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Designation of Foreign Terrorist Organizations Under the AEDPA: The *National Council* Court Erred in Requiring Pre-Designation Process

I. INTRODUCTION

September 11 will forever evoke terrible memories of the death and destruction caused by coordinated terrorist attacks against the United States.¹ Following the attacks, President Bush announced that “[t]here has been an act of war declared upon America by terrorists,”² and we will respond by “direct[ing] every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war, to the disruption and to the defeat of the global terror network.”³ An important weapon in this “war” against terrorism is the ability of the Secretary of State, under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA” or “Act”), to block all financial transactions involving the assets of foreign terrorist organizations in the United States, to prevent people from providing material support to foreign terrorist organizations, and to prohibit representatives of foreign terrorist organizations from entering the United States.⁴

Designation of an entity under the AEDPA as a foreign terrorist organization represents one of those “‘extraordinary situations’ that

1. These attacks have been linked to Osama bin Laden, who is the leader of a terrorist organization known as al-Qa’ida. *See* Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001).

2. Remarks in a Meeting with the National Security Team and an Exchange with Reporters at Camp David, Maryland, 37 WEEKLY COMP. PRES. DOC. 1319, 1320 (Sept. 15, 2001).

3. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001).

4. *See* 8 U.S.C.A. § 1189 (West 2001), *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

justify postponing notice and opportunity for a hearing.”⁵ If an organization received prior notice that it was being considered as a foreign terrorist organization, it would have an opportunity to immediately transfer all of its financial assets outside the jurisdiction of the United States, frustrating the intent of Congress and the foreign policy goals of the President.⁶ The United States Court of Appeals for the District of Columbia recently rejected this reasoning in *National Council of Resistance of Iran v. Department of State* (“*National Council*”) and held that the Secretary of State (“Secretary”) must afford putative terrorist organizations with due process *prior* to their designation under the AEDPA.⁷ The court also held that the Secretary must provide these organizations with notice of the basis of a designation and the opportunity to introduce rebuttal evidence into the record. A careful review of the AEDPA, current due process jurisprudence, and the facts of *National Council* will indicate that the court was incorrect in requiring pre-designation process.

Part II of this Note discusses the designation provisions of the AEDPA. Part III reviews current procedural due process jurisprudence. Part IV discusses the case law with respect to due process challenges of the designation provisions of the AEDPA. Part V is divided into two primary sections, one discussing the timing of due process and the other discussing the content of due process in light of the AEDPA and the facts of *National Council*. This Note concludes in Part VI that the United States Court of Appeals for the District of Columbia should reevaluate its holding in *National Council* and find that providing post-designation process to putative terrorist organizations with financial assets in the United States does not violate the Due Process Clause.

5. *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

6. Brief for Respondents at 48, *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192 (D.C. Cir. 2001) (Nos. 99-1438, 99-1439).

7. *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192 (D.C. Cir. 2001). See also Jason Binimow & Amy Bunk, Annotation, *Validity, Construction, and Operation of “Foreign Terrorist Organization” Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA)*, 8 U.S.C.A. § 1189, 2001 A.L.R. FED. 9 (2001); Robyn Whipple Diaz, *Foreign Organizations Designated as “Foreign Terrorist Organizations” Are Entitled to Due Process Protection when such a Designation Is Made by the Secretary of State*, 16 GEO. IMMIGR. L.J. 268 (2001); *D.C. Circuit Considers Due Process Issues in Context of “Foreign Terrorist Organization” Designations*, 78 NO. 31 INTER. REL. 1304 (2001).

II. DESIGNATION OF FOREIGN TERRORIST ORGANIZATIONS UNDER THE AEDPA

A. The Procedural Requirements of Designation

The Antiterrorism and Effective Death Penalty Act of 1996 authorizes the Secretary of State, in consultation with the Secretary of the Treasury and Attorney General,⁸ “to designate an organization as a foreign terrorist organization”⁹ upon finding that the organization meets certain statutorily defined criteria.¹⁰ The Secretary is required to compile an administrative record, which may include classified information,¹¹ and base his findings upon the information gathered therein.¹² Any classified information contained in the record need not be disclosed to a designated organization, but the “information may be disclosed to a court *ex parte* and *in camera* for purposes of judicial review.”¹³ A designation made under the statute is effective for a period of two years, and the Secretary may redesignate the organization for another two-year period upon finding that the relevant circumstances on which the previous designation was based still exist.¹⁴

Seven days prior to making a designation, the Secretary must notify various congressional leaders of his intent to designate an organization and of the factual basis for the designation.¹⁵ Seven days after such notification, the Secretary must publish the designation in the Federal Register.¹⁶ Once the Secretary notifies Congress of the impending designation, all financial transactions involving the assets of the organization in the United States may be blocked.¹⁷ All

8. *See* 8 U.S.C.A. § 1189(c)(4).

9. *Id.* § 1189(a)(1).

10. *See id.* The statutorily defined criteria will be discussed in detail in the following section. In brief, the Secretary must find that the organization is foreign, that it engages in terrorism, and that its activities threaten the national security of the United States.

11. *See id.* § 1189(a)(3)(B).

12. *See id.* § 1189(a)(3); *Nat'l Council*, 251 F.3d at 196 (citing 5 U.S.C.A. § 557(c) (West 2001)).

13. 8 U.S.C.A. § 1189(a)(3)(B); *Nat'l Council*, 251 F.3d at 197.

14. *See* 8 U.S.C.A. § 1189(a)(4)(A)–(B).

15. *See id.* § 1189(a)(2)(A)(i).

16. *See id.* § 1189(a)(2)(A)(ii).

17. The statute authorizes the blockage of “any assets” within the possession or control of a United States financial institution. *See* 8 U.S.C.A. § 1189(a)(2)(C). Other statutory

persons within or subject to the jurisdiction of the United States who “knowingly provide[] material support” to the organization, or attempt or conspire to do so, are subject to fines and imprisonment.¹⁸ All financial institutions that do not maintain control over and report to the Secretary the existence of any foreign terrorist organization funds are also subject to severe fines.¹⁹ In addition, alien representatives and members of the designated foreign terrorist organization are ineligible for visas or admission into the United States.²⁰

B. The Definition of a Foreign Terrorist Organization

As mentioned above, the AEDPA authorizes the Secretary to designate an organization as a foreign terrorist organization; however, before making a designation, the Secretary must find that an organization meets three statutorily defined criteria: (1) the organization must be a “foreign” organization;²¹ (2) the organization must “engage[] in terrorist activity”;²² and (3) the organization’s terrorist activity or terrorism must “threaten[] the security of United States nationals or the national security of the United States.”²³ Each of these criteria will be discussed in detail below.

1. The organization must be a “foreign” organization

The Secretary must first make a finding, based on substantial evidence in the record,²⁴ that the organization is a “foreign” organization.²⁵ Unfortunately, the statute does not define the term

language contemplates that these financial assets will probably consist of “funds.” *See* 18 U.S.C.A. § 2339B(a)(2) (West 2001).

18. 18 U.S.C.A. § 2339B(a)(1), *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

19. *See id.* § 2339B(b).

20. *See* 8 U.S.C.A. § 1182(a)(3)(B)(i)(IV)–(V) (West 2001), *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

21. 8 U.S.C.A. § 1189(a)(1)(A).

22. *Id.* § 1189(a)(1)(B).

23. *Id.* § 1189(a)(1)(C).

24. *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 23–24 (D.C. Cir. 1999).

25. 8 U.S.C.A. § 1189(a)(1)(A).

“foreign organization.” Indeed, nowhere in the United States Code is the term “foreign organization” defined.²⁶ While such an inquiry may seem trivial, it is a legitimate ground on which an organization designated under the AEDPA may challenge the designation.

Despite the lack of statutory guidance, there is some evidence that the Secretary will narrowly interpret the term “foreign organization” when making designations under the AEDPA. On October 8, 1999, Secretary of State Madeleine Albright redesignated the Mujahedin-e Khalq (“PMOI”) as a foreign terrorist organization.²⁷ The Secretary also redesignated a number of other organizations as aliases of PMOI and included them within the scope of PMOI’s designation.²⁸ One organization so designated for the first time was the National Council of Resistance of Iran (“NCRI”). NCRI, the U.S. representative office of NCRI (“NCRIUS”), and PMOI challenged the designation in *National Council*.²⁹ In its petition for review, NCRIUS argued that since it was a domestic non-profit corporation organized under the laws of the District of Columbia, it was not a “foreign organization” and thus could not be designated as such under the AEDPA.³⁰ In a terse response, the government agreed that NCRIUS was not included in the designation.³¹ This small exchange is perhaps a hint that the

26. The term is defined in a few unrelated sections of the Code of Federal Regulations. For example, in 12 C.F.R. § 347.102(k) (2001), the term “foreign organization” is defined as “an organization that is organized under the laws of a foreign country.”

27. See Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112 (Oct. 8, 1999).

28. In the designation, the Secretary named “Mujahedin-e Khalq Organization,” and then listed its aliases:

also known as MEK, also known as MKO, also known as Mujahedin-e Khalq, also known as People’s Mujahedin Organization of Iran, also known as PMOI, also known as Organization of the People’s Holy Warriors of Iran, also known as Sazeman-e Mujahedin-e Khalq-e Iran, also known as National Council of Resistance, also known as NCR, also known as the National Liberation Army of Iran, also known as NLA.

Id.

29. 251 F.3d 192 (D.C. Cir. 2001). This case will be examined below.

30. See Brief for Petitioners National Council of Resistance of Iran and National Council of Resistance of Iran, U.S. Representative Office at 16, *Nat’l Council*, 251 F.3d 192 (Nos. 99-1438, 99-1439). The court in *National Council* also noted that “[a] third petitioner, National Council of Resistance of Iran-United States (“NCRI-US”) joined the brief of NCRI, fearful that because the Secretary did not distinguish between the NCRI and NCRI-US it may have been included in the designation as well.” *Nat’l Council*, 251 F.3d at 197 n.1.

