

January 2004

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### Recommended Citation

Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. (2003-2004).

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# A DOUBLE DUE PROCESS DENIAL: THE CRIME OF PROVIDING MATERIAL SUPPORT OR RESOURCES TO DESIGNATED FOREIGN TERRORIST ORGANIZATIONS

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The Anti-Terrorist and Effective Death Penalty Act, passed in 1996, criminalized the act of providing material support or resources to foreign terrorist organizations. Before September 11, there were only three prosecutions for this crime.<sup>1</sup> Since then prosecutions have increased and likely will continue to increase. The criminalizing statute, Section 2339B,<sup>2</sup> creates a major prosecutorial tool in the fight against terrorism. Section 2339B, however, raises troubling due process issues – it works a double due process denial. An essential element of a Section 2339B prosecution is that a particular group has been designated a foreign terrorist organization by the Secretary of State. Yet the statute’s designation procedure does not provide notice and a hearing to the organization, and that violates the rights of an organization entitled to due process. The defendant in a Section 2339B prosecution is prohibited from challenging the validity of the designation, and this prohibition, too, denies due process.

This article contends that when an organization is designated a foreign terrorist organization in violation of due process, that designation is unconstitutional. A Section 2339B prosecution based on an unconstitutional designation is unconstitutional. This article concludes that the accused in a Section 2339B prosecution is entitled to judicial review of the constitutionality of a designation. This article proposes that the statutory scheme be changed to avoid these problems by affording organizations notice of an imminent designation and a meaningful hearing to contest a designation.

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\* Professor, New York Law School. Thanks to Martin Morris for his research and to Donald H. Zeigler, Stephen A. Newman and Stephen J. Ellmann for their helpful suggestions.

1. See DAVID COLE AND JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* 127 (2002) (“[A]s of December 2001, the government had prosecuted only three cases involving material support to terrorist organizations.”).

2. 18 U.S.C. § 2339B (2003).

Part I sets out the statutory scheme for Section 2339B prosecutions. Part II explores judicial interpretations of that statutory scheme. Part III explores the due process rights of an organization and how a designation may violate those rights. Part IV explains how in a Section 2339B proceeding the accused's constitutional rights are violated when a prosecution is based on a designation made in violation of due process. Part V proposes remedies for the constitutional problems.

## I. THE STATUTORY SCHEME

### A. *Section 2339B*

The basic criminalizing provision of the statute states: "Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life."<sup>3</sup> The statute does not list nor define the proscribed organizations. Instead, it states that a terrorist organization is an "organization designated as a terrorist organization under Section 219 of the Immigration and Nationality Act,"<sup>4</sup> codified at 8 U.S.C. § 1189 ["Section 1189"].

### B. *The Designation Process*

The Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, is authorized by Section 1189 to designate a group as a foreign terrorist organization if the Secretary finds that the group is foreign, engages in or has the capacity or intent to engage in terrorist activity, and "threatens the security

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3. 18 U.S.C. § 2239B(a)(1). "Material support or resources" is broadly defined to include "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2239A.

4. 18 U.S.C. § 2239B(g)(6).

of the United States nationals or the national security of the United States.”<sup>5</sup>

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5. 8 U.S.C. § 1189(a)(1) (2003). The statute broadly defines “national security” as “the national defense, foreign relations, or economic interests of the United States. . . .” 8 U.S.C. § 1189(c)(2).

Section 1189 incorporates two definitions of “engages in terrorist activity.” One is limited to violent action and states that “‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C. § 2656f(d)(2) (2003). The second definition is more expansive. It first states that a “terrorist activity” is an act illegal where committed or under United States law if committed here and involves any of the following:

- (I) The hijacking of any conveyance. . . .
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4)) or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any—
  - (a) biological agent, chemical agent, or nuclear weapon or device, or
  - (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C § 1182(a)(3)(B)(iii) (2003).

The statute then states:

As used in this chapter, the term “engage in terrorist activity” means, in an individual capacity or as a member of an organization—

- (I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
- (II) to prepare or plan a terrorist activity;
- (III) to gather information on potential targets for terrorist activity;
- (IV) to solicit funds or other things of value for—
  - (aa) a terrorist activity;
  - (bb) a terrorist organization described in clause (vi)(I) or (vi)(II) [organizations designated by the Secretary of State under Section 1189 or otherwise designated by the Secretary as terrorist organizations]; or
  - (cc) a terrorist organization described in clause (vi)(III) [a group of two or more who engage in the activities set forth in (I), (II), or (III) above]
- (V) to solicit any individual—
  - (aa) to engage in conduct otherwise described in this clause;
  - (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

Before making the designation, the Secretary of State must confidentially inform the leaders of Congress of the intent to designate a group as a foreign terrorist organization and the reasons for the proposed action.<sup>6</sup> The designation takes effect seven days after this communication when it is published in the Federal Register. In making a designation, the Secretary must create an administrative record and may consider classified information.<sup>7</sup> The classified information is not to be disclosed except to the reviewing court *ex parte* and *in camera*.<sup>8</sup> An organization is not given notice of an impending designation and not given a hearing or other opportunity to present any information before a designation is made.

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(cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in clause (vi)(I) or (vi)(II); or to a terrorist organization; or

(dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity.

8 U.S.C. § 1182(a)(3)(B)(iv).

Terrorist activity includes politically-motivated violence aimed at noncombatants, but also includes a broad range of criminal conduct, such as highjacking and kidnapping, that does not necessarily have to have a political motive.

6. 8 U.S.C. § 1189(a)(2)(A) states, "Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and the Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate, in writing, of the intent to designate an organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor."

7. 8 U.S.C. § 1189(a)(3).

8. *Id.*

Congress has the power to override the designation,<sup>9</sup> and the Secretary of State can find that changed circumstances support the designation's revocation.<sup>10</sup> Otherwise the classification lasts for two years, when a group can be redesignated a foreign terrorist organization for subsequent two-year terms without limitation on the number of possible redesignations.<sup>11</sup>

### C. *Judicial Review of the Designation*

A designated organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit but must do so no later than thirty days after the designation is published in the Federal Register.<sup>12</sup> The organization may not submit any information to the reviewing court. The reviewing court is limited to considering the administrative record and any classified material submitted to it by the government.<sup>13</sup> The classified information is not disclosed to the organization, but considered by the court *ex parte* and *in camera*. The court may set aside the designation only if the Secretary acted unconstitutionally, illegally, or arbitrarily in making the designation or the designation does not have substantial support in the administrative record or classified information.<sup>14</sup> While a designated organization is permitted this limited judicial review of the designation, a person charged

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9. 8 U.S.C. § 1189(a)(2)(B)(ii) states: "Any designation under this subsection shall cease to have effect upon an Act of Congress disapproving such designation."

10. 8 U.S.C. § 1189(a)(6)(A) states: "The Secretary may revoke a designation (1) or redesignation made under paragraph (4)(B) if the Secretary finds that - (i) the circumstances that were the basis for the designation or redesignation have changed in such a manner as to warrant revocation; or (ii) the national security of the United States warrants a revocation."

11. 8 U.S.C. § 1189(a)(4).

12. 8 U.S.C. § 1189(b)(1).

13. 8 U.S.C. § 1189(a)(3)(B).

14. 8 U.S.C. § 1189(b)(3) states: "The Court shall hold unlawful and set aside a designation the Court finds to be- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or (E) not in accord with the procedures required by law."

under Section 2339B is prohibited from challenging the legality of the designation.<sup>15</sup>

## II. JUDICIAL CONSTRUCTION OF THE STATUTORY PROVISIONS

### A. *Due Process for a Designated Organization*

The Court of Appeals for the District of Columbia concluded in *People's Mojahedin Organization of Iran v. Department of State* that the procedures for designating an organization as a foreign terrorist organization under Section 1189 violate due process if the organization had a presence in the United States when designated.<sup>16</sup> The Secretary of State designated the People's Mojahedin Organization of Iran (PMOI) and the Liberation Tigers of Tamil Elam (LTTE) foreign terrorist organizations. The PMOI and the LTTE sought judicial review claiming that the designation procedures violated due process. The court concluded that "[a] foreign entity without property or presence in this country has no constitutional rights under the due process clause."<sup>17</sup> Because the PMOI and the LTTE claimed no presence in the United States when designated, they were not entitled to due process. The organizations could only rely on the rights given in the designation statute, and those, the court held, had been satisfied.

After the first designation period, the Secretary of State redesignated the PMOI as a foreign terrorist organization and also designated the National Council of Resistance of Iran (NCRI) as an alias for the PMOI. The organizations sought judicial review claiming a due process violation. The D.C. Circuit agreed in *National Council of Resistance of Iran v. Department of State*.<sup>18</sup>

Evidence now showed that the organizations were present in the United States when designated. The government conceded that NCRI had a space in a Washington office building and an interest in an American bank account. Furthermore, the court's review of the record including classified information confirmed that NCRI had a substantial presence in the country. The court con-

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15. 8 U.S.C. § 1189(a)(8).

16. 182 F.3d 17 (1999).

