sup>136</sup> However, the Government clearly thought the matter settled, arguing that the court had "repeatedly rejected arguments by [designated organizations] that disclosure of classified information *in challenges to specific designations* was necessary to avoid running afoul of the Due Process Clause."<sup>137</sup>

As noted earlier in Sections II.A–C, the court's disposition of *People's Mojahedin I* never reached constitutional due process because the court found the organization hadn't established constitutional presence in the United States. No clear rule can be discerned from *National Council I* either, because in that case the court provided no indication of how important the classified information was to upholding the Secretary's determination. Likewise, no clear disposition was offered by *People's Mojahedin II*. Although the court there properly reached constitutional due process, the court itself rendered its discussion on the requirement of access to classified information dicta when it observed "even the unclassified record taken alone" in that case was "quite adequate to support the Secretary's determination."<sup>138</sup>

But despite statements to the contrary by the *People's Mojahedin III* court, the D.C. Circuit appears to have already foreclosed the argument that designated FTOs must be given access to the classified record—either in full or in part—in order to satisfy constitutional due process, *even* where the designation hinges on the classified material. In *Holy Land Foundation*, while analyzing the argument that due process requires disclosure of the classified record on which the designation

---

<sup>135</sup> Brief for Petitioner at 54, *People's Mojahedin III*, 613 F.3d 220 (No. 09-1059); *see also* Reply Brief for Petitioner at 13-14, *People's Mojahedin III*, 613 F.3d 220 (No. 09-1059) ("In previous appeals, the Court concluded that the *public* record contained substantial support for the Secretary's conclusion. Here, by contrast, the Government acknowledges that the Secretary's conclusion rests primarily on the classified portion of the record." (citations omitted)).

<sup>136</sup> *People's Mojahedin III*, 613 F.3d at 231 (emphasis added).

<sup>137</sup> Brief for Respondents, *supra* note 129, at 37.

<sup>138</sup> *People's Mojahedin II*, 327 F.3d 1238, 1243 (D.C. Cir. 2003).

determination was based, the court recognized that “[t]he ample record evidence (particularly taking into account the classified information presented to the court in camera) establishing [Holy Land Foundation’s] . . . terrorist activities is incontrovertible.”<sup>139</sup>

Key to resolving the question of whether the court definitively resolved the issue of FTO access to classified information in *Holy Land Foundation* is knowing how essential the classified record was to the designation decision in that case. Although the answer may be open to some dispute, the court’s characterization of the significance of the classified record—“particularly taking into account”<sup>140</sup>—strongly suggests that the classified record at least seriously bolstered the Secretary’s determination. To use the *People’s Mojahedin III* court’s language, the question is whether the unclassified information was “sufficient” to uphold the designation—or, put differently, whether the classified record was “essential to uphold an FTO designation.”<sup>141</sup>

*National Council II* provides little guidance. There, the court again acknowledged that “the voluminous unclassified materials contained in the administrative record by themselves and by a comfortable margin provide[d] sufficient support for the Secretary’s conclusion, given the standard of review.”<sup>142</sup> Although the court did assert the requirements of constitutional due process had been conclusively established by *National Council I* and *People’s Mojahedin II*, the court’s description of the criticality—or lack thereof—of classified information in supporting the FTO designation rendered those statements dicta. Indeed, *People’s Mojahedin* argued just that in a brief to the court during its third challenge.<sup>143</sup> The Government’s contrary assertion that the issue had already been foreclosed by *People’s Mojahedin I* and *II* appears to be plainly incorrect.<sup>144</sup>

Although the Government may have relied on the wrong authorities, it nonetheless appears to have stumbled upon the correct answer in its *People’s Mojahedin III* brief. A close analysis of the D.C. Circuit’s cases dealing with terrorist designations probably forecloses any access to classified information in a future as-applied challenge. Only *Holy Land Foundation* produced a binding answer to a due process challenge that was properly reached, and only in that case

---

<sup>139</sup> *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165-66 (D.C. Cir. 2003) (emphasis added). Since the court had resolved the Foundation’s statutory arguments in favor of the Government, this point was a necessary part of the court’s holding. And while *Holy Land Foundation* ostensibly dealt with IEEPA, the court made clear that the distinction “makes no difference” for the constitutional due process analysis. *Id.* at 164.

<sup>140</sup> *Id.* at 165-66.

<sup>141</sup> *People’s Mojahedin III*, 613 F.3d at 230-31.

<sup>142</sup> *Nat’l Council II*, 373 F.3d 152, 158 (D.C. Cir. 2004) (emphasis added).

<sup>143</sup> See Reply Brief for Petitioner, *supra* note 135, at 23 (arguing previous statements by the court “regarding access to classified information constituted dictum because the unclassified portion of the record sufficed . . . to establish substantial support for the Secretary’s decision”).

<sup>144</sup> See Brief for Respondents, *supra* note 129, at 37-38 (arguing *National Council I* held arguments in favor of access to classified information were foreclosed by *People’s Mojahedin I* and *II*).

did the court face an actual scenario in which a designated organization was challenging a determination based—depending on how one reads the court’s opinion—*essentially* on classified material. As one panel of the D.C. Circuit cannot overrule another panel’s prior decision,<sup>145</sup> the *Holy Land Foundation* court’s denial of access to classified information—even where that classified information was apparently crucial to the designation—is binding precedent in the D.C. Circuit.

The United States District Court for the District of Columbia recently confronted the classified information disclosure issue once again in *Fares v. Smith*,<sup>146</sup> a case in which several foreign individuals designated as “Specially Designated Narcotics Traffickers” under a scheme similar to § 1189<sup>147</sup> mounted a due process challenge to the sufficiency of a “redacted administrative record” provided by the Government.<sup>148</sup> Although this redacted record failed to provide much information at all, the court found that “two unredacted summaries of privileged information” which the Government subsequently provided contained enough information to justify the designation.<sup>149</sup> The court thus looked to *Holy Land Foundation* and *National Council I* and concluded that the plaintiffs had been “afforded sufficient procedural due process under the circumstances.”<sup>150</sup> The court recognized that the D.C. Circuit in *People’s Mojahedin III* suggested a theoretical “limit” to the Government’s ability to withhold classified material and posited that a scenario in which *no* information was released would not be constitutional.<sup>151</sup> But the court held that so long as the divulged record provided the designated entity enough to “effectively rebut” the basis for the designation, due process is satisfied.<sup>152</sup> And because the divulged, unredacted record in *Fares* clearly contained sufficient grounds to uphold the designations at issue,<sup>153</sup> any classified information withheld does not appear to have been crucial to the designation decision.

---

<sup>145</sup> See, e.g., *LaShawn A. v. Barry*, 87 F.3d 1389, 1391 (D.C. Cir. 1996) (en banc) (“[W]e granted rehearing *in banc* to decide whether one panel of this court may reconsider a prior panel’s decision . . . . The answer is no.”).

<sup>146</sup> No. 16-1730-CKK, 2017 WL 1319716 (D.D.C. Apr. 7, 2017).

<sup>147</sup> The plaintiffs had been designated by the Department of the Treasury under the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901–1908 (2012). That Act authorizes the designation of “any foreign person that plays a significant role in international narcotics trafficking.” § 1907(7). Designation carries significant consequences, including blocking of assets “owned or controlled by” the individual. § 1904(b). The Act provides for *ex parte*, in camera submissions to the court. § 1903(i).

<sup>148</sup> 2017 WL 1319716, at \*1-2.

<sup>149</sup> *Id.* at \*6-8.

<sup>150</sup> *Id.* at \*4-5 (citing 333 F.3d 156 (D.C. Cir. 2003); 251 F.3d 192 (D.C. Cir. 2001)). For the sake of its due process analysis, the court simply assumed that the designated individuals would be entitled to constitutional due process protection, although they were foreign nationals. *Id.* For further discussion of that antecedent question in the context of FTO designations, see *infra* subsection III.B.1.

<sup>151</sup> *Id.* at \*5-8 (citing 613 F.3d 220 (D.C. Cir. 2010)).

<sup>152</sup> *Id.* at \*8.

<sup>153</sup> *Id.* (noting that one of the redacted summaries provided plaintiffs much information about “the illicit activities in which . . . they are engaged; how and where they purportedly

### B. Due Process Analysis

The Fifth Amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law.”<sup>154</sup> Determining whether government action has complied with the latter requirement entails two steps: First, a court must determine whether a protected interest—life, liberty, or property—has been implicated.<sup>155</sup> Second, the court must consider the various interests of the parties at stake and identify the specific procedures that are constitutionally necessary to protect the implicated interest.<sup>156</sup>

To decide “whether due process requirements apply in the first place,” the first step of the analysis focuses the court’s attention on “the *nature* of the interest at stake.”<sup>157</sup> Although liberty and property are “broad and majestic terms”<sup>158</sup> that defy easy definition, the Supreme Court has provided guidance to make the analysis more manageable. Liberty encompasses the innumerable rights bound up in the pursuit of personal happiness and professional success.<sup>159</sup> The ability to work, raise a family, and travel, for instance, all clearly implicate protected liberty interests.