31. Brief for Respondents at 28, *Nat’l Council* (Nos. 99-1438, 99-1439). The court in

government will not include an organization, corporation, or association organized under the laws of the United States within its definition of a “foreign organization” for purposes of the AEDPA, even if such an organization, corporation, or association is substantially controlled, owned, dominated, or sponsored by a foreign organization or government. In light of the recent terrorist attacks against the United States, the government may become more willing to include a domestic organization within a designation if the organization is sponsored or controlled by a foreign terrorist organization; however, recent designations indicate a continued policy of interpreting “foreign organization” narrowly.³²

It is important to note here that a “foreign” entity must also be deemed an “organization.”³³ It appears, however, that Congress did not mean for the definition of “organization” to restrict the Secretary’s ability to designate an entity under the AEDPA. Indeed, Congress defined a “terrorist organization” as an organization so designated under the AEDPA; an organization that engages in terrorist activities otherwise designated by the Secretary as a terrorist organization; or “a group of two or more individuals, whether organized or not, which engages in [terrorist] activities.”³⁴ Under this definition, it is difficult to imagine a situation where an entity or group would not fit within the definition of “organization” for purposes of the AEDPA.

2. The foreign organization must engage in “terrorism” or “terrorist activity”

Once the Secretary finds that an organization is “foreign,” she must find, based on substantial support in the record³⁵ that the

National Council noted that “[i]n its brief to this court, the United States agrees that NCRI-US was not so designated, and we therefore do not separately consider any claims on behalf of that entity.” See *Nat’l Council*, 251 F.3d at 197 n.1.

32. In recent designations, the Secretary renewed PMOI’s designation and NCRI’s designation as an alias of PMOI, but the Secretary did not specifically include NCRIUS in its designation. See Redesignation of Foreign Terrorist Organization, 66 Fed. Reg. 51,088 (Oct. 5, 2001).

33. 8 U.S.C.A. § 1189(a)(1)(A) (West 2001).

34. *Id.* § 1182(a)(3)(B)(vi), amended by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

35. *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 23–24 (D.C. Cir. 1999). Essentially, the Secretary must have enough information in the record to support a

foreign organization “engages in terrorist³⁶ activity.”³⁷ The statutory definition of terrorist activity is broad and includes unlawful activity which involves the “highjacking or sabotage of any conveyance,” hostage taking, an attack or assassination, or the use of weapons or dangerous devices with the requisite intent,³⁸ including biological, chemical, and nuclear weapons.³⁹ Furthermore, the definition of terrorist activity includes any threat, attempt, or conspiracy to engage in any of the activities listed above.⁴⁰

An organization *engages* in terrorist activity when it commits or incites another to commit a terrorist activity, when it prepares or plans a terrorist activity, when it “gather[s] information on potential targets for terrorist activity,” when it solicits funds for a terrorist activity or another terrorist organization, or when it solicits an individual to engage in terrorist activity or to become a member of a terrorist organization.⁴¹ In addition, an organization engages in terrorist activity when it provides material support “for the commission of a terrorist activity, or to a terrorist organization.”⁴²

reasonable belief that the foreign organization is engaged in terrorist activities. *Id.* at 25; Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000).

36. The term terrorism is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C.A. § 2656f(d)(2) (West 2001).

37. 8 U.S.C.A. § 1189(a)(1)(B).

38. The statute defines the requisite intent as the “intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damages to property.” *Id.* § 1182(3)(B)(iii)(V)(b).

39. *Id.* § 1182(3)(B)(iii)(I)–(V).

40. *Id.* § 1182(3)(B)(iii)(VI).

41. *Id.* § 1182(3)(B)(iv)(I)–(V).

42. *Id.* § 1182(3)(B)(iv)(VI). The statute defines “material support or resources” as “currency or other financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” 18 U.S.C.A. § 2339A(b) (West 2001), *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The Ninth Circuit in *Humanitarian Law Project* affirmed the district court’s finding that “two of the components included within the definition of material support, ‘training’ and ‘personnel,’ were impermissibly vague,” and “enjoined the prosecution of . . . [people] for activities covered by these terms.” *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000).

3. The terrorist activities of a foreign organization must threaten national security

The third and final finding required under the AEDPA before designation is that “the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.”⁴³ The statute defines “national security” as “the national defense, foreign relations, or economic interests of the United States.”⁴⁴ The finding can be based not only on domestic national security threats but also on threats to U.S. nationals or U.S. interests abroad.⁴⁵

C. Judicial Review of Designations

An organization may challenge a designation made under the AEDPA in the United States Court of Appeals for the District of Columbia within thirty days after publication of the designation in the Federal Register.⁴⁶ The Act provides for judicial review “based solely upon the administrative record.”⁴⁷ As noted previously, the Secretary may also submit to the court classified information for ex parte and in camera review.⁴⁸ There is no opportunity for a designated foreign terrorist organization to introduce rebuttal evidence into the record.⁴⁹ Judicial examination of a designation is limited to the first two findings required by the Act, *i.e.*, that the “organizations are ‘foreign’ and that they ‘engage[] in terrorist

43. 8 U.S.C.A. § 1189(a)(1)(C) (West 2001).

44. *Id.* § 1189(c)(2).

45. The designation of PMOI is a good example of an organization that arguably did not threaten domestic interests but did threaten U.S. interests abroad. The Secretary designated PMOI as a foreign terrorist organization in 1997. *See* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997). At that time, PMOI had “no presence in the United States,” *People’s Mojahedin Org. of Iran v. Department of State*, 182 F.3d 17, 22 (D.C. Cir. 1999), but it did threaten U.S. interests in Iran. PMOI “collaborated with Ayatollah Khomeini to overthrow the former Shah of Iran. As part of that struggle, they assassinated at least six American citizens, supported the takeover of the U.S. embassy, and opposed the release of American hostages.” *Id.* at 20 (internal quotations omitted). PMOI also “exploded time bombs at more than a dozen sites throughout Tehran, including the Iran-American Society, . . . and the offices of Pepsi Cola and General Motors.” *Id.* (internal quotations omitted).

46. 8 U.S.C.A. § 1189(b)(1).

47. *Id.* § 1189(b)(2).

48. *Id.*

49. *See People’s Mojahedin*, 182 F.3d at 25.

activity.”⁵⁰ The Secretary’s determination that the organization threatens national security is not subject to judicial review because it implicates foreign policy and national security issues.⁵¹ Upon review, the court may set aside a designation it finds to be: (1) “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”; (2) “contrary to constitutional right, power, privilege, or immunity”; (3) “in excess of statutory jurisdiction, authority, or limitation, or short of statutory right”; (4) “lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court . . .”; or (5) “not in accord with the procedures required by law.”⁵²

III. THE PROCEDURAL REQUIREMENTS OF THE DUE PROCESS CLAUSE

Before examining relevant case law with regard to the designation provisions of the AEDPA, this section will review current due process jurisprudence generally. This foundation will be helpful in understanding the reasoning underlying the *People’s Mojahedin* and *National Council* decisions discussed in Part IV below. This foundation will also be useful in Part V of this Note, where current due process jurisprudence will be applied to the designation provisions of the AEDPA generally, and the facts of the *National Council* decision specifically, in order to analyze the strengths and weaknesses of that decision.

The Due Process Clause of the Fifth Amendment guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”⁵³ Courts have interpreted this clause to

50. *Id.* at 24. The court had previously held that 8 U.S.C.A. § 1189(a)(1)(C) was not subject to judicial review. *Id.* at 23.

51. *Id.* at 22.

52. 8 U.S.C.A. § 1189(b)(3).

53. U.S. CONST. amend. V. The amendment provides in full that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. The source of this concept is often traced to the original Charter of 1215 which provided that “[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any

have a procedural and a substantive component.⁵⁴ Substantive due process concerns whether government action depriving an individual of life, liberty, or property bears “a rational relation to a constitutionally permissible objective.”⁵⁵ On the other hand, procedural due process, which is the focus of this Note, “provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.”⁵⁶ While the procedural protections required by the Due Process Clause do not have “a fixed content unrelated to time, place and circumstances,”⁵⁷ the Supreme Court has held that “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”⁵⁸ A court must examine three critical issues in any procedural due process claim asserted by a foreign person or entity: (1) whether the person or entity has a constitutional presence in the United States; (2) whether government action deprived the person or entity of a constitutionally protected interest; and (3) whether the procedural protections provided by the government, if any, were constitutionally sufficient.⁵⁹

*A. The Foreign Person or Entity Must Have a
Constitutional Presence in the United States*

The first issue a court must address when examining a due process claim asserted by a foreign person or entity is whether the

way ruined, nor will we go or send against him, except by the lawful judgment of his peers or *by the law of the land.*” CHARLES A. MILLER, *THE FOREST OF DUE PROCESS OF LAW: THE AMERICAN CONSTITUTIONAL TRADITION* 3, 4 (1977) (emphasis added). In the 1354 reissue of the Charter, the Magna Carta appeared officially in English for the first time, and in place of the words “by the law of the land,” are the words “by due process of the law.” *Id.* at 5.

54. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 13.1 (6th ed. 2000).

55. *Ferguson v. Skrupa*, 372 U.S. 726, 733 (1963) (Harlan, J., concurring) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)).

56. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). See also RONALD D. ROTUNDA & JOHN E. NOWAK, 2 *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 14.6 (2d ed. 1992), for a discussion of the differences between procedural due process and substantive due process.

57. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961)).

58. *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotations omitted)).