17. *Id.* at 22.

18. 251 F.3d 192 (D.C. Cir. 2001).

cluded that these connections to the country entitled the organizations to due process.<sup>19</sup>

The court then held that the designation as a foreign terrorist organization deprived the organization of liberty and property within the meaning of the due process clause. The designation statute empowers the Secretary of Treasury to order all United States financial institutions possessing or controlling any of the organization's assets to block any financial transactions by a designated organization before the designation is even published in the Federal Register.<sup>20</sup> In addition, a designation means that the organization's fundraising in the United States has been outlawed, for anyone under American jurisdiction who gives resources to the organization is committing a crime. The designation, thus, strips an organization of bank accounts and the ability to raise or receive resources from anyone within the jurisdiction of the United States and, consequently, the court concluded, deprives the organization of a constitutionally protected liberty and property.

The court then stated, "[T]he fundamental norm of the due process clause jurisprudence requires that before the government can constitutionally deprive a person of the protected liberty or property interest, it must afford him notice and hearing."<sup>21</sup> The designation statute, however, does not provide for notice to an organization that a designation is being considered by the govern-

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19. The PMOI had not asserted a presence in the country, but the court found that it, too, was entitled to due process because "the United States is now hoist with its own petard. The Secretary concluded in her designation, which we upheld for the reasons set forth above, that the NCRI and the PMOI are one. The NCRI is present in the United States. If A is B, and B is present, then A is present also." 251 F.3d at 202. *Cf.* 32 County Sovereignty Committee v. Department of State, 292 F.3d 797 (D.C. Cir. 2002), upholding the designations of foreign terrorist organizations where members of the organizations had a presence in the United States, but the organizations had neither a presence nor a property interest in the country. The court concluded, "The Secretary therefore did not have to provide [the designated organizations] with any particular process before designating them as foreign terrorist organizations." *Id.* at 799.

20. 8 U.S.C. § 1189(C) provides: "Upon notification under paragraph (2)(A)(i), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court." The notification referred to is the notice given to the congressional leaders. 8 U.S.C. § 1189(2)(A)(ii).

21. 251 F.3d at 205.



ment and provides for no hearing before the designation. It does provide for judicial review by the D.C. Circuit *after* a designation, but the court concluded that this review does not afford a hearing that satisfies due process. First, the review comes subsequent to the designation when liberty has already been deprived. Furthermore, the judicial review is limited to the administrative record and classified information submitted by the government to the court with no opportunity for the organization to present any information about the propriety of a designation. The court noted that “[t]he unique feature of this statutory procedure is the dearth of procedural participation and protection afforded the designated entity. At no point in the proceedings establishing the administrative record is the alleged terrorist organization afforded notice of the materials used against it, or a right to comment on such materials or the developing administrative record.”<sup>22</sup> The court then held that because a designated organization is not given notice and a meaningful opportunity to be heard, the designation of an organization entitled to due process violates due process. The court stated further that due process for such an organization would normally be satisfied if the Secretary of State gives notice to entities of a pending designation,<sup>23</sup> discloses the unclassified information upon

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22. 251 F.3d at 196. Earlier, the D.C. Circuit had noted about Section 1189: “The statute before us is unique, procedurally and substantively.” *People’s Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17, 19 (1999). While the court’s duty to review “findings” on an “administrative record” looked like a usual task for the court, the situation under this designation procedure was different: “But unlike the run-of-the-mill administrative proceeding, here there is no adversary hearing, no presentation of what courts and agencies think of as evidence, no advance notice to the entity affected by the Secretary’s internal deliberations. . . . Because nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization’s activities, the ‘administrative record’ may consist of little else.” *Id.* The court then stated:

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

*Id.*

23. The court, however, added: “Upon an adequate showing to the court, the Secretary of State may provide this notice after the designation where earlier notification would impinge upon the security and other foreign policy goals of the United States.” 251 F.3d at 208.

which the government is relying, and provides the organizations with “the opportunity to be heard at a meaningful time and in a meaningful opportunity,” which shall at least include the opportunity to present evidence that the groups are not foreign terrorist organizations.<sup>24</sup>

The Secretary of State redesignated the PMOI as a foreign terrorist group. But this time, however, the Secretary gave notice and a hearing as mandated by the D.C. Circuit. PMOI then claimed that the *ex parte* use of the classified information deprived it of a meaningful opportunity to be heard and, thus, due process. The court labeled this claim “colorable”<sup>25</sup> but rejected it because the separation of powers created by the Constitution gives control of classified information to the executive.<sup>26</sup> Furthermore, the court

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24. 251 F.3d at 209. Because the designation would expire four months from its decision, the court stated that it was not vacating the designation but would “remand the questions to the Secretary with instructions that the petitioners 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.” *Id.*

*Cf. Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002). Pursuant to authority under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-07, as amended by the USA Patriot Act, 115 Stat. 272 (Oct. 26, 2001), the President declared a national emergency and the Department of the Treasury designated the Holy Land Foundation a “Specially Designated Terrorist Organization,” an action which froze their United States assets. Relying on *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001), the Holy Land Foundation claimed a due process violation because it had not been given notice or a meaningful opportunity to be heard before the assets were blocked. The court concluded that the D.C. Circuit case did not control because under the IEEPA the action required a Presidentially declared national emergency, and due process in emergency situations is satisfied with notice and a hearing after the seizure of property. *Id.* at 16. *See also* *Global Relief Foundation, Inc. v. O’Neill*, 315 F.2d 748 (7th Cir. 2002) (where assets were also blocked under the IEEPA). The Seventh Circuit concluded, “[T]he Constitution [does not] entitle GRF to notice and a pre-seizure hearing, an opportunity that would allow any enemy to spirit assets out of the United States. Although pre-seizure hearing is the constitutional norm, postponement is acceptable in emergencies.” *Id.* at 754.

25. *People’s Mojahedin Organization of Iran v. Department of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003).

26. “[U]nder the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has ‘compelling interest’ in withholding national security information from unauthorized persons in the course of executive business.” *Id.* (quoting *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (citations omitted)).

noted that due process depends on the particular circumstances of a case,<sup>27</sup> which here involved “the sensitive matter of classified information in the effort to combat foreign terrorism;” due process did not require disclosure of the classified material.<sup>28</sup> Because the Secretary had given the PMOI an opportunity to respond to the unclassified material, due process was satisfied. The court concluded that the presented record supported the Secretary of State’s designation and, therefore, the designation was valid. In so holding, the court indicated that even though Section 1189 does not require notice and a hearing, if the Secretary affords them, a designation will not violate due process.

*B. Due Process for the Defendant in a Section 2339B Prosecution*

Merely giving material support or resources to a terrorist group is not a crime under Section 2339B. A donation is prohibited only if it goes to an organization that has been designated by the Secretary of State. Therefore, the Secretary’s designation is an essential element of a Section 2339B prosecution. If Section 1189’s procedures are followed, no notice or hearing is given. Thus, if the D.C. Circuit’s due process analysis is correct, an essential element of a Section 2339B prosecution may be created in violation of the Constitution.

Defendants charged with violating Section 2339B have claimed that their prosecutions violate due process if the designation of the foreign terrorist organization was made in violation of due process.

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27. “The Due Process Clause requires only that process which is due under the circumstances of the case.” 327 F.3d at 1242.

28. *Id.* at 1242-43. The court continued that even if its assessment of due process was wrong, the error was harmless because the nonclassified information that was disclosed supported the Secretary’s designation. *Id.* at 1243. *See also* Global Relief Foundation, Inc. v. O’Neill, 315 F.3d 748 (7th Cir. 2002). Pursuant to authority under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-07, as amended by the USA Patriot Act, 115 Stat. 272 (Oct. 26, 2001), the President declared a national emergency and the Department of the Treasury designated Global Relief Foundation a “Specially Designated Terrorist Organization,” an action which froze the Foundation’s assets in the United States. The Seventh Circuit concluded, “Administration of the IEEPA is not rendered unconstitutional because that statute authorizes the use of classified information that may be considered *ex parte* by the district court. . . . The Constitution would indeed be a suicide pact . . . if the only way to curtail enemies’ access to assets were to reveal information that might cost lives.” *Id.* at 754.

Trial courts have just begun to confront this issue and have produced different conclusions about it.

The defendants in *United States v. Rahmani*<sup>29</sup> were indicted in the Central District of California for providing material resources to the Mujahedin-e Khalq (MEK). The Secretary of State had designated MEK a foreign terrorist organization as an alias for the NCRI, and the D.C. Circuit had ruled, as we have seen, that one designation of NCRI had violated due process,<sup>30</sup> but that a later designation satisfied due process and was valid.<sup>31</sup> The defendants contended that because the designation procedures of Section 1189 violate due process, the NCRI's designation could not be used in a Section 2339B prosecution.