Property interests also “take many forms.”<sup>160</sup> Surveying several prior decisions, the *Roth* Court distilled several “attributes” of protected property interests.<sup>161</sup> To qualify as a protected property interest, “more than an abstract need or desire” for the benefit is required, as is “more than a unilateral expectation” of the benefit.<sup>162</sup> Recognizing that the purpose of property is to “protect those claims upon which people rely in their daily lives,” the Court held that “a legitimate claim of entitlement” is required before a property interest is subject to the protections of due process.<sup>163</sup> Moreover, in determining whether a person has a legitimate claim of entitlement to support a protected property interest, it is important to understand that “[p]roperty interests . . . are not created by the Constitution” but

---

engaged in those activities; during which time periods; for which entities[;] . . . and the relationship between Plaintiffs and others implicated in the purportedly illicit activities”).

<sup>154</sup> U.S. CONST. amend. V.

<sup>155</sup> See, e.g., *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-71 (1972) (explaining that only if a protected interest is implicated will the court weigh the interests at stake and determine what specific procedures due process requires).

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

<sup>157</sup> *Id.* at 570-71 (emphasis added) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>158</sup> *Id.* at 571.

<sup>159</sup> See *id.* at 572 (describing liberty as including “generally . . . those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men” (second omission in original) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923))).

<sup>160</sup> *Id.* at 576.

<sup>161</sup> *Id.* at 577.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

are instead “created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”<sup>164</sup>

In the second step of the analysis, the reviewing court must weigh the public and private interests involved to discern the required procedural protections. *Mathews v. Eldridge* famously articulated the three main factors for consideration: the private interest affected by the Government’s action; the “risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and the Government’s interest, including “the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>165</sup>

As is frequently observed, the dictates of due process are not fixed for all scenarios. Rather, “due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>166</sup> *Mathews* made clear, however, that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”<sup>167</sup> Still, the Supreme Court has recognized that although due process is a “flexible” concept, that flexibility *only* comes into play when a protected interest is in jeopardy.<sup>168</sup>

#### 1. Step Zero: Constitutional Presence

An analysis of the due process that an FTO is entitled to receive from the Secretary of State must begin with an inquiry into the organization’s protected liberty and property interests. But even before that, because FTOs are *foreign* organizations, a designated group must demonstrate sufficient presence in the United States to invoke due process at all.

Ordinarily, non-resident aliens do not enjoy constitutional rights.<sup>169</sup> However, the Court has extended Fifth Amendment due process protection to aliens who “have come within the territory of the United States and developed substantial connections with this country.”<sup>170</sup> Thus in assessing what process must be provided to a designated FTO—including any potential access to the classified record on which its designation was based—it is first necessary to identify the organization’s connections to the United States.

<sup>164</sup> *Id.*

<sup>165</sup> 424 U.S. 319, 334-35 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

<sup>166</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>167</sup> 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>168</sup> *See, e.g., Morrissey*, 408 U.S. at 481 (“To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.”).

<sup>169</sup> *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

<sup>170</sup> *Id.*

The D.C. Circuit's decisions addressing FTO designations demonstrate the significance of this initial hurdle. *People's Mojahedin I* barely ventured an analysis of whether People's Mojahedin was entitled to due process, quickly concluding that it and the Tamil Tigers were entirely foreign entities without any connections to the United States.<sup>171</sup> But in *National Council I*, the court determined that People's Mojahedin and National Council *had* established constitutional presence in the United States based on National Council's ownership of a "small bank account" and its presence at the National Press Building in Washington, D.C.<sup>172</sup> Rejecting the Government's argument that these two connections were not "substantial," the court expressly declined to make a general statement about what specific types of connections would suffice to trigger due process protection.<sup>173</sup> Instead, the court simply decided—based on the unclassified and classified records before it—that National Council had "come within the territory of the United States and developed substantial connections with this country."<sup>174</sup> Thus the court determined National Council's contacts—its bank account and Press Building presence, and any contacts that might have been apparent in the classified record—qualified as "substantial" under *Verdugo-Urquidez*.

Despite heavy reliance on a single U.S. bank account in *National Council I*, the D.C. Circuit subsequently addressed a similar scenario and found that the FTO in question had *not* established constitutional presence sufficient to invoke due process protection. In *32 County Sovereignty Committee v. Department of State*, a group challenged its designation as an FTO after the Secretary of State determined the group was an alias of the Irish Republican Army.<sup>175</sup> Observing that the designated organization's only apparent contacts to the United States were "that some of their American 'members' personally rented post office boxes and utilized a bank account to transmit funds and information," the court held that the organization failed to develop substantial connections with the United States and was therefore not entitled to constitutional due process.<sup>176</sup> Apparently, the crucial distinction on which the court relied was that ownership of the bank account belonged to a *member* of the designated organization, rather than the organization itself—even though the member had used that bank account to transfer funds to the group.<sup>177</sup>

In sum, two things become apparent from the D.C. Circuit's "step zero" jurisprudence: Relatively minor contacts with the U.S. can suffice to garner that organization constitutional due process protection. And

---

<sup>171</sup> 182 F.3d 17, 22 (D.C. Cir. 1999).

<sup>172</sup> 251 F.3d 192, 201-03 (D.C. Cir. 2001).

<sup>173</sup> *Id.* at 202 (citing *Verdugo-Urquidez*, 494 U.S. at 271).

<sup>174</sup> *Id.*

<sup>175</sup> 292 F.3d 797, 799 (D.C. Cir. 2002).

<sup>176</sup> *Id.*

<sup>177</sup> *See id.* ("The [record] do[es] not aver that [the] organization possessed any controlling interest in property located within the United States, nor do they demonstrate any other form of presence here.")

relatively minor distinctions can make the difference between an FTO receiving due process protection or not.

## 2. Step One: Interests Implicated by FTO Designations

If an organization challenging its FTO designation succeeds in demonstrating presence such that it is entitled to Fifth Amendment due process protection, the legal analysis then proceeds to identification of the organization's implicated liberty or property interests. In seeking to identify these interests, *National Council I* looked to the Supreme Court's decision in *Paul v. Davis*.<sup>178</sup> That case—in which police officers passed out a flyer advertising the name and photo of a person who had been arrested for shoplifting—held that an “interest in reputation” alone did not implicate the Due Process Clause of the Fourteenth Amendment.<sup>179</sup> But *Paul* itself distinguished another Supreme Court decision, *Wisconsin v. Constantineau*.<sup>180</sup> In *Constantineau*, the Court struck down a Wisconsin statute that authorized the chief of police to publicly bar sales of liquor to someone whose alcohol consumption made one prone to various misbehaviors.<sup>181</sup> The *Constantineau* Court reasoned that the posting authorized by the statute could be interpreted by the subject of the posting as “a stigma or badge of disgrace” that could “expose [the subject] to public embarrassment and ridicule,” a reputational injury such that “procedural due process must be met.”<sup>182</sup>

In attempting to reconcile the two seemingly incompatible decisions of *Paul* and *Constantineau*, *National Council I* observed that the *Paul* Court had focused on “the effects of the [*Constantineau*] posting *beyond* stigmatization.”<sup>183</sup> Specifically, the *Paul* Court reasoned that the Wisconsin law at issue in *Constantineau* had the *effect* of depriving the subject of the posting of her ability to purchase liquor, a right otherwise enjoyed under state law.<sup>184</sup> Only because the posting in *Constantineau* “significantly altered [the subject's] status as a matter of state law” was an adequate interest implicated.<sup>185</sup>

Just as *Paul* distinguished *Constantineau*, *National Council I* distinguished *People's Mojahedin I*. In addition to being stigmatized by the FTO designation, the court found that National Council was also barred from having U.S. bank

---

<sup>178</sup> 251 F.3d at 203 (citing 424 U.S. 693 (1976)).

<sup>179</sup> *Paul*, 424 U.S. at 695, 711-12 (holding that police officers' distribution of a flyer to “approximately 800 merchants in the Louisville metropolitan area” with the plaintiff's name, photo, and the label “Active Shoplifter,” did not implicate a liberty or property interest protected by the Due Process Clause of the Fourteenth Amendment).

<sup>180</sup> *Id.* at 701-10 (citing 400 U.S. 433 (1971)).

<sup>181</sup> *See* 400 U.S. at 434, 437.

<sup>182</sup> *Id.* at 436.

<sup>183</sup> 251 F.3d at 204 (emphasis added).

<sup>184</sup> 424 U.S. at 708.

<sup>185</sup> *Id.* at 708-09.

accounts and from receiving “material support” from others—rights which they previously enjoyed, and which presumably were more important than the right to buy liquor.<sup>186</sup> But importantly, *National Council I* ultimately considered the organizations’ property interest in the U.S. bank account *alone* to be an implicated interest under the Due Process Clause.<sup>187</sup>

*National Council I* also discussed—but explicitly declined to pass judgment on—other potential liberty interests that might be implicated by an FTO designation.<sup>188</sup> The court declined to decide whether either “the right of the members of the organizations to enter the United States” or “the provision of material support or resources to the organizations”—both asserted as liberty interests—triggered the protections of the Due Process Clause.<sup>189</sup> In declining to rely upon the latter asserted interests by the FTOs, the court acknowledged that “the Secretary argues with some convincing force that aliens have no right of entry and that the organization has no standing to judicially assert rights which its members could not bring to court.”<sup>190</sup> And the court characterized as “plausible” the Government’s argument that the prohibition on providing material support to designated groups “does not affect the ability of anyone to engage in advocacy of the goals of the organizations, but only from providing material support which might likely be employed in the pursuit of unlawful terrorist purposes as of First Amendment protected advocacy.”<sup>191</sup> Indeed, the latter view seems to have been vindicated by the Supreme Court’s 2010 decision in *Holder v. Humanitarian Law Project*, which held that the criminal ban on providing material support to FTOs violated neither the plaintiffs’ freedom of speech nor their freedom of association.<sup>192</sup>

To summarize, *National Council I* surveyed the potentially implicated interests of People’s Mojahedin and National Council, determining that *only* the single, small U.S. bank account was clearly a protected interest under due process. It is also clear that stigma alone, without any attendant legal ramifications, does not implicate an interest that triggers due process protection.<sup>193</sup> Something more than stigma is required. Indeed, *National Council I* interpreted *Paul* to mean “that where the government issues a stigmatizing posting (or designation) as a result of which the stigmatized individual is ‘deprived . . . of a right previously under state law,’ due process is required.”<sup>194</sup>

---

<sup>186</sup> *Nat’l Council I*, 251 F.3d at 204.