59. See generally ROTUNDA & NOWAK, *supra* note 56, at § 17.1.

person or entity has a constitutional presence in the United States.⁶⁰ A foreign person or entity “without property or presence in this country has no constitutional rights, under the due process clause or otherwise.”⁶¹ The Supreme Court has held that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”⁶² This standard has been interpreted to apply to foreign organizations as well.⁶³ What exactly constitutes “substantial connections” in any given factual context is not clear, but an organization’s interest in a financial account held in the United States is generally sufficient to establish such connections.⁶⁴ In any event, the constitutional presence of a foreign person or organization is an important factor in any due process analysis because it may be that the organization is not entitled to constitutional protection at all, much less entitled to specific protection under the Due Process Clause.

B. There Must Be a Deprivation of Life, Liberty, or Property

The second issue a court must address when examining a due process claim is whether some type of government action has deprived a person or entity of a life, liberty, or property interest within the meaning of the Due Process Clause.⁶⁵ It is well recognized that “the range of interests protected by procedural due process is not infinite”⁶⁶ but is limited to a literal and restrictive definition of life, liberty, and property.⁶⁷ If a life, liberty, or property interest is not implicated, the government is free to deprive an

60. See *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999).

61. See, e.g., *id.* at 22.

62. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

63. See, e.g., *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192 (D.C. Cir 2001); *People’s Mojahedin*, 182 F.3d 17.

64. See, e.g., *Nat’l Council*, 251 F.3d 192 (2001). In *Board of Regents v. Roth*, 408 U.S. 564, 571–72 (1972), the Supreme Court noted that it was clear “that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.” If a property interest in “real estate, chattels, or money” is protected by due process, it seems logical that its ownership by a foreign organization would establish that organization’s constitutional presence.

65. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Roth*, 408 U.S. at 569–72.

66. *Roth*, 408 U.S. at 570.

67. See ROTUNDA & NOWAK, *supra* note 56, § 17.2.

individual of an interest without adhering to the procedural requirements of the Due Process Clause.⁶⁸ Indeed, the Supreme Court has “repeatedly rejected the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protection of the Due Process Clause.”⁶⁹

The first protected interest mentioned in the Due Process Clause is “life.” The Supreme Court has never defined the term “life,” but some of the Court’s decisions regarding the prohibition of voluntary abortions imply that for purposes of due process, life begins postnatally.⁷⁰ Also implicit in the Court’s death penalty cases is the notion that life is the period of time, from birth until death, in which a person exists as an animate being.⁷¹ Under these definitions, it appears that the designation provisions of the AEDPA, limited as they are to foreign “organizations,” do not implicate an individual’s interest in “life.”

The second interest protected by the Due Process Clause is “liberty.” This interest is generally defined as the right “to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁷² The term “liberty” undoubtedly encompasses “freedom from bodily restraint,”⁷³ but it also includes freedom from government deprivation of certain fundamental rights.⁷⁴ These fundamental rights are those that have “specific textual recognition [in the Constitution] of their existence and importance,”⁷⁵ those that are “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed,”⁷⁶ and those that are “deeply rooted in this Nation’s

68. See *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). Of course, the government’s action may still implicate other constitutional provisions.

69. *Id.* (quoting *Meachum v. Fano*, 427 U.S. 215, 224 (1976)).

70. See ROTUNDA & NOWAK, *supra* note 56, § 17.3. The Court in *Roe v. Wade* held that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” 410 U.S. 113, 158 (1973). In nearly all the instances where the word “person” is used in the Constitution, “it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.” *Id.* at 157.

71. See *generally* *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

72. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

73. *Id.*

74. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

75. *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting).

76. *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937).

history and tradition.”⁷⁷ The Supreme Court has considered most of the guarantees provided by the Bill of Rights as “fundamental,” and thus protected under the Due Process Clause.⁷⁸ Although not in the context of a due process claim, the consequences of designation have been challenged as violating certain constitutional interests that may qualify as liberty interests. However, the issue of whether the designation provisions under the AEDPA deprive a person or organization of a constitutionally protected liberty interest has yet to be directly addressed.

The third and final interest protected by the Due Process Clause is “property.” The Due Process Clause protects all traditional forms of personal and real property, including money,⁷⁹ and the Supreme Court has extended this protection to “entitlements.”⁸⁰ The Court noted that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”⁸¹ Entitlements are not defined by the Constitution; “they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”⁸² Thus, a governmentally conferred benefit becomes a constitutionally protected property interest when the “law which governs the dispensation of the benefit . . . define[s] the interest in

77. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

78. See ROTUNDA & NOWAK, *supra* note 56, § 17.4, and accompanying citations. Fundamental rights are by no means limited to those identified in the Bill of Rights. In *Board of Regents v. Roth*, the Court noted that the term “liberty” denotes the following:

[T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

79. In *Roth*, 408 U.S. at 571–72, the Supreme Court noted that it was clear “that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”

80. *Id.* at 577.

81. *Id.*

82. *Id.*

such a way that the individual should continue to receive it under the terms of the law.”⁸³

It is fairly well established that a person’s property interest in money or a bank account in the United States is sufficient to establish the possessor’s constitutional presence.⁸⁴ The deprivation of this interest will entitle the possessor to the protection of the Due Process Clause. This is probably the most obvious constitutionally protected interest implicated by the designation of an entity as a foreign terrorist organization under the AEDPA. Even a cursory glance at the designation provisions of the AEDPA indicates that one of the primary goals of the Act is to block all financial transactions involving the funds of a putative foreign terrorist organization.⁸⁵ Indeed, the deprivation of this interest was the basis upon which the *National Council* court held that the putative foreign terrorist organizations in that case were entitled to due process.

C. The Procedure, If Any, Must Be Constitutionally Sufficient

The second critical issue a court must examine when confronted with a due process claim is whether the procedural protection provided by the government, if any, is constitutionally sufficient. Due process “is a flexible concept that varies with the particular situation.”⁸⁶ Three factors identify “the specific dictates of due process.”⁸⁷ First, a court must consider “the private interest that will be affected by the official action.”⁸⁸ Second, a court must inquire into “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.”⁸⁹ The third and final factor embodies a consideration of “the Government’s interest, including

83. ROTUNDA & NOWAK, *supra* note 56, § 17.5.

84. *See, e.g., Roth*, 408 U.S. at 571–72; *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437, 444–45, 448 (1952). In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, the Court held that “a bank account surely [is] a form of property,” and its impoundment without notice or hearing violates due process. 419 U.S. 601, 606 (1975).

85. *See* 8 U.S.C.A. § 1189(a)(2)(C) (West 2001); 18 U.S.C.A. § 2339B(a)(2)(A) (West 2001).

86. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

87. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

88. *Id.*

89. *Id.*

the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁹⁰

Applying this so-called *Mathews* balancing test, the Court usually finds that due process demands “that a deprivation of life, liberty, or property ‘be *preceded* by notice and opportunity for hearing appropriate to the nature of the case.’”⁹¹ The purpose of this general rule “is not only to ensure abstract fair play to the individual,” but to ensure that the individual is protected from “arbitrary encroachment[s]” of the government, and “to minimize substantively unfair or mistaken deprivations.”⁹² There are exceptions to this general rule in “extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event,”⁹³ or when it is impossible for the government to provide pre-deprivation process for the particular deprivation at issue.⁹⁴

The *Mathews* balancing test should be used in at least two distinct areas of procedural due process analysis.⁹⁵ First, the test should be used when determining whether an individual is entitled to a hearing prior to a government deprivation of a protected interest.⁹⁶ This is sometimes called the “when” of due process.⁹⁷ Second, regardless of when notice and a hearing are required, the test should be used “to determine the precise procedures to be employed at the hearing.”⁹⁸ This is sometimes called the “what” of

90. *Id.*

91. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis added) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1952)). *See, e.g., id.* at 542 (concluding that the “root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest”).

92. *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972).

93. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

94. *See Zinermon v. Burch*, 494 U.S. 113, 129 (1990). In circumstances where it would be impossible for a state to provide notice and a hearing prior to the deprivation, the Court has held that a state common law tort remedy is sufficient procedure under the Due Process Clause. *Id.*

95. *See ROTUNDA & NOWAK, supra note 56, § 17.8.*

96. *See id.*; *see also Zinermon*, 494 U.S. 113; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Hodel v. Virginia*, 452 U.S. 264 (1981).

97. *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 205–06 (D.C. Cir. 2001).

98. *ROTUNDA & NOWAK, supra note 56, § 17.8; see, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976).

due process.⁹⁹ For purposes of analytical clarity, this Note will maintain the distinction between the “when” of due process and the “what” of due process in the sections below.

IV. THE *PEOPLE'S MOJAHEDIN* AND *NATIONAL COUNCIL* DECISIONS

There are two significant cases involving due process challenges of designation made under the AEDPA: *People's Mojahedin* and *National Council*.¹⁰⁰ In *People's Mojahedin*, the D.C. Circuit held that a foreign organization with no property or presence in the United States is not entitled to any due process protection under the Act.¹⁰¹ The court did not address the question of whether constitutional protection should be afforded to an organization with property or presence in the United States. Two years later in *National Council*, in response to another due process claim, the D.C. Circuit held that a foreign organization with property in the United States is entitled to notice and to some type of hearing prior to designation under the AEDPA.¹⁰² The facts and analyses of both cases are briefly examined in the following subsections.

A. *The People's Mojahedin Decision*

The D.C. Circuit held in *People's Mojahedin* that the Constitution does not protect a foreign organization without property or presence in the United States.¹⁰³ The plaintiffs in that case were the Liberation Tigers of Tamil Eelam (“LTTE”) and the People's Mojahedin Organization of Iran (“PMOI”). Both organizations were designated as “foreign terrorist organizations” by

99. *Nat'l Council*, 251 F.3d at 205–06.

100. See *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17 (1999); *Nat'l Council*, 251 F.3d 192 (2001); see also *32 County Sovereignty Committee v. Dep't of State*, 292 F.3d 797 (D.C. Cir. 2002) (following the analysis in *People's Mojahedin*). The statute has been challenged on other grounds. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000) (holding that the AEDPA did not violate the First Amendment, but enjoining the prosecution of plaintiffs for activities covered by the impermissibly vague words “training” and “material”).