The government responded that a district court can not decide Section 1189's constitutionality in a criminal case because Section 1189 only authorizes judicial review in the D.C. Circuit, and expressly forbids criminal defendants from challenging the validity of a designation.<sup>32</sup> The court rejected this contention, reasoning that "[b]efore a statute will be construed to restrict access to judicial review there must be clear and convincing evidence of Congressional intent to impose such a restriction. . . . This language does not evince a clear and convincing congressional intent to foreclose judicial review of a designation by other federal courts and, therefore, does not make the D.C. Circuit the sole arbiter of Section 1189's constitutionality."<sup>33</sup> Furthermore, District Judge Takasugi continued, the restriction on review in a criminal case improperly circumscribes judicial duties: "As a district judge I am duty bound to scrutinize the laws applied in my court for conformance with the Constitution. . . . I will not abdicate my responsibilities as a district judge and turn a blind eye to the constitutional infirmities of Sec-

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29. 209 F. Supp. 2d 1045 (C.D. Cal. 2002).

30. *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001).

31. *People's Mojahedin Organization of Iran v. Department of State*, 327 F.3d 1238 (D.C. Cir. 2003).

32. "The government avers that if the D.C. Circuit or the Supreme Court struck down Section 1189 as unconstitutional defendants would then be entitled to raise this defense in instant motion to dismiss. The government is essentially saying that this court is without power to review the constitutionality of Section 1189." 209 F. Supp. 2d at 1053.

33. *Id.* at 1053.

tion 1189 when it supplies a necessary predicate to the charged offense.”<sup>34</sup> Finally, the court concluded that “Section 1189 violates the defendants’ due process rights because defendants, upon a successful Section 2339B prosecution, are deprived of their liberty based on an unconstitutional designation they could never challenge. Accordingly . . . defendants may raise the constitutionality of Section 1189 as a defense. . . .”<sup>35</sup>

*Rahmani* held, however, that the criminal defendants could not prevail simply because the D.C. Circuit had held that one of the alter egos of the MEK had been denied due process. Defendants in a criminal case, the *Rahmani* court concluded, must show prejudice from a due process violation in order to prevail, and these defendants could not show prejudice.<sup>36</sup>

*Rahmani* then sharply veered from the D.C. Circuit’s analysis of Section 1189 and found the designation statute unconstitutional on its face. The court recognized that a law can be facially unconstitutional only if it is invalid under all circumstances and that any constitutional application of the statute defeats the facial challenge.<sup>37</sup> The prosecution argued that the facial challenge to the statute had to fail because the D.C. Circuit had upheld designations, indicating that the statute could be constitutionally applied. *Rahmani*, however, concluded that *People’s Mojahedin Organization of Iran v. Department of State*<sup>38</sup> had upheld the designations not because the procedures were constitutional but only because the organizations were not entitled to due process. In Judge Takasugi’s reading, the D.C. Circuit could not have ruled that the designation procedures satisfied due process because such a constitutional ruling would have violated the justiciability requirements of standing and the prohibition against advisory opinions. Moreover, Section 1189 “should not be immune from facial attack simply because it can be

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34. 209 F. Supp. 2d at 1054.

35. *Id.* at 1054-55.

36. “Prejudice requires a showing of a reasonable probability that, but for the due process violation, the result of the proceeding would have been different. . . . Here, no prejudice could have inured to the NCRI because the same result obtained after the due process defects were purportedly cured. Since no prejudice inured to the NCRI, defendants cannot prove the [necessary] prejudice. . . .” *Id.* at 1055.

37. *See id.* (“the challenger must establish that no set of circumstances exists under which the statute would be valid”).

38. 182 F.3d 17 (D.C. Cir. 1999).

applied to an entity that does not enjoy constitutional rights. If such were the case, no statute would fall to a facial challenge because the statute could always be applied to a person or entity unto whom the statute works no constitutional violation.”<sup>39</sup> In this view, *PMOI* was decided only on standing and said nothing about constitutionality.

The D.C. Circuit had also held that an organization with a presence in the United States and entitled to due process was validly designated after being afforded the notice and hearing the court prescribed.<sup>40</sup> In *Rahmani*, the government argued that this construction by the court of appeals yielded a constitutional application of Section 1189; consequently, it argued, the designation procedures could not be facially unconstitutional. *Rahmani*, however, rejected the D.C. Circuit’s interpretation and stated that a notice and hearing requirement could not be read into Section 1189. Further, the court noted that while statutes should be construed to avoid constitutional problems, reading a notice and hearing requirement into the statute was not simply a matter of statutory interpretation but “impermissible judicial legislation.”<sup>41</sup>

Agreeing with the D.C. Circuit Judge Takasugi stated that notice and a meaningful opportunity to be heard are essential to due process. The court then held that because Section 1189 does not afford organizations these basic rights, it denies them due process in all situations and is facially invalid.<sup>42</sup> The court concluded that “a designation pursuant to Section 1189 is a nullity since it is the product of an unconstitutional statute . . . and cannot be relied upon in a prosecution under Section 2339B.”<sup>43</sup> If this reasoning were correct, all Section 2339B prosecutions are unconstitutional.

In *United States v. Sattar*, Judge Koeltl of the Southern District of New York expressly rejected the *Rahmani* court’s reasoning.<sup>44</sup>

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39. 209 F. Supp. 2d at 1056.

40. *People’s Mojahedin Organization of Iran v. Department of State*, 327 F.3d 1238 (D.C. Cir. 2003).

41. “If I were to accept the government’s ‘construction’ argument, I would obliterate any distinction between a facial and as applied challenge to a statute. A court faced with a facially unconstitutional statute could simply ‘construe’ non-existent provisions into a statute to save it from unconstitutionality.” 209 F.Supp. 2d at 1057.

42. *Id.* at 1058.

43. *Id.* at 1058-59.

44. 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

The charges against the defendants in *United States v. Sattar* included conspiring to provide and providing material resources to the Islamic Group (IG), which had been designated a foreign terrorist organization. Among other arguments, the defendants urged the court to follow *Rahmani* and dismiss the Section 2339B counts “on the ground that the Indictment relies on a designation obtained in violation of due process.”<sup>45</sup> Judge Koeltl stated that “*Rahmani* is not binding . . . and is unpersuasive.”<sup>46</sup>

*Sattar* stressed that Section 1189 prohibited review of the propriety of a designation in the criminal case. Furthermore, the court stated that the defendants lacked standing to raise the constitutional rights of another, the IG, which is what they were trying to do,<sup>47</sup> and the statutory prohibition on judicial review of a designation in a criminal case did not violate the defendants’ right to due process because the issue in the criminal case is nothing more than whether an organization has been designated: “The element of the offense is the designation of IG as an FTO [a foreign terrorist organization], not the correctness of the determination, and the Government would be required to prove at trial that IG was in fact designated as an FTO. . . . The correctness of the designation itself is not an element of the offense and therefore the defendants’ right to due process is not violated by their inability to challenge the factual correctness of that determination.”<sup>48</sup>

This disagreement among courts regarding the due process provided by the statutory scheme has left due process questions open. The D.C. Circuit, authorized by Section 1189 to review designations, has held that the designation statute as written violates the due process rights of organizations with a presence in the United States by not giving them notice of an impending designation and a hearing to contest the designation. That court, however, has also indicated that a notice-and-hearing requirement can be read into

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45. *Id.* at 363.

46. *Id.* at 364.

47. “[T]he Government argues correctly that it is for IG, not the defendants, to raise IG’s due process concerns before a court as provided for under the statute. Litigants, including the defendants, ‘never have standing to challenge a statute solely on the ground that it failed to provide due process to third parties not before the court.’” 272 F. Supp. 2d at 364 (quoting *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183, 196 (2d Cir. 2002)).

48. *Id.* at 367-68.

the procedures for organizations with a United States presence, and if the Secretary meets those requirements, designations satisfy due process. That court has also upheld designations of organizations without an American presence. The D.C. Circuit cases indicate that some, but not all, Section 2339B prosecutions might be based on an essential element, the designation, that had been created in violation of due process. The D.C. Circuit, however, has not addressed how an unconstitutional designation should affect a criminal case.

*Rahmani*, on the other hand, found that the designation procedures as enacted always deny due process and that a notice-and-hearing requirement cannot be read into the statute. If this were correct, all designations are unconstitutional, and all Section 2339B prosecutions are based on an element that has been unconstitutionally created. *Rahmani* continued that even though the designation statute prohibits a criminal defendant from raising any questions about the validity of the designation, defendants could successfully raise as a defense to a criminal prosecution that the designation had been made in violation of due process.

*Sattar* said nothing about when, if ever, the designation procedures violate due process. A criminal defendant can merely litigate whether the Secretary of State had designated an organization, not whether the Secretary violated due process in making a designation. The statute states that only the D.C. Circuit can rule on whether a designation has violated due process, and then it can do so only when it has been challenged by a designated organization. *Sattar* did not explicitly state what should happen in a Section 2339B prosecution if the designation were successfully challenged by the organization, but *Sattar* indicates that if it is not challenged, it can be used as an essential element in a Section 2339B prosecution.