<sup>187</sup> *Id.* (“A foreign organization that acquires or holds property in this country may invoke the protections of the Constitution when that property is placed in jeopardy by government intervention.”).

<sup>188</sup> *Id.* at 205.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 204.

<sup>191</sup> *Id.* at 205.

<sup>192</sup> 561 U.S. 1, 7-8 (2010).

<sup>193</sup> See *Paul v. Davis*, 424 U.S. 693, 706 (1976) (“[T]he Court has never held that the mere defamation of an individual . . . was sufficient to invoke the guarantees of procedural due process . . .”).

<sup>194</sup> 251 F.3d at 204.

In completing the step-one analysis for an FTO, then, it is important to keep analytically distinct the preliminary question of constitutional presence from the identification of protected liberty or property interests—though the answer to the first question undoubtedly informs the answer to the second. It is “clear that a foreign organization that acquires or holds property *in this country* may invoke the protections of the Constitution when *that* property is placed in jeopardy by government intervention.”<sup>195</sup> But it would seem paradoxical to first determine—at the constitutional presence threshold—that a designated FTO has access to Fifth Amendment due process protection based on a single, relatively minor contact, only to then venture a much broader consideration of potential liberty and property interests of the organization *entirely divorced from that contact*.<sup>196</sup>

As noted above, D.C. Circuit jurisprudence indicates that in challenges by FTOs, relatively minute differences in the contacts of designated groups with the United States can make the difference in whether an organization can invoke due process. If organizations can achieve constitutional presence based on slim contacts to the United States, only to assert a variety of protected interests entirely separate from those contacts on which their constitutional rights are based, perverse results are encouraged. Like the Greek soldiers who pierced the defenses of Troy in a wooden horse, an FTO would be able to gain the crucial foothold of constitutional protection, only to garner significantly more due process protection than required to protect its minimal connection. Aside from leading to paradoxical results, the outcomes of individual cases would also appear extremely unfair. Why should National Council and People’s Mojahedin receive a full suite of constitutional due process protection solely because of a single small bank account, while 32 County receives none despite its members’ similar U.S. bank account used for funneling money to the organization? Such a distinction is unprincipled.

Moreover, given that Congress’s clear intent in enacting § 1189 was to target *foreign* organizations,<sup>197</sup> the Judiciary—to give proper effect to Congress’s intent—should be careful not to expand the step-one analysis to include liberty and property interests that are not constitutionally required. A contrary approach would allow a savvy organization, after being designated by the Secretary of State or in advance of such a designation, to establish a handful of relatively minor connections to the United States to gain disproportionately significant constitutional protections that it otherwise would not enjoy.

In analyzing the contacts required to achieve constitutional presence for a designated terrorist group, it is important to note that the *effects* of such a

---

<sup>195</sup> *Id.* (emphasis added).

<sup>196</sup> *Cf. Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 998 (9th Cir. 2012) (articulating an implicit requirement of Fifth Amendment due process protection: that the protection be related to the challenged action).

<sup>197</sup> *See* 8 U.S.C. § 1189(a)(1)(A) (2012); *see also supra* notes 2–3 and accompanying text.

designation—and hence many of the liberty interests impinged by such a designation—are essentially the same in every case. For example, such a designation will always have the effect of preventing financial and other assistance to the group, and of blocking entry into the United States for alien members of such organizations.<sup>198</sup> Moreover, designation as an FTO will also always carry many of the same social effects, including stigmatizing the group and dissuading potential members from joining it. Indeed, it is the State Department's express hope that an FTO designation "[s]tigmatizes and isolates" the designated group, "[h]eightens public awareness and knowledge of terrorist organizations," and encourages other nations to condemn them.<sup>199</sup>

Thus in those cases where the court found that an FTO lacked constitutional presence sufficient to trigger due process rights—*People's Mojahedin I* and *32 County*—the court also implicitly determined that the interests implicated by the latter consequences, though felt by the respective organizations, were insufficient to establish the necessary ties to the United States to warrant constitutional due process rights. Thus when an organization purchases property, opens a bank account, or otherwise establishes a systematic presence in the United States, it should certainly receive due process protection *for those interests*. But it should not, on the basis of such contacts, gain entitlement to protection for a variety of other interests—like deprivation of material or financial support, or barring of its members from entering the United States—that affected the FTO both prior to its establishment of constitutional presence and after such establishment.

### 3. Step Two: Tailoring the Process Due to the Interests Implicated

Challenges to FTO designations present a difficult problem. In weighing the constraints of due process under the Fifth Amendment alongside the criticality of § 1189 to the federal government's campaign against terrorism, how are courts to reconcile the two?

The *Mathews* factors provide the answer.<sup>200</sup> In assessing the factors at this second step, it is important to keep in mind the interests identified in the first step. When discerning the constitutionally required process for a given action of the Government, the process must be tailored to protect *only* those interests legitimately implicated by the government action. It is for this reason that an expansive interpretation of the interests

---

<sup>198</sup> See *supra* notes 6–9 and accompanying text.

<sup>199</sup> *Foreign Terrorist Organizations*, *supra* note 28.

<sup>200</sup> This is particularly true when it comes to the use of classified information in judicial review of agency action. *Cf.*, e.g., *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1068-71 (9th Cir. 1995) (applying the *Mathews* test to find the use of undisclosed classified information in INS legalization proceedings "violates due process").

implicated by an FTO designation can seriously skew the second-step analysis in favor of the FTO beyond what would otherwise be required.

Given that the FTO designation scheme lies at the heart of the nation's security and counterterrorism strategy,<sup>201</sup> it should not be surprising that much of the information feeding the Secretary of State's determinations comes from the U.S. intelligence community.<sup>202</sup> The Government's interest in collecting and using such intelligence is great—indeed the very purpose of collecting it is to inform the decisionmaking of high-level executive branch officials charged with conducting the nation's foreign policy and ensuring national security.

The inability to access the classified record relied upon by the Secretary of State undoubtedly hampers the designated organization's ability to mount an effective legal challenge, especially when a crucial basis for the designation is contained only in the classified record.<sup>203</sup> *People's Mojahedin III* itself illustrates the practical difficulties of such a challenge. Because counsel for People's Mojahedin did not have access to the classified record, they were forced to argue the Secretary's classified material *probably* didn't contain substantial support for the designation, largely by pointing to a similar proceeding in the United Kingdom which had concluded that the organization no longer posed a terror risk.<sup>204</sup>

The risk of erroneous deprivation is also certainly greater when those being subjected to government action are unable to access the full record on which the Government's decision is based. For example, in its third round of litigation, People's Mojahedin worried that some of that classified information could contain "outlandish allegations disseminated by the Iranian intelligence services, whose task is to ensure that [People's Mojahedin]'s FTO designation is maintained."<sup>205</sup>

As noted earlier, Professor Donohue has described the designation process for terrorist groups as lying at the intersection of several areas of law, including foreign relations and national security.<sup>206</sup> Given that observation, it would seem that an FTO designation decision by the Secretary of State—even if not a decision which falls *entirely* within the Executive's prerogative to conduct the nation's foreign affairs—is at least heavily infused with the character of a foreign policy decision. Indeed, the State Department's decision to designate an organization

---

<sup>201</sup> See *supra* note 1 and accompanying text.

<sup>202</sup> See also *Nat'l Council I*, 251 F.3d 192, 197 (D.C. Cir. 2001) (noting that in the court's experience the Secretary's administrative record in FTO designation challenges usually contains classified information).

<sup>203</sup> See *Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989) (acknowledging the difficulties posed for a petitioner who—"like Joseph K. in *The Trial*—can prevail . . . only if he can rebut the undisclosed evidence against him, i.e., prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.").

<sup>204</sup> Brief for Petitioner, *supra* note 135, at 49-51.

<sup>205</sup> Reply Brief for Petitioner, *supra* note 135, at 23.