101. See *People's Mojahedin*, 182 F.3d at 22.

102. See *Nat'l Council*, 251 F.3d at 208–09.

103. See *People's Mojahedin*, 182 F.3d at 22.

the Secretary of State on October 8, 1997,¹⁰⁴ and both organizations subsequently sought judicial review of the designations under 8 U.S.C.A. § 1189(b)(1).¹⁰⁵ The organizations argued that their due process rights were violated because “the Secretary’s designation had the effect of making it a crime to donate money to them.”¹⁰⁶ The D.C. Circuit quickly disposed of this argument, holding that because the LTTE and the PMOI had no property or presence in the United States, they had “no constitutional rights, under the due process clause or otherwise.”¹⁰⁷

Despite this holding, the LTTE and the PMOI were still entitled to exercise the statutory rights conferred upon them by the AEDPA. These rights consisted of contesting “their designations on the grounds set forth in § 1189(b)(3),” which entailed seeking the court’s “judgment about whether the Secretary followed statutory procedures, or whether she made the requisite findings, or whether the record she assembled substantially supports her findings.”¹⁰⁸ After reviewing the record under these standards, the court concluded that none of the organizations’ statutory rights were violated and refused to set aside the designations.¹⁰⁹

In reaching its decision, the court noted that it could set aside a designation under the AEDPA if the first two requisite findings, *i.e.*, that an organization is foreign and that it engages in terrorist activities, did not have substantial support in the administrative record.¹¹⁰ However, the court held that the third and final required finding—that the terrorist activity of the organization threaten national security—is non-justiciable because it is a decision “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and [has] long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”¹¹¹

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

105. *See People’s Mojahedin*, 182 F.3d at 18–19.

106. *Id.* at 22.

107. *Id.*

108. *Id.*

109. *See id.* at 25.

110. *See id.* at 22, 24.

111. *Id.* at 23 (quoting *Chicago & S. Air Lines, Inc. v. Waterman Steam Ship Corp.*, 333 U.S. 103, 111 (1948)). The position of the D.C. Circuit as to the third factor is consistent with a long line of Supreme Court decisions finding executive and legislative decisions involving national security and foreign relations issues non-justiciable. *See, e.g., Chicago & S.*

The court also recognized that its role in reviewing the quality or reliability of the information contained in the record was limited. This is because the Act restricts its review to an administrative record compiled solely by the Secretary of information “[n]ever subjected to adversary testing.”¹¹² The Act has no provision allowing the putative terrorist organization an opportunity to introduce “counter-evidence” into the record.¹¹³ The reliability of any information is difficult to judge without counter-evidence, counter-arguments, or counter-analyses with which to compare it. As a result, the court found that its only function “is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism.”¹¹⁴

B. *The National Council Decision*

The D.C. Circuit revisited the due process question again in *National Council*, holding that when a foreign organization has a property interest in the United States, due process requires the Secretary to provide the organization with notice and some type of hearing prior to designation under the Act.¹¹⁵ The petitioners in *National Council* were the National Council of Resistance of Iran (“NCRI”) and the PMOI. The PMOI was redesignated as a foreign terrorist organization by the Secretary of State on October 8, 1999, after the Secretary found that the PMOI continued to engage in terrorist activities.¹¹⁶ This redesignation of the PMOI extended its

Air Lines, 333 U.S. at 111–12; *Coleman v. Miller*, 307 U.S. 433, 454 (1939); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–21 (1936); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). The Court has recognized “the generally accepted view that foreign policy [is] the province and responsibility of the Executive.” *Haig v. Agee*, 453 U.S. 280, 293–94 (1981). Matters related to foreign affairs and national security “are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference,” *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952), and “are rarely proper subjects for judicial intervention.” *Haig*, 453 U.S. at 292.

112. *People’s Mojahedin*, 182 F.3d at 25.

113. *Id.*

114. *Id.*

115. *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192 (D.C. Cir. 2001), *reh’g denied* (August 27, 2001).

116. *See Designation of Foreign Terrorist Organizations*, 64 Fed. Reg. 55,112 (Oct. 8, 1999). In the two-year period following its 1997 designation, the PMOI allegedly claimed responsibility for the killing of two Iranian officials and three separate bombings of Iranian

1997 designation for two more years. The D.C. Circuit rejected the PMOI's petition for review of the 1997 designation in the *People's Mojahedin* case discussed above. The Secretary also designated the NCRI for the first time as a foreign terrorist organization on October 8, 1999, finding that NCRI was an "alias or alter ego" of the PMOI.¹¹⁷ The organizations argued, among other things,¹¹⁸ "that by designating them without notice or hearing as a foreign terrorist organization . . . , the Secretary deprived them of liberty, or property, without due process of law, in violation of the Fifth Amendment."¹¹⁹

In examining whether the organizations had a constitutional presence in this country, the court determined that the "PMOI and NCRI have entered the territory of the United States and established substantial connections with this country."¹²⁰ While the court noted that "neither the record nor the classified information establishes a presence for the PMOI under its own name," the same was not true as to the NCRI.¹²¹ The NCRI had "an overt presence within the National Press Building in Washington, D.C." and claimed to have an interest in a \$200 bank account.¹²² These connections were

government facilities in Iran. See Brief for Respondents at 22, *Nat'l Council* (Nos. 99-1438, 99-1439).

117. *Nat'l Council*, 251 F.3d at 197.

118. The organizations made various constitutional and statutory arguments against the Secretary's ability to make such "alias" designations; however, the court rejected these arguments because there was substantial support in the record indicating that the NCRI was an "alias" of the PMOI. Thus, while the Secretary did not specifically make the three required findings concerning the NCRI, the court reasoned that "[i]f the NCRI is the PMOI, and if the PMOI is a foreign terrorist organization, then the NCRI is a foreign terrorist organization also." *Id.* at 200.

119. *Id.* The Secretary also argued that this line of reasoning was foreclosed by the court's prior opinion in *People's Mojahedin*, 182 F.3d 17. The court rejected this argument, reasoning that the mere fact that the PMOI did not establish its constitutional presence two years previously did not foreclose the possibility that it could "now have a presence in this country." *Nat'l Council*, 251 F.3d at 201.

120. *Nat'l Council*, 251 F.3d at 203. The court made a critical assumption here, the validity of which is beyond the scope of this Note. The court assumed that the standard required to be met before due process protection is extended to a foreign entity is the same standard as applied to an alien individual. This standard extends constitutional protection to aliens "when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 202 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

121. *Id.* at 201.

122. *Id.*; see also Brief for Respondents at 39, *Nat'l Council* (Nos. 99-1438, 99-1439). It is interesting to note that the court in *People's Mojahedin* found that PMOI had "offices and

sufficient to allow the NCRI to “lay claim to having come within the territory of the United States and developed substantial connections with this country.”¹²³ The NCRI’s connections were also sufficient to allow the PMOI to claim a constitutional presence in this country. “The Secretary concluded in her designation,” the court observed, “that the NCRI and the PMOI are one. The NCRI is present in the United States. If A is B, and B is present, then A is present also.”¹²⁴

The court then found that the designation process and its consequences deprived the organizations of a constitutionally protected interest entitling them to due process of law.¹²⁵ The court noted that “at least one of the [organizations] has an interest in a bank account in the United States.”¹²⁶ This \$200 bank account was in fact owned by the NCRI,¹²⁷ but as the organizations “are one, if one [owns it], they both do.”¹²⁸ The Supreme Court has made clear, the court continued, 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.”¹²⁹ As a result of the Secretary’s designation, all financial transactions involving the organizations’ bank account could be blocked.¹³⁰ The court found that “for the present purposes, the colorable allegation [of the existence of a bank account] would seem enough to support their due process claims.”¹³¹

The organizations also argued that the consequences of designation under the AEDPA deprived their members of certain

members throughout . . . North America.” *People’s Mojahedin*, 182 F.3d at 21. Some of those offices were located in the United States. See Brief of Petitioner People’s Mojahedin of Iran at 10, *Nat’l Council* (Nos. 99-1438, 99-1439). Thus, the only difference between a finding of no constitutional presence in *People’s Mojahedin* and a finding of constitutional presence in *National Council* was a \$200 bank account possessed by its alias, the NCRI.

123. *Nat’l Council*, 251 F.3d at 201.

124. *Id.* at 202.

125. See *id.* at 203.

126. See *id.* at 204.

127. See Brief for Respondents at 39, *Nat’l Council* (Nos. 99-1438, 99-1439); Brief for Petitioners at 19, *Nat’l Council* (Nos. 99-1438, 99-1439).

128. *Nat’l Council*, 251 F.3d at 204.

129. *Id.* (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491–92 (1931)).

130. See 8 U.S.C.A. § 1189(a)(2)(C) (West 2001); 18 U.S.C.A. § 2339B(a)(2) (West 2001).

131. *Nat’l Council*, 251 F.3d at 204.

liberty interests. Members were deprived of their right to enter the United States, to travel outside of the United States, and to exercise their “First Amendment associational and expressive rights.”¹³² The court did not decide whether these alleged deprivations were enough to implicate due process “because the invasion of the Fifth Amendment protected property right . . . [wa]s sufficient to entitle [the organizations] to the due process of law.”¹³³

132. *Id.* at 204–05. The organizations argued that designation under the AEDPA not only curtailed their right to contract, see Brief for Petitioners National Council of Resistance of Iran and National Council of Resistance of Iran, U.S. Representative Office at 21, *Nat’l Council* (Nos. 99-1438, 99-1439) (“stigmatizing governmental action curtailing the liberty to contract, whether for a beer, banking services, or anything else that can be bought in the free market, triggers procedural due process requirements”), but also curtailed their members’ rights to enter the United States, associate with the organizations, and provide material support to the organizations. See *id.* at 21; Brief of Petitioner People’s Mojahedin of Iran at 15–16, *Nat’l Council* (Nos. 99-1438, 99-1439). The underlying premise of these arguments was that the interests identified above were so “fundamental” that they must be included within the definition of a “liberty” interest protected by the Due Process Clause. The court never reached the merits of these arguments because the organizations also argued that the designation deprived them of a property interest, see Brief of Petitioner People’s Mojahedin of Iran at 13, *Nat’l Council* (Nos. 99-1438, 99-1439), and the court determined that it “need not decide as an initial matter whether those consequences invade Fifth Amendment protected rights of liberty, because the invasion of the Fifth Amendment protected property right in the first consequence is sufficient to entitle [the organizations] to the due process of law.” *Nat’l Council*, 251 F.3d at 205.