Taken together, these cases raise a number of interrelated issues. Do the designation procedures violate due process? If so, do designations always violate due process or only sometimes? If the designation procedure violated due process, can it be used as an essential element in a Section 2339B prosecution? If such a designation cannot be used as an essential element, can review of the constitutionality of an element's creation be prohibited in the criminal case?



### III. THE PROCESS DUE AN ORGANIZATION UNDER SECTION 1189

To satisfy due process, an organization must be afforded an opportunity for a meaningful hearing to contest the designation and notice of an impending designation. Organizations without a presence in the United States, however, are not entitled to due process and can be validly designated with the statutorily-prescribed procedures. Whether a notice-and-hearing can be read into the statutory scheme for the designation organizations entitled to due process is unclear.

#### A. *The Notice and Hearing Requirement*

Organizations entitled to due process are clearly denied that constitutional right if they are not afforded notice of an imminent designation and a meaningful opportunity to be heard. The designation deprives the organization of a property interest, and the Fifth Amendment commands that no one be deprived of life, liberty, or property without due process of law. While due process is a flexible concept,<sup>49</sup> its procedural core is clear. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"<sup>50</sup> Notice of the government's proposed action is necessary for a meaningful hearing, and due process also requires notice.<sup>51</sup> The procedures for designating a foreign terrorist organization, however, do not give the organization notice of the impending designation and do not provide for any kind of hearing before the designation. The statutorily-authorized designation procedures do not afford due process to organizations entitled to that constitutional right.

#### B. *Due Process for an Organization Without a United States Presence*

The Court of Appeals for the District of Columbia concluded that an organization with a presence in the United States could not

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49. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

50. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 522 (1965)).

51. See *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). ("The core of due process is the right to notice and a meaningful opportunity to be heard.").

be validly designated without notice and a hearing,<sup>52</sup> but that other organizations could be.<sup>53</sup> *Rahmani*, however concluded that while totally foreign groups may not have standing to raise the due process claim, due process requires that all organizations, including those without a United States presence, be given notice and a hearing before a designation.<sup>54</sup>

Although the Supreme Court has not ruled on the designation procedures, Court cases from a related area, the exclusion of aliens from the country, indicate that *Rahmani* is wrong. Aliens without a presence in the United States indeed do not have standing to raise a due process claim, but the actions taken against such aliens, even if the actions would have violated the Fifth Amendment if taken against someone with due process rights, are perfectly valid. Such aliens are due no particular constitutional process, and because they are not, they are not denied due process even if they had standing to bring a Fifth Amendment claim.

Thus, aliens who have established a presence in the country can be deported only if due process, including notice and a meaningful hearing, is afforded.<sup>55</sup> On the other hand, an alien first seeking admission to the country has no due process rights.<sup>56</sup> Such an

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52. *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 201-02 (D.C. Cir. 2001). *See also* *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (foreign corporation that had property in the United States seized through eminent domain entitled to protection of Fifth Amendment).

53. "A foreign entity without property or presence in this country has no constitutional rights under the due process clause." *People's Mojahedin Organization of Iran v. Department of State*, 182 F.2d 17, 22 (D.C. Cir. 1999). *See, e.g.,* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.").

54. *See* 209 F. Supp. 2d at 1056-58.

55. *See, e.g.,* *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953):

It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person with the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law. Although it later may be established . . . that [an alien] can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. Although Congress may prescribe conditions for the expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.

56. *See, e.g.,* *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege

alien does not have standing to raise a due process challenge,<sup>57</sup> but this is not simply a matter of standing. Instead, as the Supreme Court has made clear, “[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”<sup>58</sup> Although Congress may give the executive the power to exclude without affording the alien notice or an opportunity to be heard, due process has been satisfied because “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”<sup>59</sup> The alien may not have standing to raise a due process claim,<sup>60</sup> but even

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regarding his application, for the power to admit or exclude aliens is a sovereign right.”); *accord* *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-60 (1892).

57. *See, e.g.*, *Allende v. Schultz*, 845 F.2d 1111, 1114 n.4 (1st Cir. 1988) (where the court stated, “*Kleindienst v. Mandel*, 408 U.S. 753 (1972), established that an alien has no standing to bring a constitutional challenge to the denial of a visa. . . .”).

58. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

59. *Id.* at 544. *See also* *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (Congress may give an executive officer final authority to determine whether alien should be excluded and “if it did so, his order was due process of law. . . .”).

60. *See also* *Johnson v. Eisentrager*, 339 U.S. 763 (1950). After World War II concluded, German nationals who never had a presence in the United States were convicted by a military commission in China for violating laws of war. The Court held that the aliens were not entitled to habeas corpus in the civilian courts to challenge their convictions, stating that the “ultimate question in this case is one of jurisdiction of civil courts. . . .” *Id.* at 765. The prisoners could not bring the action because they had no presence in the country. “[T]he privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign. . . .” *Id.* at 777-78.

The German nationals, however, were not just denied access to the courts; they also were not entitled to the due process that would have been afforded to a person in the country. The Court held that the military had the authority to try the aliens abroad for violating the laws of war. “The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established. . . . It being within the jurisdiction of a Military Commission to try the prisoners, it was for it to determine whether the laws of war applied and whether an offense against them had been committed.” *Id.* at 786-788. Because of their status they were not just denied access to the civil courts; they could also be validly tried in a manner that would have ordinarily denied due process to a citizen. The government had committed no due process violation.

if he did, an exclusion following the prescribed procedures gives all the process that was due and does not violate the Constitution.<sup>61</sup>

The designation of foreign terrorist groups is similar to the exclusion decision. The direct consequence to a designated organization is that “the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets. . . .”<sup>62</sup> Clearly, if a group does not have a presence in the United States, a group does not have assets in the United States. Instead, the practical effect on the totally foreign organization is to prevent such a designee from putting money into a United States financial institution, which is akin to seeking entry into the country. Just as with aliens seeking physical entry into the country, Congress has the authority to devise any procedure for determining whether a foreign organization should be allowed to place its assets in the country, and whatever is prescribed is the process that is due. Even if a totally foreign organization did have standing to raise a due process claim, it would not matter. The congressionally-mandated designation procedure is all that is due. Following it does not violate due process, and a Section 2339B prosecution based on such a designation would not be one where an essential element of the crime had been created in violation of due process.

Organizations without a United States presence, however, are little concerned with the direct consequences of the designation.<sup>63</sup>

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61. Judge William Fletcher of the Ninth Circuit contends that standing determinations are really decisions about the merits of a case and are indistinguishable from determining whether the plaintiff has stated a claim upon which relief can be granted. He concludes, “The essence of a standing inquiry is . . . the meaning of the specific . . . constitutional provision upon which the plaintiff relies rather than a disembodied and abstract application of general principles of standing law. . . . [T]he merits of a standing claim must always depend, in the end, on the meaning of the . . . constitutional clause upon which the plaintiff relies.” William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 239 (1988). Thanks to Donald H. Zeigler for pointing out this article to me.

62. 8 U.S.C. § 1189(a)(2)(C).

63. The designation, however, does not just exclude an organization from utilizing a bank in the United States. Assets can be frozen in any United States financial institution, and an American bank may operate abroad. A freezing order under Section 1189 would seem to require the blocking of an organization’s assets in, for example, a London branch of an American bank. See 31 C.F.R. § 597.319(a) (2001) (definition of “United States financial institution” includes “[a]ny financial institution

What truly concerns these organizations is that they cannot raise funds from Americans because an American giving them money commits a crime under Section 2339B. This consequence, however, does not affect the constitutional rights of the organization.<sup>64</sup> The prescribed procedures violate due process only when they are used to designate an organization with a United States presence.

### C. *The Reading of Notice and a Hearing into Section 1189*

A Section 2339B prosecution based on the designation of an organization with American ties will have an element created in violation of the Constitution unless Section 1189 is interpreted to require notice and a hearing as the D.C. Circuit commanded. Is it proper to interpret the designation statute as containing these constitutionally necessary requirements when Congress did not authorize them?

In *PMOI*, the D.C. Circuit upheld a designation of an organization with an American presence after the Secretary of State afforded that organization notice and a hearing. This indicated that the court found it proper to read those due process requirements in Section 1189. *Rahmani*, in contrast, concluded that the designation procedures could not be interpreted to authorize a notice-and-hearing requirement through statutory interpretation but only through an improper act of judicial legislation. The line between statutory interpretation to avoid constitutional problems and judicial legislation is unclear.<sup>65</sup> The Supreme Court has only offered

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organized under the laws of the United States, including such financial institution's foreign branches"). The order, then, might go beyond the equivalent of excluding an alien from the geographic United States, but if the government can validly regulate the activity in a foreign branch of a United States institution, an organization with assets in the foreign branch should have a sufficient connection with the United States to give it due process rights entitling it to notice and a hearing.

64. An alien without a presence in the United States does not have a right to raise money here. *Cf.* *Kleindienst v. Mandel*, 408 U.S. 753, 771 (1972) ("[A]n alien who seeks admission . . . has no First Amendment rights while outside the Nation. . . .") (Douglas, J., dissenting).