<sup>206</sup> See *supra* note 1 and accompanying text.

as an FTO is in large part directed at *foreign* governments, because fighting terrorism requires a coordinated response from the international community.<sup>207</sup>

Although the Judiciary's role in addressing constitutional questions is of course incontestable, courts should be careful to interpret the constitutional requirements of due process for FTOs with a presence in the United States with proper consideration given to the Executive's constitutional role in conducting foreign relations and fighting terrorism.<sup>208</sup>

The Government has at least one interest that cuts *against* withholding classified information in FTO designation challenges: promoting "fairness in the adjudications of United States courts."<sup>209</sup> But aside from that amorphous and hard-to-measure interest, the Government has several compelling interests in safeguarding national security, protecting classified information, and fighting terrorism in an efficient, cost-effective manner. Judge Friendly once observed that courts began requiring hearings more frequently after the Supreme Court's landmark decision in *Goldberg v. Kelly*.<sup>210</sup> Acknowledging the "vast increase in the number and types of hearings required in all areas in which the government and the individual interact," Judge Friendly reasoned that "common sense dictates" that in many cases involving agency adjudicative decisions the Government could satisfy its burden with "less than full trial-type hearings."<sup>211</sup> In particular, cost is a legitimate concern because each new procedural protection afforded will cost the government money and presumably carry additional risks.<sup>212</sup> Although the precise application of the balancing test will always be "uncertain and subjective," it is clear that the "required degree of procedural safeguards varies . . . inversely with the burden and any other adverse consequences of affording it."<sup>213</sup>

---

<sup>207</sup> See *Foreign Terrorist Organizations*, *supra* note 28 (noting two of the purposes of an FTO designation: to "encourage other nations" to block terrorism financing; and to send "[s]ignals to other governments [of] our concern about named organizations").

<sup>208</sup> See generally *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948) (stating that decisions which "embody Presidential discretion as to political matters [are] beyond the competence of the courts to adjudicate").

<sup>209</sup> *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) (noting "grave concern[s] over] . . . heavy reliance upon *in camera ex parte* evidence"); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-71 (1951) (Frankfurter, J., concurring) ("[D]emocracy implies respect for the elementary rights of man, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . Appearances in the dark are apt to look different in the light of day").

<sup>210</sup> See Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1267-68 (1975) (questioning whether "the executive [should] be placed in a position where it can take no action affecting a citizen without a hearing").

<sup>211</sup> *Id.* at 1268.

<sup>212</sup> See *id.* at 1276 ("[P]rocedural requirements entail the expenditure of limited resources, . . . at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and . . . the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving.").

<sup>213</sup> *Id.* at 1278 (footnote omitted).

A criminal proceeding, of course, is different—and the Government rightly faces a much higher threshold when seeking to conceal classified information that is being used to convict.<sup>214</sup> Yet although some have argued that the damage inflicted on a designated FTO is comparable to that of a convicted criminal,<sup>215</sup> that argument is misguided. While the ramifications of an FTO designation are no doubt serious, it would be facetious to suggest that hindering a group's ability to fundraise and carry out its operations is a punishment on par with incarceration and the attendant consequences that flow from a criminal conviction. Indeed, the separate federal criminal ban on providing material support to FTOs *does* entail criminal prosecutions with the latter consequences and attendant safeguards, but those proceedings are entirely separate and distinct from the designation of an FTO. And the Supreme Court already held that criminal ban passed constitutional muster in *Humanitarian Law Project*.<sup>216</sup>

Balancing the organization's interest in the bank account and the Government's interest in national security, *National Council I* was careful to distinguish the *what* from the *when* of due process analysis.<sup>217</sup> The court relied on *United States v. Yunis* for the proposition that “the United States enjoys a privilege in classified information affecting national security so strong that even a criminal defendant to whose defense such information is relevant cannot pierce that privilege absent a specific showing of materiality.”<sup>218</sup> The court reasoned such an interest in classified national security information informs the *what* rather than the *when* of due process analysis.<sup>219</sup>

The court determined the *when* of due process requires the Secretary of State to afford organizations notice and an opportunity to rebut the Secretary's record prior to her making the FTO designation, reasoning that pre-deprivation process “would [not] interfere with the Secretary's duty to carry out foreign policy.”<sup>220</sup> But the court nonetheless held that the *what* of due process only required that the Secretary grant access to the unclassified portions of the record.<sup>221</sup> Relying heavily on the flexible due process standard set forth in

---

<sup>214</sup> See *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (“Where the disclosure of [classified information] . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . [the] court may require disclosure and, if the Government withholds the information, dismiss the action.”).

<sup>215</sup> See, e.g., *Nice-Petersen*, *supra* note 34, at 1414.

<sup>216</sup> See generally *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>217</sup> 251 F.3d 192, 205-07 (D.C. Cir. 2001) (explaining that the *what* component of due process is concerned with the specific procedures that must be afforded, while the *when* is concerned with “whether due process may be effectively provided post-deprivation as opposed to pre-deprivation”).

<sup>218</sup> *Id.* at 207-08 (citing 867 F.2d 617 (D.C. Cir. 1989)).

<sup>219</sup> *Id.*

<sup>220</sup> See *id.* at 207-08. The court did, however, provide a caveat that the Secretary may wait until after the designation is made in cases where she can show a “particularized need.” *Id.* at 208.

<sup>221</sup> *Id.* at 208-09.

*Mathews*, the court required the Secretary provide the organizations “the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record.”<sup>222</sup> No such requirement applied to the classified record. Regarding the Secretary’s reliance on classified information, the court stated simply that she “need not disclose the classified information to be presented *in camera* and *ex parte*,” because such information “is within the privilege and prerogative of the executive.”<sup>223</sup>

However, in *Abourezk v. Reagan* the D.C. Circuit identified 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.”<sup>224</sup> The *Abourezk* court stated that “[o]nly in the most extraordinary circumstances does our precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute,” pointing to *Molerio v. Federal Bureau of Investigation* as an example of such an “extraordinary” case.<sup>225</sup> Because in *Molerio* the Government demonstrated “acute national security concerns” and the plaintiff “had been accorded considerable discovery of non-[classified] materials,” the use of *ex parte*, *in camera* evidence was permissible.<sup>226</sup> This holding was despite the fact that the use of such classified information posed a “large risk that an unjust result would eventuate if the case proceeded without the privileged material”<sup>227</sup>—in other words, a great risk of erroneous deprivation.

Importantly, the other explicit exceptions to *Abourezk*’s “main rule” were those “specified by statute,” although in such cases the courts still must “confine to a narrow path submissions not in accord with our general mode of open proceedings.”<sup>228</sup> Section 1189 is such a statutory scheme—and therefore should not be subject to the general rule prohibiting disposition of the merits of a case on *in camera*, *ex parte* classified evidence. Generally the parties to a proceeding must be accorded full access to the information being used against them as a requirement of due process.<sup>229</sup> But as *Abourezk* noted, this is not *always* the case—particularly when compelling national security interests are at stake, and when Congress has expressly addressed the precise question as part of a comprehensive statutory scheme designed to facilitate the Secretary of State’s conduct of the nation’s foreign affairs.

In *Jifry v. FAA*, the D.C. Circuit reviewed the claims of “two non-resident alien pilots” who alleged that the Federal Aviation Administration violated the

---

<sup>222</sup> *Id.* at 209.

<sup>223</sup> *Id.* at 208.

<sup>224</sup> 785 F.2d 1043, 1061 (1986).

<sup>225</sup> *Id.* (citing 749 F.2d 815, 819-25 (D.C. Cir. 1984)).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (“The validity . . . of a conclusion largely depend[s] on the mode by which it was reached. Secrecy is not congenial to truth-seeking . . . . No better instrument has been derived for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”).

Fifth Amendment Due Process Clause by revoking their airman certificates.<sup>230</sup> The pilots argued that “they were denied meaningful notice of the evidence against them and a meaningful opportunity to be heard” because they were denied access to the classified information on which the revocations were based.<sup>231</sup> The court rejected that argument, relying explicitly on the line of cases dealing with People’s Mojahedin.<sup>232</sup> In weighing the interests at stake, the *Jifry* court stated that the pilots’ interest “in possessing FAA airman certificates to fly foreign aircraft outside of the United States . . . pales in significance to the government’s security interests in preventing pilots from using civil aircraft as instruments of terror.”<sup>233</sup> The plaintiffs’ attempt to prevent the Government from relying on classified information *ex parte* and *in camera*, the court stated, was “not well-taken.”<sup>234</sup> Indeed, the Government in *People’s Mojahedin III* pointed to *Jifry* to support its argument that agency “decision[s] based on classified information not disclosed to the relevant parties or their attorneys” do not violate due process, and “that it is perfectly proper for the [c]ourt to take this classified information into account *ex parte/in camera* as it reviews the agency action.”<sup>235</sup>

People’s Mojahedin responded by distinguishing its situation from the facts of *Jifry*. The group argued that the § 1189 designation scheme “impinges on the fundamental rights” of the organization and its “U.S. supporters.”<sup>236</sup> But again, this argument is misguided. An FTO has no constitutional due process rights—fundamental or otherwise—until it establishes *substantial* connections with the United States.<sup>237</sup> Once it establishes such connections to the United States—by purchasing property, opening a bank account, or establishing a continual place of business—it must be accorded constitutional due process protections to safeguard *those* interests.<sup>238</sup> But it is hard to see how, by establishing a single small bank account or other comparable contact with the United States, National Council had somehow earned for itself “fundamental rights” unrelated to that bank account that must be accorded constitutional protection. Given the low threshold set by the D.C. Circuit for what qualifies as “substantial,” a contrary approach would prove absurd.<sup>239</sup> And because the effects of the designation would have been felt equally by National Council *whether*

---

<sup>230</sup> 370 F.3d 1174, 1176 (D.C. Cir. 2004).

<sup>231</sup> *Id.* at 1176, 1184.

<sup>232</sup> *Id.* at 1183-84 (citing *People’s Mojahedin II*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003); *Nat’l Council I*, 251 F.3d 192, 208-09 (D.C. Cir. 2001)).