Although the court failed to reach the merits of these claims, the Ninth Circuit in *Humanitarian Law Project v. Reno* rejected similar claims brought against the AEDPA under the First Amendment. See 205 F.3d 1130 (9th Cir. 2000). The plaintiffs in that case alleged that the AEDPA violated the First Amendment by prohibiting the giving of material support to designated organizations and by restricting their right to associate with designated organizations. *Id.* at 1133–37. The court rejected the plaintiffs’ claims because the AEDPA was sufficiently tailored to accomplish its legitimate end of “preventing the United States from being used as a base for terrorist fundraising.” *Id.* at 1136. However, the court did determine that “two of the components included within the definition of material support, ‘training’ and ‘personnel,’ were impermissibly vague,” and “enjoined the prosecution of any of the plaintiffs’ members for activities covered by these terms.” *Id.* at 1137. Congress amended the definition of material support subsequent to this decision; however, it did not eliminate the terms “training” or “personnel,” but instead added “expert advice or assistance” to the definition. See 8 U.S.C.A. § 2339A(b), amended by Uniting and Strengthening America by Providing Appropriate Tools Required to Interpret and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 377.

133. *Nat’l Council*, 251 F.3d at 205. In response to the argument that the designation deprives organization members of the right to enter the United States, the court noted that the Secretary argued “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.” *Id.* at 204. In response to the First Amendment arguments, the government argued that “the limitation 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

In addressing whether the Due Process Clause was violated in this case, the court examined “when” the constitutionally required process was due before examining “what” constitutionally required process was due.¹³⁴ In other words, the court first determined whether the fundamental requirements of due process should be observed prior to or subsequent to a designation under the AEDPA. The Secretary argued that “no governmental interest is more compelling than the security of the nation.”¹³⁵ This compelling interest would be frustrated “[i]f an organization were warned that it was being considered for designation as an alias of a foreign terrorist organization, [because] it would have an opportunity to remove or hide its assets”¹³⁶

The court apparently rejected the government’s argument, concluding that “the government has offered nothing that apparently weighs in favor of post-deprivational as opposed to pre-deprivational compliance with due process requirements of the Constitution.”¹³⁷ The court also noted that the Secretary has not “shown how affording the organization whatever due process they are due before their designation as foreign terrorist organizations and the resulting deprivation of right would interfere with the Secretary’s duty to carry out foreign policy.”¹³⁸ As such, the court held that “the Secretary must afford the limited due process available to the putative foreign terrorist organization *prior* to the deprivation worked by designating that entity as such with its attendant consequences.”¹³⁹ This holding, however, did “not foreclose the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made.”¹⁴⁰

pursuit of unlawful terrorist purposes as of First Amendment protected advocacy.” *Id.* at 205.

134. *Id.* at 205–06.

135. *Id.* at 207 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

136. See Brief for Respondents at 48, *Nat’l Council* (Nos. 99-1438, 99-1439).

137. *Nat’l Council*, 251 F.3d at 207.

138. *Id.* at 207–08.

139. *Id.* at 208 (emphasis added). While the court recognized an exception to the pre-deprivation notice and hearing requirement if the Secretary could “make a showing of particularized need,” that showing is apparently not made when the Secretary compiles an administrative record supporting the conclusion that a foreign organization is using the United States as a base to fund terrorist activities, since notice to that organization will allow it to transfer any and all funds presently collected in the United States to another jurisdiction.

140. *Id.*

After determining the “when” of due process, the court then examined the “what” of due process. In other words, the court determined what procedural protections are constitutionally required in designating an organization under the AEDPA. The court recognized that the fundamental requirements of due process include notice of the action sought and a right to an effective hearing. “This,” the court held, “is what the Constitution requires of the Secretary in designating organizations as foreign terrorist organizations under the statute.”¹⁴¹ In order to satisfy the notice requirement, the court directed the Secretary to “provide notice of those unclassified items upon which he proposes to rely to the entity to be designated” once he “has reach[ed] a tentative determination that the designation is impending.”¹⁴² In order to meet the hearing requirement, the court directed the Secretary to “afford to the entities considered for imminent designation the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations.”¹⁴³

The court found that “even in those instances when post-deprivation due process is sufficient, our review under § 1189(b) is not sufficient to supply the otherwise absent due process protection.”¹⁴⁴ In other words, notice by publication in the Federal Register and the ability of putative terrorist organizations to petition the D.C. Circuit for review of designations alone will not satisfy due process in those cases where delayed notice is otherwise acceptable. This is because the court’s review is limited to an administrative record compiled solely by the Secretary “without notice or opportunity for any meaningful hearing.”¹⁴⁵

In conclusion, the court instructed the Secretary to afford due process rights to other organizations in the future. “While not within our current order,” the court stated, “we expect that the Secretary will afford due process rights to these and other similarly situated

141. *Id.*

142. *Id.* at 209.

143. *Id.*

144. *Id.*

145. *Id.*

entities in the course of future designations.”¹⁴⁶ In fashioning a remedy, the court did not set aside the designations, but remanded the case to the Secretary “with instructions that the [organizations] be afforded the opportunity to file responses to the nonclassified evidence against them, to file evidence in support of their allegations that they are not terrorist organizations, and that they be afforded an opportunity to be meaningfully heard by the Secretary upon the relevant findings.”¹⁴⁷

V. EXAMINING THE *NATIONAL COUNCIL* DECISION THROUGH THE LENS OF DUE PROCESS

The *National Council* decision will be examined in detail below using the *Mathews* balancing test. This section will first examine the court’s analysis as to the “when” of due process, and will argue that the court was incorrect in requiring notice and a hearing *prior* to designation under the AEDPA. The section will then examine the court’s analysis as to the “what” of due process, or the content of due process, and will argue that the court in *National Council* was correct in directing the Secretary to provide notice of a designation’s basis and an opportunity for a putative terrorist organization to introduce rebuttal evidence into the administrative record.

A. *The “When” of Due Process: The National Council Court Erred in Requiring Pre-Deprivation Process*

1. *The private interest*

The first factor outlined in the *Mathews* balancing test requires consideration of “the private interest that will be affected by the official action.”¹⁴⁸ The private interest in *National Council* was an interest in a \$200 bank account.¹⁴⁹ The Secretary argued that such an interest did not compare to the significant property interests found by the Supreme Court in prior cases in order to require notice and

146. *Id.*

147. *Id.*

148. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

149. *See Nat’l Council*, 251 F.3d at 204; Brief for Respondents at 39, *Nat’l Council* (Nos. 99-1438, 99-1439).

some type of hearing preceding deprivation.¹⁵⁰ For example, the Court in *James Daniel* required pre-deprivation notice and a hearing prior to civil forfeiture of a *home*.¹⁵¹ The government essentially argued that the private interest in *National Council* did not carry much weight in the *Mathews* balancing test, especially when considering the other types of interests the Supreme Court has recognized as significant.

The court in *National Council* apparently misunderstood the government's reasoning, finding that "the decision would seem to weigh in favor of affording due process protection to the interest asserted by petitioners—it being a property interest as was the interest before the Supreme Court in *James Daniel Good Real Property*."¹⁵² However, the issue being addressed in the government's discussion of the *James Daniel* case was not whether the organizations were entitled to due process protection, but "when" that protection should be provided.¹⁵³ It was the government's opinion that cases like *James Daniel* demonstrated that minimal weight should be given to the NCRI's interest in its bank account, thus rendering the constitutionality of post-designation process more likely.

A review of *James Daniel* demonstrates that the Supreme Court did give special significance to the private interest in real property generally, and in a personal residence specifically. In *James Daniel*, the United States filed an in rem action "seeking to forfeit Good's house and the 4-acre parcel on which it was situated."¹⁵⁴ The government "sought forfeiture under 21 U.S.C.A. § 881(a)(7), on the ground that the property had been used to commit or facilitate the commission of a federal drug offense."¹⁵⁵ In an ex parte hearing, a United States Magistrate Judge authorized seizure of Good's property after finding that "the Government had established probable cause to believe Good's property was subject to

150. See *Nat'l Council*, 251 F.3d at 206.

151. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 47 (1993) (emphasis added).

152. *Nat'l Council*, 251 F.3d at 206.

153. See Brief for Respondents at 46–47, *Nat'l Council* (Nos. 99-1438, 99-1439).

154. *James Daniel*, 510 U.S. at 497.

155. *Id.* Four and a half years previously, Hawaii police found drugs and drug paraphernalia in Good's home when executing a search warrant. Good pled guilty to "promoting a harmful drug in the second degree, in violation of Hawaii law." *Id.*

forfeiture.”¹⁵⁶ A few days later, the government seized the property without a prior hearing or notice to Good.¹⁵⁷ Good challenged the seizure on due process grounds.¹⁵⁸

After discussing the above facts, the Supreme Court restated “the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.”¹⁵⁹ The government argued that “seizure of real property under the drug forfeiture laws justifies an exception to the usual due process requirement of pre-seizure notice and hearing.”¹⁶⁰ The Court rejected this argument and held that “[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing *real property* subject to civil forfeiture.”¹⁶¹ In explaining its holding, the Court noted that the “constitutional limitations we enforce in this case apply to *real property* in general.”¹⁶² The private interest in real property, particularly a residence, “is a private interest of historic and continuing importance.”¹⁶³ A government seizure of real property deprives the owner “of valuable rights of ownership, including the right to sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents.”¹⁶⁴ When dealing with the seizure of real property, the private interests at stake “weigh heavily in the *Mathews* balance.”¹⁶⁵

While the NCRI’s interest in its \$200 bank account should be accorded some weight, it is not one of those interests, like the interest in real property discussed above, that “weigh[s] heavily in the *Mathews* balance.”¹⁶⁶ Of course, it will not always be the case that the amount of money blocked under the designation provisions of the AEDPA will be so minimal. In all probability, the weight a court will give to an organization’s private interest in money will increase

156. *Id.*

157. *See id.* at 498.