65. The difficulty of determining whether constitutionally-saving restrictions can be read into a statute is indicated by interpretation of another aspect of Section 2339B. In *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), the plaintiffs said that they wished to give what they feared would be considered material support in violation of Section 2339B to designated foreign terrorist groups and sought an injunction barring enforcement of that act against them. The Ninth Circuit rejected most of the

guidelines, not a rule, on how to find the demarcation.<sup>66</sup> Perhaps

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plaintiffs' arguments but did conclude that the term "personnel" included in the definition of what constitutes material support or resources for the purposes of Section 2339B was impermissibly vague and would infringe First Amendment rights. The government suggested that "personnel" be interpreted to avoid the free speech problem by limiting it to acts performed "under the direction and control" of the terrorist organization. The Ninth Circuit responded, "While we construe a statute in such a way as to avoid constitutional questions . . . we are not authorized to rewrite the law so it will pass constitutional muster." *Id.* at 1138.

In contrast, the court in *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002), did narrowly construe "personnel" to avoid constitutional problems. The defendant was charged with violating Section 2339B and contended that providing personnel to a designated group carried the risk that people could be convicted for merely associating with the organization. The court responded that the plain meaning of the term meant either "'a body of persons usu[ally] employed (as in a factory, officer, or organization),' or 'a body of persons employed in some service.'" *Id.* at 572, (quoting Webster's Ninth New Collegiate Dictionary 878 (1989); *Bakal Bros., Inc. v. United States*, 105 F.3d 1085, 1089 (6th Cir. 1997) (citations omitted)). The court continued, "Thus, in Section 2339B, providing 'personnel' . . . means that the persons provided to the foreign terrorist organization work under the direction and control of that organization. . . . So construed. . . there is no danger, let alone a substantial one, that Section 2339B will be applied to infringe upon legitimate rights of association." *Id.* at 572-73. In other words, *Lindh* accepted a reading of "personnel" that *Humanitarian Law Project* maintained was judicial legislation. *Cf.* *United States v. Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002). In interpreting Section 2339B on the government's application for pretrial detention of defendants charged with providing material support or resources to a designated foreign terrorist organization, *Goba* after reviewing *Humanitarian Law Project* and *Lindh* stated: "It is easy to see how someone could be unsure about what [Section 2339B] prohibits with the use of the term 'personnel,' as it blurs the line between protected expression and unprotected conduct. . . . At this stage of the proceeding, and with due respect to the Court of Appeals for the Ninth Circuit, I accept the reasoning of the District Judge in *Lindh*. . . ." *Id.* at 193-94. *But see Sattar*, 272 F. Supp. 2d at 359 ("the standards set out [in *Lindh* for 'personnel'] are not found in the statute, do not respond to the concerns of the Court of Appeals in *Humanitarian Law Project*, and do not provide standards to save the 'provision' of 'personnel' from being unconstitutionally vague as applied to the facts alleged in the Indictment").

66. Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1197-98 (1999) summarizes the Court's approach to statutory interpretation:

The justices start with the words of a statute when searching for its meaning in the absence of "a clearly expressed legislative intent to the contrary." [*Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).] The Court does not apply the plain meaning rule "in rare cases [when] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." [*Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).] In such cases, the legislator's intentions control. Similarly, the Court does not read a statute literally if the result would be absurd and some other interpretation is available that is consistent with legislative intent.

the best illustration is *Aptheker v. Secretary of State*,<sup>67</sup> in which the Supreme Court held a portion of the Subversive Activities Control Act of 1950,<sup>68</sup> which made it unlawful for a member of an organization that had been ordered to register as a Communist organization to obtain a passport, unconstitutional because it swept within it both knowing and unknowing members. The Court refused to read absent restrictions into the statute that would have rendered the law constitutional:

It must be remembered that "although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ." or judicially rewriting it. . . . To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting.<sup>69</sup>

This language implies that a notice-and-hearing requirement should not be read into the designation procedures. Congress did not enact that requirement, and the clarity and preciseness of the enacted procedures indicate that the omission was intentional. The absence of notice and a hearing fits in with the scheme that limits the procedural rights of the organizations. Thus, the Secretary never has to give direct notice to the organization even after it is designated; publication in the Federal Register suffices. There is but a thirty day window for judicial review, and that review is limited to the administrative record compiled by the Secretary and classi-

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The problem, of course, is that the justices disagree about how these principles apply in individual cases.

67. 378 U.S. 500 (1964).

68. 50 U.S.C. § 785 (repealed 1993).

69. 378 U.S. at 515 (quoting *Scales v. United States* 367 U.S. 203, 211 (1961)). See also *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991) ("[The statute's] language is plain and unambiguous. What the government asks is not construction of a statute, but, in effect, an enlargement of it by the court . . . . To supply omissions transcends the judicial function.").

fied information revealed to the court but not the organization. The organization is not permitted to present information even for the purposes of judicial review. Furthermore, Section 1189 clearly authorizes the same procedures for all organizations; no distinction is made between groups with or without a United States presence. Reading a notice-and hearing requirement into Section 1189 for some organizations is not merely interpreting the statute Congress did enact but inserting something into it purposely left out, an act akin to amending the statute.

The Court, however, has on other occasions read into a statute a procedure that seems to have been purposely omitted by Congress. Most pertinent here are cases considering legislative schemes that have prohibited judicial review in a criminal proceeding of an administrative action that has furnished an essential element of the crime. A number of times, instead of finding the legislative scheme unconstitutional, the Court has found a right of review in the criminal case regardless of the prohibition.<sup>70</sup> If courts can validly find a right of judicial review that Congress has not authorized, perhaps courts can just as validly find a notice-and-hearing requirement that Congress has not enacted.<sup>71</sup>

If courts do not have that power, then all designations of organizations entitled to due process are unconstitutional. If courts do have that power, then such designations are constitutional if the Secretary has afforded the prescribed notice and hearing. Until the Supreme Court decides the matter, we can expect lower courts considering the issue to differ. Meanwhile, nothing indicates that the Secretary is giving notice and a hearing to organizations entitled to due process except when the D.C. Circuit has specifically ordered it

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70. See, e.g., *Touby v. United States*, 500 U.S. 160 (1991); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *Adamo v. United States*, 434 U.S. 275 (1978); *Dickinson v. United States*, 346 U.S. 389 (1953); and *Estep v. United States*, 327 U.S. 114 (1946). These cases are discussed more fully *infra*, notes 81-118 and accompanying text.

71. The words of Henry Hart and Albert Sacks bear repeating, "Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).



for a particular group. What effect should such a constitutional violation have on Section 2339B prosecutions?

#### IV. THE PROCESS DUE AN ACCUSED IN A SECTION 2339B PROSECUTION

A crime is not constitutionally created unless all elements of the crime are constitutionally created, and a defendant charged with such a crime has standing to challenge the constitutional defect. An accused in a Section 2339B prosecution has the right of judicial review with regard to whether an element of his prosecution - the designation of the foreign terrorist organization - was made in violation of due process.

##### A. *Prosecutions When An Essential Element Has Been Unconstitutionally Created*

Early in our history, the Supreme Court held that there were no federal common law crimes and that Congress had to enact a statute making conduct criminal for that conduct to constitute a federal crime.<sup>72</sup> As the Court has more recently said, “[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.”<sup>73</sup> For a crime to be valid, the criminal statute and all the elements of the defined crime must have been validly enacted. If, taking an extreme example, a criminal law were enacted by only one House of Congress, a prosecution under that statute would be unconstitutional because the conduct would not have been made criminal by a statute. Similarly, a crime can be valid only if all its elements have been validly enacted. If, for example, the statutory scheme of which Section 2339B is a part gave the designation power not to the Secretary of State but to either House

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72. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). See Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612, 615 (1992) (The effect of *Hudson and Goodwin* “was that only the legislature could create crimes in the federal government.”); see also Edmund H. Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51, 53 (1943) (“There are no common-law crimes within the areas of the federal government. . . . Hence if an act is to constitute a crime, it must be created by statute, and by a statute only.”).

73. *Liparota v. United States*, 471 U.S. 419, 424 (1985).

alone, the resulting designations would not be validly enacted and could not act as an essential element in a Section 2339B prosecution.<sup>74</sup>

Here the existing scheme does not delegate the designation authority to one House of Congress but to the Secretary of State. Congress can delegate the authority to create elements of a crime to administrative officers and agencies.<sup>75</sup> The due process issue in a Section 2339B prosecution, however, is not whether Congress can delegate the designations to the Secretary, but whether a designation, and therefore an essential element of a prosecution, has been made by constitutionally authorized procedures. Just as a criminal “law” cannot be used to prosecute an accused if Congress adopted the provision by unconstitutional procedures, Congress cannot create crimes by mandating that others use unconstitutional procedures to create an element of a crime. Congress can delegate to others, but it cannot delegate what it does not have, the power to act unconstitutionally.