<sup>233</sup> *Id.* at 1183 (emphasis added).

<sup>234</sup> *Id.* at 1182.

<sup>235</sup> Brief for Respondents, *supra* note 129, at 39.

<sup>236</sup> Reply Brief for Petitioner, *supra* note 135, at 25.

<sup>237</sup> See *supra* notes 169-70 and accompanying text.

<sup>238</sup> See *supra* note 195 and accompanying text.

<sup>239</sup> See also *supra* text accompanying notes 195-96.

or not it possessed a small U.S. bank account, it seems far-fetched to suggest that contact should drastically alter the bank's level of constitutional protection.

Indeed, even sensitive—but less-than-classified—information may sometimes be constitutionally withheld from an organization challenging its terrorist designation based on the public and private interests involved. In *Al-Aqeel v. Paulson*, a Saudi Arabian citizen challenged his terrorist designation by the Secretary of the Treasury under IEEPA.<sup>240</sup> The court first determined the petitioner had established a constitutional presence in the United States such that he could invoke due process.<sup>241</sup> The petitioner sought access to the sensitive but unclassified information in the record, arguing “that because IEEPA provides for *ex parte* and *in camera* judicial review of classified portions of the record in a challenge to a designation under the Act, he [was] therefore entitled to the non-classified portions of the record, including privileged and [sensitive but unclassified] materials.”<sup>242</sup> The court rejected that request, explaining that a petitioner's access to privileged but unclassified materials is “determined by a ten-factor balancing test” set forth in *Frankenhauser v. Rizzo*.<sup>243</sup> Based on that test, the court held that the petitioner did not provide a “legal basis for obtaining the privileged portions of the Administrative Record.”<sup>244</sup>

Thus *Al-Aqeel* illustrates that even information *less* sensitive than classified information may be constitutionally withheld from a party seeking revocation of a government-imposed terrorist designation. So it would be incredible to suggest that *more* sensitive information—that which has been formally classified—should be released merely because that information is necessary to sustain the Secretary's designation determination under the FTO designation scheme.

---

<sup>240</sup> 568 F. Supp. 2d 64, 66 (D.D.C. 2008).

<sup>241</sup> *Id.* at 70.

<sup>242</sup> *Id.* at 72 (citation omitted).

<sup>243</sup> *Id.* at 72-73 (citing 59 F.R.D. 339, 344 (E.D. Pa. 1973)). The ten *Frankenhauser* factors are:

- (1) “[t]he extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information”;
- (2) “the impact upon persons who have given information of having their identities disclosed”;
- (3) “the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure”;
- (4) “whether the information sought is factual data or evaluative summary”;
- (5) “whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question”;
- (6) “whether the investigation has been completed”;
- (7) “whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation”;
- (8) “whether the plaintiff's suit is non-frivolous and brought in good faith”;
- (9) “whether the information sought is available through other discovery or from other sources”; and
- (10) “the importance of the information sought to the plaintiff's case.” 59 F.R.D. at 344-45.

<sup>244</sup> *Al-Aqeel*, 568 F. Supp. 2d at 72-73.

The Supreme Court has recognized that executive branch officials have a great deal of discretion in deciding who may access classified national security information. In *Department of Navy v. Egan*, the Supreme Court reviewed the discharge of a naval facility employee due to revocation of his security clearance and held that a review board lacked statutory authority to review the underlying clearance revocation.<sup>245</sup> Though the decision was made on statutory grounds, the Court emphasized the great deference the Judiciary ordinarily gives the Executive in determining who may have access to classified information and thus considered the decision unreviewable.<sup>246</sup>

As discussed earlier, when due process requires a hearing, that hearing must be meaningful. In its third challenge, People's Mojahedin argued the required chance to rebut the Secretary's record could only be meaningful if it included "the opportunity to present . . . such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are" terrorist organizations.<sup>247</sup> The Government, however, believed that the court was more than capable of reviewing the information for itself.<sup>248</sup> Weighing the interests, some commentators have argued that due process could be satisfied by something less than full disclosure of the classified record,<sup>249</sup> or by alternate procedures in which another party could review the classified information.<sup>250</sup>

Indeed, People's Mojahedin in its third appearance before the D.C. Circuit argued that even granting the Government's compelling interest in protecting classified information, "the importance of the individual rights affected by an FTO designation requires narrow tailoring of any significant constraint on the

---

<sup>245</sup> See 484 U.S. 518, 520 (1988).

<sup>246</sup> See *id.* at 529-30 (noting that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" which includes "the protection of classified information . . . and th[e] broad discretion to determine who may have access to it"). Although the Fifth Circuit in *Toy v. Holder* suggested *Egan* should be limited to the context of security clearance determinations because of the extensive process and specialized personnel involved in making those decisions, see 714 F.3d 881, 885-86 (2013), there is likewise significant process involved in the collection and evaluation of intelligence information used by the Secretary of State in making FTO designations. Indeed, the Secretary of State and intelligence officials compiling the records upon which FTO designations are based are clearly qualified to assess the risks of releasing classified information to groups that the Secretary has legitimately determined pose a threat to U.S. national security and foreign policy interests.

<sup>247</sup> Brief for Petitioner, *supra* note 135, at 53 (alteration in original) (internal quotation marks omitted) (quoting *Nat'l Council I*, 251 F.3d 192, 208-09 (D.C. Cir. 2001)).

<sup>248</sup> Brief for Respondents, *supra* note 129, at 43 (arguing the "Court [does not] require[] assistance in weighing whether the classified information in the Administrative Record helps establish the reasonableness of the Secretary's decision to deny the revocation petition").

<sup>249</sup> See Broxmeyer, *supra* note 35, at 487 (explaining the FTO designation scheme comports with procedural due process "because the government's pressing need for prompt action to avoid the frustration of its compelling national security interest in fighting terrorism outweighs the high risk of an erroneous deprivation of even a substantial private interest of a designated organization").

<sup>250</sup> See Wyatt, *supra* note 31, at 257 (proposing "agents of the Department of State who already have access to classified information, but who are detached from FTO designations, could fill this role").

ability to mount an effective challenge.”<sup>251</sup> They argued that “[a] blanket prohibition on even limited access to classified information on which a designation rests does not satisfy that requirement.”<sup>252</sup> People’s Mojahedin asserted, for example, that giving access to its counsel or to some third party is necessary to ensure that only restrictions absolutely necessary to protect the Government’s national security interest are permitted.<sup>253</sup> They also suggested requiring the Secretary to provide an unclassified summary of the information relied on, and reviewing the classified record and “tailoring its redactions more narrowly” to ensure that only information that should be classified is actually classified.<sup>254</sup>

Of course, requiring the Secretary to grant FTOs access to classified information—regardless of the form—would flatly contradict Congress’s directive in the text of § 1189.<sup>255</sup> Validation of the review Congress intended—limited to the unclassified record—is not, as People’s Mojahedin asserted, an “abdication of any duty to engage in meaningful judicial review,”<sup>256</sup> but rather a faithful adherence to the considered view of Congress and a sensible tailoring of the constitutionally required procedures to the constitutionally implicated interests. And even People’s Mojahedin apparently recognized the compelling nature of the Government’s interest in protecting classified information by conceding that, upon judicial review of the Secretary’s designation, *only* if the court is inclined to uphold the designation based on the classified record would “additional disclosures” be needed.<sup>257</sup>

Certainly Congress judged that the Secretary was both capable and well-positioned to evaluate the quality of the intelligence and the national security and foreign policy concerns on which the designation was based—especially with the support of the U.S. intelligence professionals furnishing the classified information. Although some have argued that the use of *ex parte*, in camera submissions of classified material renders the ability to present evidence in defense meaningless,<sup>258</sup> that argument cannot be taken seriously. Indeed, People’s Mojahedin itself had a number of high-profile American officials lobbying the Secretary of State to remove its FTO

---

<sup>251</sup> Brief for Petitioner, *supra* note 135, at 55.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 57-58.

<sup>255</sup> See 8 U.S.C. § 1189(a)(3)(B) (2012) (“Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court *ex parte* and in camera for purposes of judicial review . . .”). *But see* Reply Brief for Petitioner, *supra* note 135, at 24 (arguing § 1189 “does not preclude classified information from being *permissibly* disclosed where necessary to satisfy due process concerns or simply to facilitate meaningful review,” and that “the limited sharing of classified information with counsel possessing a security clearance, for the purpose of facilitating review . . . would not constitute ‘disclosure’ in the statutory sense”).

<sup>256</sup> Reply Brief for Petitioner, *supra* note 135, at 25.

<sup>257</sup> Brief for Petitioner, *supra* note 135, at 51-52.

<sup>258</sup> See Nice-Petersen, *supra* note 34, at 1413 (“Where much of the evidence used to justify a designation is classified . . . a blocked entity is left without a meaningful opportunity to present evidence in its defense.”).

designation.<sup>259</sup> Certainly the Secretary of State—the official responsible for operationalizing the President’s chartered course for foreign affairs—can be expected to respond to legitimate countervailing information, national security, and foreign policy concerns that would warrant revocation of a designation.