158. *See id.*

159. *Id.*

160. *Id.* at 498–99.

161. *Id.* at 505 (emphasis added).

162. *Id.* (emphasis added).

163. *Id.* at 501.

164. *Id.*

165. *Id.*

166. *Id.*

as the amount of money in controversy increases. However, when compared to the compelling interest of the government in preventing a putative terrorist organization from transferring its assets to another jurisdiction before a designation takes effect, an organization's interest in a financial account does not seem so significant.

2. The risk of erroneous deprivation

The second factor, the risk of erroneous deprivation, basically entails an evaluation of the potential value of a hearing in decreasing the risk of error.¹⁶⁷ The Secretary argued that “the risk of erroneous deprivation here is minimized by the statutory standards and procedures specified by the Antiterrorism Act.”¹⁶⁸ First, the Secretary must “compile an administrative record on which a designation decision must be based.”¹⁶⁹ Second, the Secretary must “consult with the Attorney General and the Secretary of Treasury before designating a foreign terrorist organization.”¹⁷⁰ Third, the Secretary must also “notify congressional leaders seven days before designating such an organization.”¹⁷¹ The congressional notification must be in writing and must include information “of the intent to designate a foreign organization under [the statute], together with the [required] findings . . . with respect to that organization, and the factual basis therefor.”¹⁷² In addition, although not noted by the government or the court, any designation under the statute “shall cease to have effect upon an Act of Congress disapproving such designation,”¹⁷³ or upon revocation by the Secretary of State due to changed circumstances.¹⁷⁴ The court summarily rejected the Secretary's arguments because neither the involvement of various officials in the executive branch, nor notice to legislative leaders in the legislative branch can substitute for a pre-deprivation hearing.¹⁷⁵

167. *See id.*

168. Brief for Respondents at 47, *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) (Nos. 99-1438, 99-1439).

169. *Id.*; *see also* 8 U.S.C.A. § 1189(a)(1) (West 2001).

170. *Nat'l Council*, 251 F.3d 192, 206; *see also* 8 U.S.C.A. § 1189(c)(4).

171. *Nat'l Council*, 251 F.3d at 206-07; *see also* 8 U.S.C.A. § 1189(a)(2)(A).

172. 8 U.S.C.A. § 1189(a)(2)(A)(i).

173. *Id.* § 1189(a)(2)(B)(ii).

174. *See id.* § 1189(a)(6).

175. *Nat'l Council*, 251 F.3d at 207.

While the court was correct that mere consultation with various legislative and executive officials cannot replace a pre-deprivation hearing, such consultation arguably reduces, at least modestly, the risk of an erroneous decision. In addition, the straightforward nature of the three factual findings that the Secretary must make under the Act also reduces the risk of error. The first finding is relatively simple, thus making the risk of error relatively small—the organization must be foreign. The second finding involves the question of whether the organization engages in terrorist activities. It is often very clear whether or not an organization engages in terrorism due to the tendency of such organizations to claim responsibility for terrorist activities committed by them. However, there may be cases where the issue is not so clear. In those cases, the risk that terrorism poses to the national security of the United States and to the physical safety of Americans weighs in favor of deferring to an initial judgment by the executive branch and allowing the putative terrorist organization to contest the designation after its financial support is extinguished. The third and final finding involves a judgment that is entrusted solely to the executive branch and is not subject to judicial review—determining whether the terrorist organization threatens the national security interests of the United States. Since this finding requires consideration of the government's interests, and no one is in a better position to judge the government's interests than the government itself, the risk of error in assessing this factor appears small.

It is also true, however, that if an organization is allowed to present evidence rebutting the contention that it engages in terrorist activities prior to a designation, the judgment as to whether the organization's activities threaten U.S. interests may be different. Indeed, the *National Council* court correctly concluded that these procedures could not achieve the potential risk reduction that may be realized by a pre-designation hearing.¹⁷⁶ A pre-designation hearing would in theory reduce the risk of error due to the ability of an organization considered for imminent designation to introduce rebuttal evidence to the Secretary before a designation takes effect. On the other hand, it does not seem likely in practice that any information introduced by an organization to the Secretary would be sufficient to change the Secretary's mind or affect the adequacy of

176. *Id.*

the record. However, the theoretical possibility of a reduction in the risk of erroneous deprivation that may be realized with the provision of a hearing prior to designation under the AEDPA cannot be dismissed on mere assumptions as to how a hearing will actually affect the decision-making process.¹⁷⁷ It is sufficient for the purposes of this Note to presume that a pre-designation hearing will reduce the risk of erroneous deprivations at least somewhat. Even in making this assumption, however, the potential benefits realized from a pre-deprivation hearing are decidedly outweighed by the government's interest in taking immediate action to protect itself and its people from the activities of terrorist organizations. It seems reasonable to defer to the executive branch the initial determination as to whether an organization should be designated, especially when that organization has the ability to contest the executive's determination following its imposition.

3. The government's interest

The third factor in the *Mathews* balancing test entails an examination of "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁷⁸ The Secretary argued that the government's interest in prohibiting terrorism was compelling.¹⁷⁹ This compelling interest would be frustrated, the government alleged, "[i]f an organization were warned that it was being considered for designation as an alias of a foreign terrorist organization, [because] it would have an opportunity to remove or hide its assets."¹⁸⁰ In similar situations, "the Supreme Court has recognized, on many occasions, that where [the Government] must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of Due Process Clause."¹⁸¹

Despite this argument, the court concluded that "the government has offered nothing that apparently weighs in favor of a post-deprivational as opposed to pre-deprivational compliance with

177. *Id.* at 209.

178. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

179. *Nat'l Council*, 251 F.3d at 207 (internal quotations omitted).

180. See Brief for Respondents at 48, *Nat'l Council* (Nos. 99-1438, 99-1439).

181. *Id.* at 46 (quoting *Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997)).

due process requirements of the Constitution.”¹⁸² The court also noted that the Secretary has not “shown how affording the organizations whatever due process they are due before their designation as foreign terrorist organizations and the resulting deprivation of right would interfere with the Secretary’s duty to carry out foreign policy.”¹⁸³ As such, the court held that “the Secretary must afford the limited due process available to the putative foreign terrorist organization *prior* to the deprivation worked by designating that entity as such with its attendant consequences.”¹⁸⁴

In all fairness to the court, the government’s brief “made little effort to tie the factors to the question of ‘when’ as opposed to ‘what’ due process is to be afforded.”¹⁸⁵ However, the government did argue that pre-designation process would frustrate the purposes of the designation, and that argument was found with relative ease in its discussion of the due process question.¹⁸⁶ It is difficult to understand why the court did not address this argument in its opinion. It was apparent that the NCRI maintained an interest in a United States bank account. The NCRI was challenging its first designation under the AEDPA, and thus the bank account was not frozen prior to the designation, as would be the case in the redesignation of an organization with financial assets in the United States. If the NCRI had received notice of the impending designation, it would have had the opportunity to transfer what little assets it did have to a jurisdiction outside of the United States. Despite these considerations, the court found that “[i]t is not immediately apparent how the foreign policy goals of the government in general and the Secretary in particular would be inherently impaired by [prior] notice.”¹⁸⁷

The court was quick to point out that its holding did “not foreclose the possibility of the Secretary [demonstrating], in an appropriate case, . . . the necessity of withholding all notice and all opportunity to present evidence until the designation is already

182. *Nat’l Council*, 251 F.3d at 207.

183. *Id.*

184. *Id.* at 208 (emphasis added).

185. *Id.* at 206. *See generally* Brief for Respondents, *Nat’l Council* (Nos. 99-1438, 99-1439).

186. Brief for Respondents at 48, *Nat’l Council* (Nos. 99-1438, 99-1439).

187. *Nat’l Council*, 251 F.3d at 208.

made.”¹⁸⁸ It also suggested that upon a showing of “particularized need,” the Secretary may be able to provide putative terrorist organizations with notice and some type of hearing following a designation.¹⁸⁹ But if the interest of the government in prohibiting terrorism, combined with the ease in which a putative terrorist organization like the NCRI can transfer funds outside the jurisdiction of the United States, does not justify postponing notice until after designation, it is difficult to imagine what additional showing the government must make in order to so qualify under the court’s standard.

The court also failed to address Supreme Court case law allowing post-deprivation process when the government interest meets certain criteria.¹⁹⁰ Even in *James Daniel*, where the Court held that pre-deprivation notice and hearing must be afforded before the seizure of real property, the Court recognized that the government may be justified in postponing notice and hearing when seizing property “that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.”¹⁹¹ The issue of post-deprivation process was directly addressed by the Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*¹⁹² The plaintiff in that case leased his yacht to two Puerto Rican residents.¹⁹³ A little over a year later, Puerto Rican authorities found marihuana on board the yacht and seized the yacht pursuant to a statute which provided that “vessels used to transport, or to facilitate the transportation of, controlled substances, including marihuana, are subject to seizure and forfeiture to the Commonwealth of Puerto Rico.”¹⁹⁴ The yacht “was seized without prior notice to [the lessor] or either lessee and without prior adversary hearing.”¹⁹⁵ Notice was given to the lessees of the seizure, but when the seizure was not challenged within

188. *Id.* at 209.

189. *Id.* at 208–09.