*Sattar* missed the point of the due process concern in a Section 2339B prosecution by concluding that the issue in a Section 2339B prosecution is only whether the organization had been designated, not “the correctness of the designation itself. . . .”<sup>76</sup> The question is not just whether the Secretary made the designation, and it is not whether the Secretary made proper policy choices in designating an organization. Instead, the issue is the constitutionality of the procedures to create an element of the crime, for a person can only be constitutionally convicted if a crime has been validly created. The government apparently conceded in *Rahmani* that if the Supreme Court found that a designation violated due process because notice and a hearing were not afforded, that designation could not

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74. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

75. See *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (“[W]hen Congress had legislated and indicated its will, it could give to those who were to act under such general provision ‘power to fill up the details’ by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress . . . .”); see *Schwenk*, *supra* note 72, at 58 (“Once it is admitted that the creation of a criminal offense is not the ‘exclusive’ function of the legislature, there is no reason why the administrative agency may not participate in the creation of a criminal offense under the rules of delegation of power, i.e., in the event that the legislature has set a sufficient primary standard in the act.”).

76. *United States v. Sattar*, 272 F. Supp. 2d 348, 368 (S.D.N.Y. 2003).

be used in a Section 2339B prosecution.<sup>77</sup> That concession indicates the obvious - a valid prosecution requires more than just the mere fact of a designation but a constitutionally-valid designation. A crime is not a crime unless all its elements are constitutionally created.

A Supreme Court ruling that a particular designation violated due process is not necessary to make a Section 2339B prosecution invalid. Assume that a designation were made on January 1; a person gave the organization money on February 1; and the Supreme Court held that the designation violated due process on June 1. If all that mattered is whether a designation had been made, the donor could still be convicted of the crime. The government's position as indicated in *Rahmani*, however, seems to be that the person could be validly convicted on April 1 before the Court ruled, but not on August 1. But if the August 1 conviction could not stand because the designation was unconstitutional, then the April 1 conviction must also have been invalid. The unconstitutionality did not occur when the Court ruled. If the Court finds a designation unconstitutional, it would be holding that the designation was unconstitutional when made. The designation would have been null at its inception. The issue is not whether the Supreme Court has ruled but whether all the necessary elements of the crime have been validly created. If they have not been, then the crime does not exist under our Constitution.

### B. *The Criminal Defendant's Standing*

A defendant in a Section 2339B prosecution has standing to raise the claim that an essential element in his prosecution was unconstitutionally created. District Judge Koeltl in *Sattar* misunderstood the nature of the claim when he concluded that the defendants lacked standing because they were merely raising another's constitutional rights.<sup>78</sup> The Section 2339B defendant is not just a third party trying to raise the constitutional rights of an-

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77. See *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1053 (C.D. Cal. 2002) ("The government avers that if the D.C. Circuit or the Supreme Court struck down Section 1189 as unconstitutional defendants would then be entitled to raise this defense . . . .").

78. See *Sattar*, 272 F. Supp. 2d at 364 ("While the defendants can challenge the allegation that they violated § 2339B by providing material support to an FTO or could

other.<sup>79</sup> The accused is not asking the court to rescind a foreign terrorist organization designation and the criminal court clearly does not have that authority. Instead, the Section 2339B defendant is asking the criminal court to find that an element essential to his prosecution was unconstitutionally created and that it, therefore, cannot be used in his case. If the criminal court agrees, the defendant is directly affected because he could not be prosecuted, but the designation of the organization would still remain in effect until, if ever, the D.C. Circuit found the designation invalid. The government could still freeze the organization's assets, but it could not prosecute the defendant.

Imagine again that the Supreme Court found that a particular designation was made in violation of due process. If an accused were then prosecuted for material support to that organization, he would have standing to raise the validity of the designation. With regard to standing, a defendant is in precisely the same position even if the Supreme Court has not ruled on the designation that forms an essential element of his prosecution. A defendant is directly asserting the right to be tried only for a crime that was constitutionally created.<sup>80</sup> If the accused is to be denied review of the constitutionality of the procedures used to designate a foreign terrorist organization, it must be for some other reason than that he lacks standing.

### C. *The Prohibition of Judicial Review in the Criminal Case*

Can Congress, as in Section 1189,<sup>81</sup> prohibit a defendant from challenging the validity of a statute under which he is prosecuted?

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contest that IG was in fact, designated as an FTO, they cannot assert the due process claims of the FTO and challenge the underlying designation.”).

79. *Cf.* Center for Reproductive Law and Policy v. Bush, 304 F.3d 183, 196 (2d Cir. 2002), *relied on by* Sattar, 272 F. Supp. 2d at 364 (“Plaintiffs’ allegation, simply put, is that the vague language of the Standard Clause causes the foreign [non-governmental organizations] to be overly cautious in avoiding interaction with plaintiffs, which in turn harms plaintiffs’ speech and association interests. . . . As plaintiffs do not assert harm to their own interest in receiving due process of law, this is precisely the sort of claim that the prudential standing doctrine is designed to foreclose.”).

80. *See* Allen v. Wright, 468 U.S. 737, 751 (1984) (“The requirement of standing . . . has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”).

81. 8 U.S.C. § 1189(a)(8) (2003).

That question is answered by examining a series of Supreme Court cases that granted a right of review in a criminal case of an administrative action that established an element of a criminal offense even though Congress had not authorized, or even seemingly prohibited, such review. In *Estep v. United States*<sup>82</sup> the defendant was convicted of violating the Selective Service Act by refusing to be inducted into the armed forces. Estep claimed that he should have been exempted from the draft because he was a religious minister, but his local draft board ordered his induction. The Selective Service Act made a local draft board's classifications final and did not permit any judicial review of a board's classification. Even so, the Supreme Court held that Estep was entitled to a limited review of the administrative action in a criminal case. The Court first reasoned that a draft board's classification was lawful only if the board had jurisdiction to issue the classification<sup>83</sup> and then concluded:

We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency. . . . The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions made by the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction is reached only if there is no basis in fact for the classification which it gave the registrant.<sup>84</sup>

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82. 327 U.S. 114 (1946).

83. The Court stated, "It is only orders 'within their respective jurisdictions' that are made final. It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution [for failing to submit to induction.]" 327 U.S. at 120.

84. 327 U.S. at 122-23; *accord* *Dickinson v. United States*, 346 U.S. 389 (1953).

The Court thus ruled that the defendant could have review in the criminal case of whether there was no basis in fact for the administrative action that had created an element of the prosecution.

The Court reached a similar result in *Adamo v. United States*.<sup>85</sup> *Adamo Wrecking Company* was indicted for violating an “emission standard” issued by the Administrator of the Environmental Protection Agency, who was authorized by the Clean Air Act to issue such regulations. That Act permitted judicial review by affected parties within thirty days after the regulation’s promulgation in the D.C. Circuit. Further, the Act expressly prohibited review in a criminal case of an administrative action of the Administrator that could have been reviewed in the D.C. Circuit.<sup>86</sup> Even with this specific statutory prohibition, the *Adamo* court held that the accused is entitled to judicial review of the administrative action in a criminal case. Justice Rehnquist, writing for the Court, reasoned that under the part of the statutory scheme at issue, Congress had authorized the Administrator to issue “emission standards,” which Congress intended to be regulations of a certain sort, not merely any rule that the Administrator chose to label an “emission standard.”<sup>87</sup> Consequently, the review restriction applied only to regulations that were “emission standards.” The Court concluded that, in spite of the explicit prohibition on review in a criminal case, Congress did not intend to make the Administrator’s decision that a regulation was an “emission standard” conclusive in a criminal case. Accordingly, the court in a criminal proceeding has the authority to determine whether a regulation that created an essential element of the crime is indeed an “emission standard.” The Court noted that any doubts on the matter should be resolved in the defendant’s favor.<sup>88</sup> *Adamo*

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85. 434 U.S. 275 (1978).

86. “Action of the Administrator with respect to which review could have been obtained [in the D.C. Circuit] shall not be subject to judicial review in civil or criminal proceedings for enforcement.” 42 U.S.C. § 1857h-5(b)(2), *quoted in Adamo*, 434 U.S. at 277.

87. “Congress intended, within broad limits, that ‘emission standards’ be regulations of a certain type, and it did not empower the Administrator, after the manner of Humpty Dumpty in *Through the Looking-Glass*, to make a regulation an ‘emission standard’ by his mere designation.” *Adamo*, 434 U.S. at 283.

88. “At the very least, it may be said that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that where there is some ambiguity

concluded that the regulation at issue was not an “emission standard,” and sustained the trial court’s dismissal of the indictment.

The issue in *Touby v. United States*<sup>89</sup> was the temporary scheduling of drugs. In the Controlled Substance Act,<sup>90</sup> Congress delegated to the Attorney General the authority to classify controlled substances, with those placed on Schedule I carrying the most serious penalties for violation of the drug laws. The law prescribes procedures to be used and factors that the Attorney General must consider in the scheduling. The Act also permits any “aggrieved person” to challenge a permanent scheduling in a court of appeals.<sup>91</sup>

This permanent scheduling takes some time, and the law also permits the Attorney General to temporarily schedule drugs under streamlined procedures to move quicker against fast-emerging “designer drugs.”<sup>92</sup> A temporary scheduling remains in effect for one year, which gives the Attorney General time for a permanent scheduling. While the Act provides for judicial review of a permanent order, it states that a temporary scheduling “is not subject to judicial review.”<sup>93</sup> The *Touby* defendants, convicted of making a substance that had been temporarily placed on Schedule I by the Attorney General, contended that the judicial-review prohibition violated the Constitution.