Moreover, although § 1189 generally tracks the language of the APA, Congress replaced the APA’s “substantial evidence” standard—requiring that agency decisions and actions be supported by substantial evidence in the administrative record—with § 1189’s “substantial support” language.<sup>260</sup> The D.C. Circuit has observed that the change in language may reflect Congress’ recognition that “substantial evidence” is “a term of art in administrative law” that typically requires adversarial, adjudicative procedures by the agency involved, and that therefore Congress indicated that such procedures were *not* intended for the FTO scheme.<sup>261</sup>

Given that § 1189 erects a comprehensive scheme for targeting *foreign* organizations, whose constitutional presence in the United States is often based on minute contacts to begin with, the Judiciary ought to accord Congress’ determination great respect and recognize that the interests of designated FTOs should not override those of the President and Secretary of State in providing for the nation’s security. The interests of designated FTOs, under a traditional due process analysis considering the range of public and private interests involved, are more than adequately protected by the procedures for handling classified information provided by § 1189.

### C. Comparative Analysis

Although analysis along traditional due process lines is essential to understanding if § 1189 passes constitutional muster, equally illuminating is a practical comparison of § 1189 to a post-World War II statutory scheme for blacklisting organizations. At the onset of the Cold War, a fear of subversive and Communist infiltration in government agencies led to an Executive Order creating a designation scheme under which the Attorney General targeted groups suspected of subversive activities against the U.S. government. The scheme—which, like the modern FTO designation system, entailed the Government identifying and labeling private organizations believed to pose a threat to national security—was ultimately reviewed by the Supreme Court.

---

<sup>259</sup> See Daniel Benjamin, *Giuliani Took Money From a Group That Killed Americans. Does Trump Care?*, POLITICO (Nov. 23, 2016), <http://www.politico.com/magazine/story/2016/11/giuliani-mek-terrorist-group-money-bolton-iran-214479> [https://perma.cc/58GM-KB8Q] (detailing lobbying efforts by high-profile U.S. political figures, including former New York City Mayor Rudy Giuliani and former U.N. Ambassador John Bolton, on behalf of People’s Mojahedin in its effort to be removed from the FTO list).

<sup>260</sup> Compare 5 U.S.C. § 706(2)(E) (2012), with § 1189(c)(3)(D).

<sup>261</sup> *People’s Mojahedin I*, 182 F.3d 17, 24 n.8 (D.C. Cir. 1999).

Although not dealing directly with classified material, the resultant analysis provides a useful point of comparison between the two schemes.

Similarly, more recent litigation over the Government's detention of terrorism suspects has produced a body of law addressing the use of classified information in detainees' legal challenges to their confinement. The Supreme Court's decision in *Boumediene v. Bush*, holding that detainees had the right to challenge their detentions in court, and the subsequent litigation in lower courts thus provides another point of reference for considering the role of classified information in the FTO context—especially given the shared terrorism nexus with § 1189.

#### 1. The Attorney General's Designation of Subversive Organizations

The FTO designation scheme is not the first time our nation has blacklisted organizations perceived as a threat to national security. In the decades after World War II, a similar program was devised for groups aligned with communist, fascist, and totalitarian movements. The Supreme Court famously reviewed the constitutionality of this program in *Joint Anti-Fascist Refugee Committee v. McGrath*.<sup>262</sup>

Executive Order 9835 initiated the so-called "Employees Loyalty Program" for federal executive branch employees and established a "Loyalty Review Board."<sup>263</sup> The Attorney General was directed to create a list of organizations that he deemed "totalitarian, fascist, communist or subversive."<sup>264</sup> The program was intended to identify and root out disloyal persons working for the federal government.<sup>265</sup> It provided that the Attorney General's list of organizations would be used in proceedings before the Loyalty Review Board when evaluating the loyalty of individual federal employees.<sup>266</sup> Membership in a designated organization "serve[d] as evidence . . . [against] persons reasonably suspected of disloyalty."<sup>267</sup>

As under § 1189, employees in proceedings before the Loyalty Review Board did not have the ability to challenge the underlying designation of the organization with which they were affiliated.<sup>268</sup> Additionally, "[p]otential members, contributors

---

<sup>262</sup> 341 U.S. 123, 129 (1951). Notably, *People's Mojahedin I* explicitly recognized some similarity between § 1189 and the Cold War-era scheme reviewed by *Joint Anti-Fascist Refugee Committee*. See 182 F.3d at 22; see also *infra* note 318.

<sup>263</sup> *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 125-28 (quoting Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947)).

<sup>264</sup> *Id.* at 125 (quoting Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947)).

<sup>265</sup> *Id.* at 127-28.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 160-61 (Frankfurter, J., concurring).

<sup>268</sup> See *id.* at 178 (Douglas, J., concurring) (describing as "evil" the circumstances "when a government employee is charged with being disloyal" because the accused "is not allowed to prove that the charge against the organization is false").

or beneficiaries of listed organizations may well be influenced by use of the designation, for instance, as ground for rejection of applications for commissions in the armed forces or for permits for meetings in the auditoriums of public housing projects.”<sup>269</sup> Designations under the scheme were “made without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosed evidence or suspicion on which designation may have been based, and without opportunity to establish affirmatively that the aims and acts of the organization [were] innocent.”<sup>270</sup> Designation by the Attorney General, like designation as an FTO by the Secretary of State, came with significant repercussions. Such designations “cripple[d] the functioning and damage[d] the reputation of those organizations in their respective communities and in the nation.”<sup>271</sup>

In *Joint Anti-Fascist*, the Supreme Court consolidated three cases questioning “whether . . . the Attorney General of the United States ha[d] authority to include the complaining organization in a list of organizations designated by him” pursuant to Executive Order 9835.<sup>272</sup> Collectively, the designated groups complained that their designations by the Attorney General discouraged people from making financial contributions and participating in organizational activities, required cancellation of meetings and lectures, revoked federal tax exemptions, resulted in members being publicly ridiculed, and, in one case, caused to be “instituted against the [organization] and its members a multiplicity of administrative proceedings, including those to rescind licenses, franchises, . . . or to impede the naturalization of its members.”<sup>273</sup>

The case produced six opinions, none backed by a majority of the Court. The final judgment, rendered by Justice Burton, remanded the case with a denial of the Government’s motion to dismiss.<sup>274</sup> That opinion, joined by Justice Douglas, entirely avoided the constitutional due process question.<sup>275</sup> Because the Court was considering a motion to dismiss, Justice Burton reasoned that if the allegations in the complaint were taken as facts, then the designations made by the Attorney General were not even authorized by the Executive Order.<sup>276</sup> The designations had been “patently arbitrary,” he wrote, because they were completely unsupported if relying only on “the very facts alleged by [the organizations] in their own complaints.”<sup>277</sup>

---

<sup>269</sup> *Id.* at 161 (Frankfurter, J., concurring).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 139 (Burton, J.).

<sup>272</sup> *Id.* at 124-25.

<sup>273</sup> *Id.* at 131, 133-35; *see also* 158-59 (Frankfurter, J., concurring).

<sup>274</sup> *Id.* at 141 (Burton, J.).

<sup>275</sup> *Id.* at 135-36.

<sup>276</sup> *Id.* at 126.

<sup>277</sup> *Id.*

Concurring separately, Justice Black disagreed that the case could be disposed of so easily—and passionately took issue with the designations, which he derided as “deadly edicts.”<sup>278</sup> In his view, the designations were “the practical equivalents of confiscation and death sentences for any blacklisted organization.”<sup>279</sup> The President and Attorney General had no authority whatsoever to “determine, list and publicize individuals and groups as traitors and public enemies,” Justice Black wrote.<sup>280</sup> Justice Black resolutely concluded that “with or without a hearing,” the lists were unconstitutional—and even if they *were* constitutional, the Fifth Amendment would require notice and a hearing beforehand.<sup>281</sup>

Justice Frankfurter also felt compelled to address the constitutional challenges to the Attorney General’s designations. Because of the “infinite variety and perplexity of the tasks of government,” he recognized that a specific set of due process protections may be fair in some situations and unfair in others.<sup>282</sup> In a prescient opinion issued more than twenty years before *Mathews*, Justice Frankfurter acknowledged that the particular procedures required by the Constitution must depend on the interests at stake.<sup>283</sup>

Analyzing the interests at stake in the Attorney General’s designations, Justice Frankfurter characterized national security as “the greatest of all public interests” and considered that the designations at issue did not “*directly* deprive anyone of liberty of property.”<sup>284</sup> He also considered it important that the designations were made by the Attorney General—the nation’s top law enforcement officer—and that the scheme had been developed by other duly elected officials sworn to uphold the Constitution.<sup>285</sup> On the other hand, he noted the fact that the Bill of Rights is predominantly concerned with procedural protections,<sup>286</sup> and that hearings have featured prominently in the Court’s earlier considerations of due process.<sup>287</sup> Only rarely, he noted, had the Court dispensed with a hearing requirement.<sup>288</sup>

Justice Frankfurter concluded that due process required notice and a hearing.<sup>289</sup> He reasoned that “fairness can rarely be obtained by secret,

---

<sup>278</sup> *Id.* at 142.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 143.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 163 (Frankfurter, J., concurring).

<sup>283</sup> *Compare id.* (“The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.”), *with supra* text accompanying note 74.

<sup>284</sup> *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 164 (Frankfurter, J., concurring) (emphasis added).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 164-65.

<sup>287</sup> *Id.* at 166-67.

<sup>288</sup> *Id.* at 167.