190. *See, e.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908); *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *Phillips v. Comm’r*, 283 U.S. 589 (1931); *United States v. Pfitsch*, 256 U.S. 547 (1921).

191. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 52 (1993) (quoting *Calero-Toledo*, 416 U.S. at 679).

192. *See Calero-Toledo*, 416 U.S. at 663.

193. *See id.* at 665.

194. *Id.* at 665–67.

195. *Id.* at 667.

fifteen days of the notice, the yacht was forfeited to the Puerto Rican government.¹⁹⁶ The lessor learned of the seizure and forfeiture of the yacht some days later while “attempting to repossess the yacht from the lessees, because of their apparent failure to pay rent.”¹⁹⁷ The lessor filed suit, seeking a declaration that the seizure and forfeiture laws violated due process.¹⁹⁸

The Supreme Court denied the lessor’s due process claim because “seizure for purposes of forfeiture is one of those extraordinary situations that justif[ies] postponing notice and opportunity for a hearing.”¹⁹⁹ The Court recognized that “in limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible.”²⁰⁰ Such circumstances occur when three factors are present: (1) “the seizure has been directly necessary to secure an important governmental or general public interest”; (2) “there has been a special need for very prompt action”; and (3) “the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.”²⁰¹

The Court determined that the “considerations that justif[y] postponement of notice and hearing . . . are present here.”²⁰² First, the seizure of the yacht serves an important government purpose because it “permits Puerto Rico to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions.”²⁰³ In addition, “preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.”²⁰⁴

196. *See id.* at 667–68.

197. *Id.* at 668.

198. *See id.* at 664.

199. *Id.* at 677 (internal quotations omitted).

200. *Id.* at 678.

201. *Id.* (quoting *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972)).

202. *Id.* at 679.

203. *Id.*

204. *Id.*

Finally, “seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes.”²⁰⁵ Under these circumstances, the Court held that “this case presents an ‘extraordinary’ situation in which postponement of notice and hearing until after seizure did not deny due process.”²⁰⁶

Application of the *Calero-Toledo* factors to the AEDPA and the facts of *National Council* demonstrates that due process does not require pre-designation process to be given to putative terrorist organizations that may have financial assets within the jurisdiction of the United States. First, designation under the Act and its resulting consequences serve important governmental interests. Congress has recognized that “terrorism is a serious and deadly problem that threatens the vital interests of the United States,”²⁰⁷ that recent events have demonstrated the threat that terrorism poses to the physical well-being of United States residents and to domestic and international commerce,²⁰⁸ and that some organizations finance these terrorist activities by “rais[ing] significant funds within the United States, or us[ing] the United States as a conduit for the receipt of funds raised in other nations.”²⁰⁹ The United States’ attempt to designate foreign organizations that participate in terrorism in order to starve them of the financial capital needed to conduct terrorist activities can be fairly described as compelling. Even the *National Council* court itself recognized that “no governmental interest is more compelling than the security of the nation.”²¹⁰

The interest in prohibiting terrorism and the financial consequences resulting from designation under the Act represent a rare circumstance where there is “a special need for very prompt action.”²¹¹ Even more than the yacht in *Calero-Toledo*, money found in a bank account is easily “removed to another jurisdiction,

205. *Id.*

206. *Id.* at 679–80.

207. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(1), 110 Stat. 1214 (1996).

208. *See id.* § 301(a)(4).

209. *Id.* § 301(a)(6).

210. *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 207 (D.C. Cir. 2001) (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

211. *Calero-Toledo*, 416 U.S. at 678 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972)).

destroyed, or concealed, if advance warning of confiscation were given.”²¹² Affording an organization notice and a hearing prior to designation would frustrate the intent underlying the designation provisions of the AEDPA, which intent was to curb terrorist activity and terrorist funding, because a putative foreign terrorist organization once notified would presumably hide or transfer its assets.

While it may seem that the special need for prompt action is not justified when dealing with a paltry sum of money like the \$200 in the *National Council* case, Congress has indicated 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.”²¹³ In addition, there was the possibility that the NCRI had bank accounts within the United States of which the Secretary was not aware. This possibility justified prompt action in designating the NCRI first, putting American financial institutions on notice of the designation, and then determining what assets of the NCRI, if any, were subject to blockage under the Act. The AEDPA contemplates such a procedure by requiring “any financial institution that becomes aware that it has possession of, or control over, any funds in which a terrorist organization, or its agent, has an interest, . . . [to] report to the Secretary the existence of such funds”²¹⁴

The third and final factor discussed in the *Calero-Toledo* case was whether the person initiating the deprivation was “a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.”²¹⁵ It is clear that designation under the AEDPA satisfies this factor. The Secretary of State, a government official, in consultation with the Secretary of Treasury and the Attorney General, and after notifying several congressional leaders, determines whether designation is appropriate under the AEDPA.²¹⁶ The Act requires the Secretary to make three required findings before

212. *Id.* at 679.

213. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214 (1996) (emphasis added).

214. 18 U.S.C.A. § 2339B(a)(2)(B) (West 2001).

215. *Calero-Toledo*, 416 U.S. at 678 (quoting *Fuentes*, 407 U.S. at 91).

216. *See* 8 U.S.C.A. § 1189 (West 2001).

designating an organization as a foreign terrorist organization.²¹⁷ The Act also requires the Secretary to conclude whether the putative terrorist organization threatens the national security of the United States, thus necessitating blockage of the organization's financial assets in order to protect the United States and its people.

In sum, the three essential considerations that informed the *Calero-Toledo* Court's ruling to allow post-deprivation process are present here. First, immediate blocking of terrorist funds is necessary in order to establish the United States' jurisdiction over the property.²¹⁸ Second, the money may disappear if the government gives advance warning of its intent to block the funds.²¹⁹ Third, the designation is made by the Secretary of State under the provisions of the AEDPA. Consideration of these factors indicates that the *National Council* court did not give proper weight to the government's interest, and when balanced against the NCRI's interest in a bank account and the risk of error, the government's interest is sufficiently compelling so as to justify post-designation process in this case.²²⁰ The designation of foreign terrorist

217. See *supra* Section II.B.

218. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 57 (1993) (citing *Calero-Toledo*, 416 U.S. at 679).

219. See *id.*

220. While it seems clear that post-designation process is sufficient under the facts of *National Council*, there may be situations in which pre-designation process is required. For example, if an entity is being redesignated under the Act, then presumably all of its assets are already frozen, and it does not have the ability to hide or transfer its assets once notified by the Secretary of its imminent redesignation. Indeed, the *National Council* court recognized that "[i]t is particularly difficult to discern how . . . [prior] notice could interfere with the Secretary's legitimate goals were it presented to an entity such as the PMOI concerning its redesignation." *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208 (D.C. Cir. 2001). In this type of situation, the compelling governmental interest in delaying notice and a hearing until after designation is simply not present, and pre-designation process will normally be required, unless the organization has no constitutional presence in the United States.

It is not always the case, however, that redesignation will require the Secretary to afford putative terrorist organizations with pre-designation process. The facts of *National Council* demonstrate this well. At the outset, it is important to recognize that if the NCRI was not designated as an alias of the PMOI, the PMOI would not have been able to establish a constitutional presence in the United States. Without this presence, the PMOI could not even assert a due process claim, let alone claim entitlement to pre-designation process. While it is true that providing such an entity with pre-deprivation process would not interfere with the Secretary's foreign policy goals, the Secretary is simply not constitutionally required to provide such an entity with due process. The PMOI was saved from this fate by the designation of the NCRI as its alias and the NCRI's possession of a bank account. But since the NCRI's possession of a bank

organizations with financial assets in the United States “present[s] an extraordinary situation in which postponement of notice and hearing until after seizure d[oes] not deny due process.”²²¹

B. The “What” of Due Process: The National Council Court Did Not Err in Requiring Additional Procedural Protection

In addition to the question of whether post-designation process satisfies the Constitution, there remains the issue of whether the procedural protections outlined in the AEDPA, given before or after a designation, actually satisfy due process. This issue concerns the “what” of due process. While consideration of the *Mathews* factors indicates that process may be constitutionally provided after a designation is made, consideration of these same factors demonstrates that the procedural protections of the Act do not meet the requirements of the Due Process Clause. The *National Council* court was correct in requiring the Secretary to give notice to putative terrorist organizations of the basis of designations and in requiring the Secretary to allow such organizations the opportunity to introduce rebuttal evidence into the record.²²²

account implicates the government’s interest in preventing the transfer of assets prior to designation, and since the NCRI and the PMOI are one, the Due Process Clause was not violated by postponing process for both organizations until after the designation.

221. *Calero-Toledo*, 416 U.S. at 679–80. President Bush recently confirmed this conclusion in Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001):

For those persons listed in the Annex to this order or determined to be subject to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order.

222. Instead of finding the underlying statute unconstitutional, the *National Council* court simply required the Secretary of State to provide putative terrorist organizations with certain constitutionally required procedures. *Nat’l Council*, 251 F.3d at 209. Calling this portion of the *National Council* decision “impermissible judicial legislation,” a federal district court recently refused to construe any procedures into § 1189. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1057 (C.D. Cal 2002). As a result, the court held the statute to be facially unconstitutional for failing to provide putative terrorist organizations with notice and an opportunity to introduce rebuttal evidence into the record. *Id.* at 1058. Although it is tempting to address the decision’s criticism of *National Council*, such a discussion is beyond the scope of this Note. The decision’s value as precedent is also negligible, since challenges to designations under the AEDPA must be brought in the D.C. Circuit. *See* 8 U.S.C.A. § 1189(b)(1); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000). *But see Rahmani*, 209 F. Supp. 2d at 1053.