*Touby* reiterated the basic principle about congressional delegations to others:

Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act]

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in a criminal statute, doubts are resolved in favor of the defendant.” 434 U.S. at 284-85, (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)).

89. 500 U.S. 160 (1991).

90. 21 U.S.C. § 801 (2003).

91. *Touby*, 500 U.S. at 163.

92. The Court explained: “Drug traffickers were able to take advantage of this time gap by designing drugs that were similar in pharmacological effect to scheduled substances but differed slightly in chemical composition, so that existing schedules did not apply to them. These ‘designer drugs’ were developed and widely marketed long before the Government was able to schedule them and initiate prosecution.” *Id.*

93. 21 U.S.C. § 811(h)(6) (2003), *quoted in Touby*, 500 U.S. at 163.

is directed to conform, such legislative action is not a forbidden delegation of legislative power.”<sup>94</sup>

The defendants argued that the prohibition on judicial review violated the nondelegation doctrine because “the purpose of requiring an ‘intelligible principle’ is to permit a court to ‘ascertain whether the will of Congress has been obeyed.’”<sup>95</sup>

The Court rejected this argument but only by finding a right of judicial review in the criminal case in spite of the express statutory prohibition. The Court noted that a permanent scheduling order was subject to judicial review and continued:

Even before a permanent scheduling order is entered, judicial review is possible under certain circumstances. The United States contends, and we agree, that [the prohibition on judicial review] does not preclude an individual facing criminal charges from bringing a challenge to a temporary scheduling order as a defense to a prosecution. . . . This is sufficient to permit a court to “ascertain whether the will of Congress has been obeyed. . . .” Under these circumstances, the nondelegation doctrine does not require, in addition, an opportunity for preenforcement review of administrative determinations.<sup>96</sup>

Although *Touby* does not expressly state it, the implication is that without such judicial review that statutory scheme would have violated the essential checks and balances of the Constitution. Only the fundamental charter would have given the Court the authority to find a right of review when Congress had expressly forbidden it, and the Court did not disagree with the opinion of Justice Marshall, joined by Justice Blackmun, who in concurring explicitly stated the constitutional basis of the decision. He wrote separately to

emphasize . . . that the opportunity to a defendant to challenge the substance of a temporary scheduling order in the course of criminal prosecution is essential to the result in this case . . . . Because of the severe impact of

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94. 500 U.S. at 165 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

95. 500 U.S. at 168 (internal citations and quotations omitted).

96. 500 U.S. at 168-69 (quoting *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989)).



criminal laws on individual liberty, I believe that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law. . . . We must therefore read the Controlled Substances Act as preserving judicial review of a temporary scheduling order in the course of a criminal prosecution in order to save the Act's delegation of lawmaking power from unconstitutionality.<sup>97</sup>

The constitutional basis for the right of review in criminal cases is also indicated by *Estep* and *Adamo*. Both of those cases relied on what might be characterized as creative statutory interpretations,<sup>98</sup> but the interpretations were apparently driven by notions that the statutory schemes without the judicial review in the criminal cases were fundamentally unfair.<sup>99</sup> If, as the results in *Touby*, *Estep*, and *Adamo* indicate, judicial review in a criminal case is constitutionally required to ensure administrative conformance to congressional di-

97. 500 U.S. at 169-70.

98. Justice Stewart dissenting in *Adamo* stated that the majority's statutory interpretation was "tampering with the plain statutory language. . . ." 434 U.S. at 291.

99. *Estep* indicated this when it said, "We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency. We are loathe to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused." 327 U.S. at 122. *Estep* also noted that habeas corpus was available when a person was held in violation of the Constitution or the laws and stated the defendant after conviction could "challenge the jurisdiction of the local board. . . . The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow." *Id.* at 124-25.

A number of the fairness concerns cited by *Adamo* apply at least as much to Section 2339B prosecutions. Thus, it could be said for a Section 2339B as it was for the Clean Air Act defendant that "[n]ot only is the Administrator's promulgation of the standard not subject to judicial review in the criminal proceeding, but no prior notice of violation from the Administrator is required as a condition for criminal liability." 434 U.S. at 283. *Adamo* also stated, "The severity of the scheme is accentuated by the fact that persons subject to the Act, including innumerable small businesses, may protect themselves against arbitrary administrative action only by daily perusal of proposed emission standards in the Federal Register and by immediate initiation of litigation in the District of Columbia to protect their interests." *Id.* at n.2. Anyone giving money or other aid to an organization can only know if they are committing a crime by regular reading of the Federal Register, but unlike in *Adamo*, the potential donor has no opportunity to challenge the administrative action in the D.C. Circuit.

rectives when the administrative action furnishes an essential element of the crime, then judicial review of such an administrative action must be constitutionally required in a criminal case to ensure conformance with the more fundamental law set out in the Constitution. This is precisely what the Court indicated in the most significant in this series of cases, *United States v. Mendoza-Lopez*.<sup>100</sup>

In *Mendoza-Lopez*, the defendants were indicted for the felony of entering the United States after having been deported.<sup>101</sup> They sought to dismiss the indictment claiming their predicate deportations resulted from a fundamentally unfair hearing denying them due process. The immigration law at issue did not permit judicial review of the deportation order itself, and the Court concluded that the criminal statute did not permit a challenge to a predicate deportation order in the criminal case either.<sup>102</sup> Confronted with a statutory scheme that prohibited judicial review of the administrative action, the Court found the scheme unconstitutional.

The Court stated that the crime could not be based merely on the fact that a deportation had been ordered. Rather, the proceeding that ordered the deportation had to afford due process: "If the statute envisions that a court may impose a criminal penalty for re-entry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirements of due process."<sup>103</sup> Justice Marshall's opinion for the Court concluded that the alien must have judicial review in the criminal case of whether the administrative action had afforded due process:

Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding. . . . This principle means at the very least that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative

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100. 481 U.S. 828 (1987).

101. *Id.* See 8 U.S.C. § 1326 (2003).

102. "The text and background of [the criminal statute] thus indicate no congressional intent to sanction challenges to deportation orders in [the criminal] proceedings. . . ." 481 U.S. at 837.

103. 481 U.S. at 837.

means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense. . . . Depriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation is used to establish an element of the offense.<sup>104</sup>

In *Mendoza-Lopez*, the aliens had been ordered deported in a proceeding that had not afforded due process, but could not be judicially reviewed. When the government attempted to use that administrative order as an essential element in a prosecution, the Court held that the defendants had the right of review in the criminal case of the constitutional validity of the order. The Court held that because the deportation proceeding denied due process, it “may not be used to support a criminal conviction. . . .”<sup>105</sup>

Superficially, the situation in *Mendoza-Lopez* appears different from a Section 2339B prosecution. In *Mendoza-Lopez*, the alien was ordered deported in a hearing that denied him due process but the administrative process did not permit review of the order. When the alien was subsequently prosecuted for reentry into the country after that deportation order, the government sought to deny him the opportunity to challenge the fairness of the deportation proceeding in the criminal case. In a Section 2339B prosecution, an organization is designated a foreign terrorist organization without affording the organization the notice and hearing required by due process, but the organization can seek judicial review.

On the other hand, at a fundamental level, the two situations are the same. A determination that violated due process is made – a deportation order or a designation – and the government seeks to use that determination as an essential element in a subsequent criminal prosecution. The precise nature of the constitutional defect is irrelevant; the constitutional defects are alike in that in each an essential criminal element was created in violation of the Constitution, and in each the statutory scheme did not grant *the accused* the right to have judicial review of the unconstitutionality. Since

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104. 481 U.S. at 837-38 (emphasis in original).

105. 481 U.S. at 842.

the accused was granted the right of review in the criminal case of the element's constitutionality in *Mendoza-Lopez*, an accused in a Section 2339B also has a right of review of the constitutionality of that crime's elements.

Even so, *Sattar* found no right of review in a Section 2339B prosecution and specifically sought to distinguish *Mendoza-Lopez* and *Touby*. Judge Koeltl concluded that *Mendoza-Lopez* was not controlling. In the statutory scheme at issue in *Mendoza-Lopez*, no review of any sort was authorized of the administrative action while in the statutory scheme of which Section 2339B is a part, the organization is permitted judicial review of the designation: "Raising the defense in the criminal cases provided those defendants [in *Mendoza-Lopez*] the only meaningful review of the administrative proceeding affecting them. In this case, it is clear that Congress provided [the designated organization] with judicial review of its own designation. The administrative determination of the designation of an FTO is potentially subject to extensive judicial review but that review is not to occur as a defense in a criminal proceeding."<sup>106</sup>

In other words, because others could challenge the administrative action, a Section 2339B accused cannot. This stands the accepted prohibition on contesting the rights of others on its head. Under Judge Koeltl's theory, an accused can establish his right not to be prosecuted for a crime containing an essential element created in violation of due process only if a third party has successfully exercised its right of judicial review. *Sattar* cited nothing for the proposition that granting review to a third party could wipe out the accused's due process right of review.<sup>107</sup> *Mendoza-Lopez* certainly

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106. *Sattar*, 272 F. Supp. 2d at 366 (citing 8 U.S.C. § 1189(a)(8) (2003)).