<sup>289</sup> *Id.* at 173-74.

one-sided determination of facts decisive of rights” and that there was no reason to believe that it would be “impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can.”<sup>290</sup>

Justice Douglas joined these Justices in rejecting the Government’s motion to dismiss. He also acknowledged the serious consequences of the Attorney General’s designations—both those that flow indirectly from “public opinion,” and those that result from regulatory agencies taking action to “penalize or police” designated organizations following their designations.<sup>291</sup> He was also concerned about the lack of a hearing prior to the designation being made. Reasoning that notice and a hearing are required “[i]n situations far less severe or important than these,” including relatively minor civil proceedings of all sorts, he argued that the same should be required before “determinations that may well destroy” the designated organization.<sup>292</sup> Although he acceded that the Government’s interest in national security was great, Justice Douglas believed that concern was relevant “only to those sensitive areas where secrets are or may be available, where critical policies are being formulated, or where sabotage can be committed.”<sup>293</sup>

In the last concurring opinion of the case, Justice Jackson agreed a hearing was required at some point in the designation procedure.<sup>294</sup> Justice Jackson believed the designation by itself “deprive[d] the organizations themselves of no legal right or immunity,” because their failure to increase membership or receive financial contributions were “applied by public disapproval, not by law.”<sup>295</sup> Indeed, he reasoned that “[i]f the only effect of the Loyalty Order was that suffered by the organizations, I should think their right to relief very dubious.”<sup>296</sup> Justice Jackson was primarily concerned about the employees discharged and barred from future government employment on the basis of the designation—not the organization itself.<sup>297</sup> Although concurring with the judgement in the case, Justice Jackson—like Justice Frankfurter—felt that only the individual employees were entitled to a hearing.<sup>298</sup>

In language paralleling that used by critics of the FTO designation scheme, Justice Douglas illustrated his qualms with the Attorney General’s list by way of example—the case of Dorothy Bailey, who was hauled before the Loyalty Review Board over suspicions that she was affiliated with a Communist front

---

<sup>290</sup> *Id.* at 170, 172-73.

<sup>291</sup> *Id.* at 175 (Douglas, J., concurring).

<sup>292</sup> *Id.* at 177-78.

<sup>293</sup> *Id.* at 181.

<sup>294</sup> *Id.* at 187.

<sup>295</sup> *Id.* at 183-84.

<sup>296</sup> *Id.* at 184.

<sup>297</sup> *Id.* at 185-86.

<sup>298</sup> *Id.* at 186.

organization.<sup>299</sup> He recounted that the case against Ms. Bailey was based largely on FBI reports, but when her lawyer questioned the board chairman, the chairman was unable to provide any specific information about her accusers' identities or affiliations.<sup>300</sup> Because she could not obtain any information about the witnesses against her, Justice Douglas worried, she had "no way of defending" herself against the charges.<sup>301</sup> Such a procedure, he said, "is abhorrent to fundamental justice."<sup>302</sup>

Justices Reed, Minton, and Chief Justice Vinson dissented. Although tolerant of efforts to change social life by methods of persuasion and advocacy, the three Justices emphasized the nation's "right and duty to protect its existence against any force that seeks its overthrow or changes in its structure by other than constitutional means."<sup>303</sup> They feared a "weakness of will" from a government "indifferent to manifestations of subversion," and argued that genuine concern about potential actions from such organizations required the Government to take action.<sup>304</sup>

Justice Reed acknowledged that the designation scheme did not require proof in the usual sense, but only an "examination and determination by the Attorney General"—and also said that none was needed because the proceedings were not criminal prosecutions.<sup>305</sup> Addressing the organizations' due process argument, he reasoned that although the designations by the Attorney General damage the organizations' "prestige, reputation and earning power," they did not "prohibit any business of the organizations, subject them to any punishment[,] or deprive them of liberty of speech or other freedom."<sup>306</sup> As a result, there was simply "no deprivation of any property or liberty of any listed organization by the Attorney General's designation."<sup>307</sup>

Justice Reed also found it important that the organizations' designations did not have "any finality in determining the loyalty of members" in proceedings before the Loyalty Review Board.<sup>308</sup> Although employees could not directly contest the underlying designation of an organization, they "do[] have every opportunity to explain [their] association with that organization."<sup>309</sup> Such an opportunity, he concluded, was sufficient for constitutional purposes.<sup>310</sup> Due process depends on the particular government action in question, Justice Reed

---

<sup>299</sup> *Id.* at 179-83 (Douglas, J., concurring).

<sup>300</sup> *Id.* at 179-80.

<sup>301</sup> *Id.* at 180.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 193 (Reed, J., dissenting).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 194-95.

<sup>306</sup> *Id.* at 202.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 205-06.

<sup>309</sup> *Id.* at 209.

<sup>310</sup> *Id.* ("The Constitution requires for the employee no more than this fair opportunity to explain his questioned activities.").

reasoned.<sup>311</sup> And as such, the “Government should be free to proceed without notice or hearing” in designating potentially dangerous organizations because the employees’ rights are thereafter protected by separate proceedings.<sup>312</sup> Justice Reed also pointed to practical reasons for having one executive official make the designation, deeming it preferable to have the Attorney General conduct *one* investigation and make *one* determination as opposed to separate investigations “by each of the more than a hundred agencies of government that are catalogued in the United States Government Organization Manual.”<sup>313</sup>

Evaluating the *Joint Anti-Fascist* opinions thus reveals the Justices agreed that a stigma imposed upon a group by a designation, by itself, did not implicate the protections afforded by the Due Process Clause.<sup>314</sup> This consensus is consistent with this Comment’s analysis of *National Council I* and *32 County Sovereignty Committee*.<sup>315</sup>

But more generally, America’s experience with the fear of communist subversion in the federal government offers several insights for assessing the constitutionality of § 1189. As Justice Douglas conceded with respect to Ms. Bailey, she was not charged with a crime, and so she did not have a right to confront the witnesses against her under the Sixth Amendment.<sup>316</sup> And importantly, while neither employees accused of disloyalty after World War II nor persons charged with materially supporting terrorist groups may challenge the underlying designations of the organizations with which they allegedly affiliated, the latter proceeding *is* criminal—persons charged with providing material support to an FTO face a criminal trial, with the full range of constitutional protections afforded and the corresponding threat of penal punishments.

Moreover, the *Joint Anti-Fascist* opinions were primarily concerned with the need to provide notice and the opportunity to rebut the Attorney General’s decision—a process that, as discussed earlier, the D.C. Circuit has already required in the FTO context.<sup>317</sup> The concurring Justices agreed that a hearing was needed, but did not elaborate on the precise form of that

---

<sup>311</sup> *Id.* at 212-13.

<sup>312</sup> *Id.* (“Petitioners will have [post-designation] protection when steps are taken to punish or enjoin their activities. Where notice and such administrative hearing as the Code [sic] Federal Regulations prescribes precede punishment, injunction or discharge, petitioners and their members’ rights to due process are protected.”).

<sup>313</sup> *Id.* at 191-92.

<sup>314</sup> *See also* *Paul v. Davis*, 424 U.S. 693, 704-05 (1976) (“[A]t least six of the eight Justices who participated in [*Joint Anti-Fascist*] viewed any ‘stigma’ imposed by official action of the Attorney General of the United States, divorced from its effect on the legal status of an organization or a person, . . . as an insufficient basis for invoking the Due Process Clause of the Fifth Amendment.”).

<sup>315</sup> *See supra* subsection III.B.2.

<sup>316</sup> *See id.*

<sup>317</sup> *See supra* note 75 and accompanying text.

hearing, nor did they require that the Government divulge any sensitive information in providing such a hearing.

Also significant is the fact that those organizations listed by the Attorney General were *domestic* organizations. Indeed, with respect to the constitutionality of the underlying designation, the crucial analytical difference between the two schemes is that the FTO scheme targets exclusively foreign organizations, whereas the groups listed by the Attorney General following World War II were domestic organizations.<sup>318</sup> It is undoubtedly true that, as articulated by one lower court judge in the proceedings leading up to *Joint Anti-Fascist*, that however imprecise the word “subversive” is, “[i]t is highly defamatory” and causes the organization to “lose reputation, members, supporters, contributions from government employees and others, valuable privileges, speakers, and meeting places.”<sup>319</sup> As explained in Section III.B., however, such domestic organizations may rightfully assert a number of legitimate property and liberty interests that a foreign organization with minimal contacts to the United States cannot. Domestic organizations have pre-existing constitutional and statutory rights to solicit financial and human support, to hold meetings, to express and publicize their political views, and to possess property in the United States. Foreign organizations do not enjoy similar rights—certainly not under the Constitution. Foreign organizations’ lack of due process rights means that the Government may deprive those organizations of their liberty and property interests without being required to provide due process.

Comparing the Government’s response to the fight against terrorism to its actions against communism during the McCarthy era, Professor Cole argued that America is repeating many of the mistakes of its past.<sup>320</sup> But as discussed at length, there are a number of considerable differences between America’s past and the contemporary experiences designating foreign groups as terrorist organizations. Moreover, the fact that the FTO designation scheme was enacted by congressional act, and not an Executive Order, should warrant even greater deference than was accorded to the Attorney General’s designations under the Cold War–era scheme. As Justice Frankfurter acknowledged in his concurring opinion, an act of Congress should receive more deference from the Judiciary than would a designation scheme established by the President in an Executive Order.<sup>321</sup>

---

<sup>318</sup> Indeed, the *People’s Mojahedin I* court recognized this distinction when it observed that the two schemes unquestionably “bear some resemblance,” but noted the major difference was that the organizations challenging their designations in *Joint Anti-Fascist* were domestic groups, whereas § 1189 is specifically directed to foreign organizations. 182 F.3d 17, 22 (D.C. Cir. 1999).