1. Terrorist organizations must be allowed to introduce rebuttal evidence into the record

Organizations may challenge designations made under the AEDPA in the D.C. Circuit within thirty days after publication of the designations in the Federal Register.²²³ The court's review of a designation must be "based solely upon the administrative record."²²⁴ The Secretary may also present classified information relied upon in making a designation for ex parte and in camera review.²²⁵ The court in *National Council* held that this post-designation hearing alone did not satisfy the due process hearing requirement, but that the Secretary must also afford putative terrorist organizations with "the opportunity to present, at least in written form, such evidence as . . . [they] may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations."²²⁶ Application of the *Mathews* factors to the AEDPA and the facts presented in *National Council* demonstrates that the court's holding in this respect was correct.

The constitutionally cognizable private interest that will probably most often be implicated by designation under the AEDPA is an organization's interest in some financial asset possessed or controlled by a United States financial institution.²²⁷ The NCRI in *National Council* asserted an interest in a United States bank account.²²⁸ The court found that this interest was sufficient to entitle the NCRI to due process protection.²²⁹ One of "the fundamental requirement[s] of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."²³⁰ This hearing requirement normally must include the opportunity for an opposing party to introduce

223. 8 U.S.C.A. § 1189(b)(1) (West 2001).

224. *Id.* § 1189(b)(2).

225. *Id.*

226. *Nat'l Council*, 251 F.3d at 209. The court stated that "even in those instances when post-deprivation process is sufficient, our review under § 1189(b) is not sufficient to supply the otherwise absent due process protection." *Id.*

227. *See* 8 U.S.C. § 1189(a)(2)(C).

228. *Id.* at 201; *see also* Brief for Respondents at 39, *Nat'l Council* (Nos. 99-1438, 99-1439).

229. *Nat'l Council*, 251 F.3d at 203.

230. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

rebuttal evidence into the record.²³¹ An organization does not have this opportunity under the statutory provisions of the AEDPA. In order to dispense with this requirement, if it is possible at all, the risk of erroneous deprivation must be low and the government interest must be high. Such a situation does not exist here. The importance of the government's interest may justify delaying a hearing until after a designation, but it certainly does not justify eliminating a meaningful hearing entirely.

The prevailing assumption is that providing an opposing party with an opportunity to present rebuttal evidence into the record will reduce the risk of an erroneous decision.²³² In considering the nature of the record upon which the Secretary bases her determination, this assumption seems well placed when dealing with designations under the AEDPA. The D.C. Circuit noted in reviewing past designations that the administrative "record consists entirely of hearsay, none of it . . . ever subjected to adversary testing, and . . . no opportunity for counter-evidence by the organizations affected."²³³ Without counter-evidence in the record, the court is unable to test the reliability or accuracy of the information upon which the Secretary relied in making a designation. "As we see it," the court observed, "our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism."²³⁴ That determination "might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging."²³⁵ In light of the compelling nature of the government's interest in protecting this nation from terrorism, it seems reasonable to delay the opportunity to introduce rebuttal evidence until after a designation is made. However, once a particular designation is made and the financial assets of the targeted organization are frozen, the objections to allowing the organization to introduce rebuttal evidence into the record are eliminated, and the risk of error present in a decision based on a record compiled

231. *See, e.g.*, *Wolf v. McDonnell*, 418 U.S. 539, 566 (1974) ("Ordinarily, the right to present evidence is basic to a fair hearing.").

232. *See, e.g.*, *Lister v. Hoover*, 706 F.2d 796, 804 (7th Cir. 1983).

233. *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 25 (D.C. Cir. 1999).

234. *Id.*

235. *Id.*

solely by the Secretary weighs in favor of providing this procedural protection.

2. Terrorist organizations must be given notice of the basis of designation

The Secretary must notify Congress one week prior to making a designation.²³⁶ Once Congress is notified of an impending designation, all financial assets of the putative foreign terrorist organization found within the possession or control of United States financial institutions may be blocked.²³⁷ Seven days after notifying Congress, the Secretary must publish the designation in the Federal Register.²³⁸ The court in *National Council* found the notice provided to putative terrorist organizations generally, and the NCRI and the PMOI specifically, constitutionally insufficient.²³⁹ In order to meet the demands of due process, the court held that the Secretary must provide a putative terrorist organization with notice of the designation, the administrative record, and the unclassified items upon which she relied or proposes to rely in making the designation.²⁴⁰ Application of the *Mathews* factors to the AEDPA and the facts in *National Council* will demonstrate that the court's conclusion as to notice was correct.

As mentioned above, a putative terrorist organization's claim to constitutional protection will probably most often arise from the deprivation of a financial asset controlled or possessed by a United States financial institution.²⁴¹ The NCRI had an interest in a \$200 bank account.²⁴² There is little question that this interest entitles the NCRI and other similarly situated organizations to the protection of the Due Process Clause.²⁴³ One of the fundamental protections provided by due process is notice of the action sought and its

236. 8 U.S.C.A. § 1189(a)(2)(A)(i) (West 2001).

237. *See id.* § 1189(a)(2)(C); 18 U.S.C.A. § 2339B(a)(2) (West 2001).

238. *See* 8 U.S.C.A. § 1189(a)(2)(A)(ii).

239. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001).

240. *Id.* at 209.

241. *See* 8 U.S.C.A. § 1189(a)(2)(C).

242. *Nat'l Council*, 251 F.3d at 201; *see also* Brief for Respondents at 39, *Nat'l Council* (Nos. 99-1438, 99-1439).

243. *Nat'l Council*, 251 F.3d at 203.

basis.²⁴⁴ While the AEDPA does give a putative terrorist organization notice of a designation by publication in the Federal Register, it does not give an organization notice of the designation's basis. Without this notice, it is extremely difficult for an organization to utilize the availability of a hearing because of its inability to determine the underlying factors upon which the Secretary relied in making a designation. Imposing such a difficulty on a putative terrorist organization can be justified, if at all, by circumstances indicating that the risk of erroneous deprivation is minimal and the government interest is compelling. Designation under the AEDPA does not present such a situation.

When the Secretary publishes notice of designations in the Federal Register, she merely lists the name of each foreign terrorist organization and the names of its aliases. Nowhere does the document state the factual basis for designating each organization. In all probability, an organization will not learn of the information upon which the Secretary relied in making the designation unless and until it challenges the Secretary's decision in the D.C. Circuit. At that time, the Secretary will be forced to publicly file the unclassified version of the administrative record in order to support her decision.²⁴⁵ However, receiving notice so late in the game necessarily prevents the organization from presenting rebuttal evidence in the administrative record in an attempt to change the Secretary's mind. This in turn will likely increase the risk of a mistaken deprivation, especially considering that the record upon which judicial review is based may be composed entirely of hearsay evidence.²⁴⁶ While the importance of the government's interest in protecting the American people from terrorism weighs in favor of delaying notice until after a designation is made, it cannot support the total denial of proper notice to a putative terrorist organization when the reasons for delaying notice no longer exist.

It is clear that pre-designation notice would allow a putative terrorist organization to hide or transfer its assets outside of the jurisdiction of the United States. This would undermine the

244. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 39 (1982) ("To satisfy due process, notice must clarify what the charges are in a manner adequate to apprise the individual of the basis for the government's proposed action.") (internal quotations and citations omitted).

245. *Nat'l Council*, 251 F.3d at 209.

246. *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 25 (D.C. Cir. 1999).

government's ability to stifle funding to terrorist organizations. However, it is not clear how this same interest applies to "what" type of notice a terrorist organization should be given. In other words, the question of "when" notice should be given bears little relationship in this case to what the content of that notice should be when actually given. The government may have an interest in withholding some information upon which the Secretary relied in making a designation when that information is confidential. Indeed, the *National Council* court itself recognized this governmental interest by allowing the government to withhold the presentation of such information to the organization in question.²⁴⁷ The government may instead present this confidential information in camera and ex parte to the court in accordance with the provisions of the AEDPA.²⁴⁸ However, this fails to justify the government in not informing putative terrorist organizations of the non-classified information upon which the Secretary relied in making designations, especially when considering the risk of erroneous deprivation and the important private interest involved.

VI. CONCLUSION

President Bush has indicated that "a major thrust of our war on terrorism . . . [is to] launch[] a strike on the financial foundation of the global terror network."²⁴⁹ The designation provisions of the AEDPA are a major weapon in the war that can and should be used to accomplish the objective of curbing the ability of terrorist organizations to fund terrorist activity. Under the Act, the Secretary of State can block all financial transactions involving the assets of a foreign terrorist organization. In addition, the Secretary can prohibit anyone from providing material support to a foreign terrorist organization. Prior notice of an impending designation would render the consequences of the designation ineffective due to the ability of an organization to quickly transfer its assets to another jurisdiction. A careful balancing of the private interest, the risk of error, and the government interest found in the *National Council* case indicates

247. *Nat'l Council*, 251 F.3d at 208–09.

248. *Id.*

249. Remarks on the United States Financial Sanctions Against Foreign Terrorists and Their Supporters and an Exchange with Reporters, 37 WEEKLY COMP. PRES. DOC. 1364, 1364 (Sept. 28, 2001).

that the court erroneously required pre-designation process. Designation of a foreign terrorist organization with financial assets in the United States is one of those “extraordinary situation[s] in which postponement of notice and hearing until after seizure d[oes] not deny due process.”²⁵⁰

If the decision in *National Council* is upheld, the purpose of the designation procedure under the AEDPA will be completely undermined, and the statute will no longer be effective in blocking the assets of foreign terrorist organizations within the United States. This result would be unfortunate given the increasing threat of terrorism to the United States and its people. As President Bush indicated following the terrorist attacks of September 11, the United States intends to “direct every resource at . . . [its] command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war, to the disruption and to the defeat of the global terror network.”²⁵¹ The designation provisions of the AEDPA are one such resource that can and should be used to curb the threat of terrorism. The D.C. Circuit should reevaluate its decision in *National Council* and hold that post-designation process does not violate the Due Process Clause when designating a putative terrorist organization with financial assets in the United States.

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250. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679–80 (1974).

251. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001).