<sup>319</sup> *Joint Anti-Fascist Refugee Comm. v. Clark*, 177 F.2d 79, 85 (D.C. Cir. 1949) (Edgerton, J., dissenting), *rev’d*, 341 U.S. 123.

<sup>320</sup> See Cole *supra* note 41, at 28–30.

<sup>321</sup> *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 173 (Frankfurter, J., concurring).

## 2. Post-9/11 Habeas Cases

Before the D.C. Circuit rendered *People's Mojahedin III*, the organizations and the Government argued about the relevance of the habeas corpus cases stemming from post-9/11 terror suspect detention. In *Boumediene v. Bush*, the Supreme Court held the Suspension Clause of the Constitution applied at the U.S. military post at Guantanamo Bay, Cuba, and that aliens detained there could challenge their detentions through habeas proceedings.<sup>322</sup> However, the Court expressly disavowed any attempt to resolve issues related to what degree of access to classified information detainees may have in those proceedings.<sup>323</sup> Instead, the Court left those issues to be worked out by the district courts, acknowledging that “the Government has a legitimate interest in protecting sources and methods of intelligence gathering” and “expect[ing] that the District Court will use its discretion to accommodate this interest to the greatest extent possible.”<sup>324</sup>

On remand, the district courts set forth the parameters for access to classified information. In one case, Judge Kessler ordered that “[i]f any information to be disclosed to Petitioner . . . is classified, the Government shall provide Petitioner with an adequate substitute and, unless granted an exception, provide Petitioner’s counsel with the classified information, provided Petitioner’s counsel is cleared to access such information.”<sup>325</sup> However, recognizing the Government’s compelling interest in safeguarding information pertinent to national security, the district court further stipulated that the Government could make a motion to prevent disclosure, citing national security.<sup>326</sup>

In another case, *Al Odah v. United States*, the D.C. Circuit reviewed a district court order “compelling disclosure of certain classified information to counsel for certain detainees held at Guantanamo Bay.”<sup>327</sup> The court remanded the case to the district court, specifying the findings that must be made before such an order could be issued.<sup>328</sup> The court directed “the habeas court [to] proceed by determining whether the classified information is material and counsel’s access to it is necessary to facilitate meaningful review, and whether no alternatives to access would suffice to provide the detainee with the meaningful opportunity required by *Boumediene*.”<sup>329</sup> Even in a criminal proceeding, discovery of classified information requires more than a “mere showing of theoretical relevance” to the defendant’s case.<sup>330</sup> Accordingly, in the habeas context,

---

<sup>322</sup> 553 U.S. 723, 771 (2008).

<sup>323</sup> *See id.* at 796.

<sup>324</sup> *Id.*

<sup>325</sup> *Taher v. Bush*, 585 F. Supp. 2d 94, 98-99 (D.D.C. 2008).

<sup>326</sup> *Id.* at 99.

<sup>327</sup> 559 F.3d 539, 540 (D.C. Cir. 2009).

<sup>328</sup> *Id.* at 541.

<sup>329</sup> *Id.* at 548.

<sup>330</sup> *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989).

“before the district court may compel the disclosure of classified information, it must determine that the information is both relevant and material—in the sense that it is at least helpful to the petitioner’s habeas case.”<sup>331</sup>

Likewise, in *Bismullah v. Gates*—in which Guantanamo detainees challenged their designation as enemy combatants by a military tribunal—the D.C. Circuit explained that detainees’ access to classified information depended on how necessary such access was to allow for meaningful review of the record before the court.<sup>332</sup> The court issued a protective order granting a “presumption . . . that counsel for a detainee has a ‘need to know’ the classified information relating to his client’s case.”<sup>333</sup> However, the court also left room for the Government to withhold “certain highly sensitive information” from the detainee, although required it still be shown to the court.<sup>334</sup>

Relatedly, People’s Mojahedin argued a hearing could not be meaningful without access to the classified information being used against it. Pointing to *Bismullah*, People’s Mojahedin argued that ex parte, in camera submission of the classified record to the court could not allow for the “informed participation by counsel” necessary to help the court conduct its review of the record.<sup>335</sup> People’s Mojahedin lauded the *Bismullah* court’s development of a middle-ground approach “aimed at maximizing counsel’s access to the information while at the same time guarding against inappropriate dissemination of classified material.”<sup>336</sup> Because of “the importance of the rights at stake,” it asserted, some access to the classified record used by the Secretary of State was necessary to facilitate meaningful review.<sup>337</sup> But the Government countered that the analogy to the 9/11 habeas cases was misguided: those detentions posed the threat of “indefinite incarceration of individuals protected by constitutional habeas rights” and thus involved “a legal and factual scenario obviously different” from the FTO designation scheme.<sup>338</sup>

The Government’s position seems to be the stronger one. Dealing with detainment for a lengthy and perhaps indeterminate amount of time constitutes a far more onerous burden than deprivation of a group’s ability to fundraise, solicit membership, and receive support from members of the public. Moreover, even in the habeas context, the *Boumediene* Court recognized the Government’s interest in national security and left the lower courts free to withhold classified information on a case-by-case basis.

---

<sup>331</sup> *Al Odah*, 559 F.3d at 544.

<sup>332</sup> See 501 F.3d 178, 180 (D.C. Cir. 2007), *vacated on other grounds*, 554 U.S. 913 (2008).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> Brief for Petitioner, *supra* note 135, at 56 (citing 501 F.3d 178).

<sup>336</sup> *Id.* (citation omitted).

<sup>337</sup> *Id.*

<sup>338</sup> Brief for Respondents, *supra* note 129, at 41.

Indeed, the habeas cases illustrate that what constitutes “meaningful” notice and opportunity to be heard may differ depending upon a number of factors, including relevance to the petitioner’s case and the importance of the national security interests involved. The main difference between the habeas cases and challenges to FTO designations is that the private interests at stake are significantly greater in the former, such that even an equivalent interest in national security by the Government should prevail in the FTO context where it would not in the habeas context.

Finally, habeas proceedings evaluate the detentions of foreign individuals held by United States officials, either on U.S. territory or on a U.S. military installation like Guantanamo. As *Boumediene* properly recognized, the constitutional protections afforded for these people are very different—and decidedly stronger—in the habeas context than for organizations in the FTO context.

### CONCLUSION

The demands of due process must be respected at all times—even, as Justice Frankfurter observed in *Joint Anti-Fascist*, during “times of agitation and anxiety, when fear and suspicion impregnate the air we breathe.”<sup>339</sup> In the twenty years since the enactment of AEDPA and the creation of the FTO list, no small number of organizations have been devastated by their designation by the Secretary of State. According to the State Department, sixty-one organizations are currently designated as FTOs, and only twelve have ever had their designations removed.<sup>340</sup> An FTO designation is no doubt a powerful weapon: affected organizations have been stripped of much financial, material, and moral support. And it is also true that the Executive Branch has strong interests in restricting and controlling access to classified information—and it must be free to collect, use, and rely upon that information in providing for the nation’s security. This is especially true when officers’ actions are directed at foreign entities that U.S. intelligence services have determined pose a legitimate threat to the United States. Respect for this concern is embodied in the Supreme Court’s due process jurisprudence, which allows for procedures tailored to accommodate the public interest.<sup>341</sup> And protecting the nation’s classified information is among the most compelling public interests.<sup>342</sup>

But the D.C. Circuit’s line of cases confronting § 1189 and its allowance of the use of classified information by the Secretary of State have failed to

---

<sup>339</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring).

<sup>340</sup> See *Foreign Terrorist Organizations*, *supra* note 28.

<sup>341</sup> See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (“At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.”).

<sup>342</sup> See *Dep’t of Navy v. Egan*, 484 U.S. 518, 534 (1988) (White, J., dissenting) (“It cannot be denied that the Government has a ‘compelling interest’ in safeguarding the Nation’s secrets.”).

definitively settle whether essential reliance on classified information can satisfy due process under the Fifth Amendment. But despite the court's wavering path, analyzing the court's jurisprudence and due process principles, and comparing the designation scheme to McCarthy-era designations and modern habeas corpus cases, reveals that § 1189's use of classified information in making FTO designations comports with due process.

Due process is a "majestic concept" that, although informed by historic experience, "is also a living principle" that must accommodate new challenges.<sup>343</sup> Just as modern-day international terrorism is changing the nature of warfare—and as technology is changing notions of what is "domestic" and what is "foreign"—due process must confront the unique situation presented by the FTO designation scheme and the global fight against terrorism. Congress weighed those concerns and developed a scheme adapted to accomplish the mission. As Justice Jackson once wisely declared in the midst of the Second World War, "[c]ivil liberties had their origin and must find their ultimate guaranty in the faith of the people. If that faith should be lost, five or nine men in Washington could not long supply its want."<sup>344</sup>

---

<sup>343</sup> *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 174 (Frankfurter, J., concurring).

<sup>344</sup> *Douglas v. City of Jeannette*, 319 U.S. 157, 182 (1943) (Jackson, J., dissenting in part and concurring in judgment in part).

\* \* \* \* \*