107. *Cf.* Alexander, *supra* note 72 at 637:

[A] no-review provision for an administrative crime is not made constitutional by the opportunity to challenge a regulation in a limited time and forum. It is no solace to a defendant facing prosecution under an arguably illegal rule to know that she would have had the chance to challenge the rule had she thought of it earlier. Nor is it comforting to know that the rule was in fact challenged by a civil litigant whose motives may differ greatly from a defendant facing an actual criminal conviction. Indeed, real reason exists to doubt whether a judge presiding over a civil challenge to a regulation punishable by criminal penalties will evaluate the rule in the same light as he might in a criminal trial, where the stakes are more apparent.

did not rest on, or even suggest, such a novel doctrine. Instead, *Mendoza-Lopez* at most indicated that due process review in the criminal case was not constitutionally required if *the accused* had had an earlier right of judicial review in the administrative proceeding:

Depriving *an alien* of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation is used to establish an element of the offense. . . . [A] collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of *the alien* to obtain judicial review. . . .<sup>108</sup>

*Mendoza-Lopez* held that the person charged with the crime had the right to judicial review of the constitutionality of a crime's element, not that review can be denied because a third party could have sought review. *Sattar* did note that the only meaningful review for the *Mendoza-Lopez* defendants was in the criminal case, and precisely the same is true for Section 2339B defendants—the only meaningful judicial review they can have is in the criminal case. Of course, if the statutory scheme in which Section 2339B is imbedded required due process for the creation of all the prosecution's elements including the designation, an accused would not have a viable constitutional claim to be reviewed in the criminal case. The statutory scheme, on the other hand, permits an element of the accused's prosecution to be created in violation of due process, for

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108. 481 U.S. at 838-39 (emphasis added); *Mendoza-Lopez's* discussion of *Lewis v. United States*, 445 U.S. 55 (1980), is telling. Lewis had been convicted of the federal crime of possessing a firearm after having been convicted of a felony. He claimed that the predicate conviction had been obtained in state court in violation of his Sixth Amendment right to counsel. *Lewis* held that the federal criminal statute did not allow him to attack the prior state conviction in the federal criminal case and that this prohibition did not violate the Fifth Amendment. *Mendoza-Lopez* noted, "In rejecting the notion that the statute permitted, or the Constitution required, this 'new form of collateral attack' on prior convictions, the Court pointed to the availability of alternative means to secure judicial review of the conviction: '[I]t is important to note that a convicted felon may challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm.'" *Mendoza-Lopez*, 481 U.S. at 841 (quoting *Lewis*, 445 U.S. at 67).

which the accused has no right of review except the one that is constitutionally required, as *Mendoza-Lopez* indicates, in the criminal case.

One of the grounds *Sattar* gave for distinguishing *Touby* was similar to its treatment of *Mendoza-Lopez*. The district court stated that *Touby* contained “no suggestion that the judicial review for a permanent scheduling order was permitted as a defense in a criminal prosecution, and the challenge to a temporary scheduling order in a criminal prosecution was the only place where a challenge could occur. In this case, like the challenge to a permanent scheduling order, Congress has provided an explicit place for judicial review – in the Court of Appeals for the District of Columbia.”<sup>109</sup>

*Sattar* is correct that *Touby* did not suggest that an accused could have judicial review of a permanent scheduling order in a criminal case. This is not surprising because a temporary scheduling order, not a permanent one, was before the Court. Furthermore, *Sattar* overlooked one important aspect of the review provisions for permanent scheduling orders—unlike with a foreign terrorist organization designation, “any aggrieved person” had the right to challenge a permanent scheduling order, including those aggrieved persons later charged with violations of the drug laws.<sup>110</sup> Even if *Touby* can be imaginatively read to deny an accused a review of a permanent scheduling order in a criminal case, the Court would merely have been denying such review when the accused had had an earlier opportunity for judicial review, an opportunity denied the Section 2339B defendant.

Indeed, the Supreme Court has held that an accused might be deprived of judicial review of an administrative action in the criminal case when that accused had a prior opportunity for judicial review. During World War II, in the Emergency Price Control Act of 1942, Congress delegated the power to set prices on various commodities to the Office of Price Administration (“OPA”). The Act allowed anyone aggrieved by the price controls to seek judicial review of the administrative orders, but it did not allow review of the orders in criminal prosecutions. The defendants in *Yakus v. United*

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109. 272 F. Supp. 2d at 366.

110. *Touby*, 500 U.S. at 163.

*States*<sup>111</sup> were convicted of selling beef at prices above the maximum set by the OPA. The defendants were aware of the regulation and did not seek the authorized review, but still contended that they were entitled to judicial review of the regulation in the criminal case.

The Supreme Court rejected their claim and held that the review prohibition did not violate due process. In reaching this conclusion, the Court stressed that the defendants had not sought the authorized review:

There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process. . . . [W]e are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity. . . .<sup>112</sup>

While *Yakus* did hold that affording *an accused* an earlier opportunity for judicial review could deprive the accused of review of an administrative order in the criminal cases, *Yakus* now seems confined to its facts. Referring to the World War II case, *Mendoza-Lopez* stated, "While the Court has permitted criminal conviction for violation of an administrative regulation where the validity could not be challenged in the criminal proceeding. . . the decision in that case was motivated by the exigencies of wartime, dealt with the propriety of regulations rather than the legitimacy of an adjudicative procedure, and most significantly, turned on the fact that adequate judicial review of the validity of the regulation was available in another forum. Under different circumstances, the propriety of using an administrative ruling in such a way remains open to question."<sup>113</sup> Justice Powell, concurring in *Adamo*, observed that in *Yakus*, the "statute there came before the Court during World War II, and it

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111. 321 U.S. 414 (1944). See Alexander, *supra* note 72, at 630 ("The Court disposed of *Yakus*'s due process challenge by analogizing his situation to that of a litigant who waives the right to assert a constitutional right by failing to raise it in a timely manner.").

112. 321 U.S. at 444.

113. 481 U.S. at 838 n.15.

can be viewed as a valid exercise of the war powers of Congress . . . . Although the opinion of Chief Justice Stone [in *Yakus*] is not free from ambiguity, there is language emphasizing that the price controls imposed by the Congress were a 'war emergency measure.' Indeed, the Government argued that the statute should be upheld under the war powers authority of Congress."<sup>114</sup> Faced in *Adamo* with a statutory scheme similar to that in *Yakus*, where review in a criminal case was expressly prohibited but the accused had the opportunity for review in another forum, the Court chose not to follow *Yakus* and granted the accused a right of review of the administrative action in the criminal case.

In any event, *Yakus* made it clear that the defendants' opportunity for judicial review in another forum was crucial to the decision. The Court did so when it stressed what was not before it:

We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. . . . Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds.<sup>115</sup>

The Section 2339B defendant, however, is arguing that the designation procedures resulted in a due process violation. *Yakus*, the highwater mark for denying review in a criminal case of an administrative action, stated that an accused had a constitutional right to show that he had been denied the opportunity of review in another forum even though others had the right of review and may have sought it, indicating that a prosecution would be invalid without the accused having an opportunity for judicial review of the administrative action. *Yakus*, like the other cases, indicates that the prosecu-

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114. 434 U.S. at 290.

115. 321 U.S. at 446-47.



tion of a Section 2339B defendant, who has “no opportunity to establish the invalidity of the regulation by resort to the statutory procedure,” is unconstitutional unless the accused has a right of judicial review of the administrative action in the criminal case.

Indeed, it is worth considering again Justice Rutledge’s influential dissent in *Yakus*, justly labeled “eloquent” by Justice Powell.<sup>116</sup>

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the court criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the court parties to doing so. . . . But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers and of the constitutional integrity of the judicial process, more especially in criminal trials.<sup>117</sup>

Rutledge wrote about a scheme where the accused had had an opportunity for review of the administrative action. His words apply with even more force to a scheme where the accused has no opportunity for review of an element of his prosecution created by the administrative action and where Congress has mandated procedures for that creation that can violate due process. If Congress

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116. See *Adamo v. United States*, 434 U.S. at 290-91 (Powell, J., concurring) (“Indeed, following *Yakus*, and apparently concerned by Mr. Justice Rutledge’s eloquent dissent, Congress amended the most onerous features of the Emergency Price Control Act.”).

117. 321 U.S. at 468 (Rutledge, J. concurring); See Alexander, *supra* note 72 at 631-32 (Rutledge argued that “[m]erely because Congress could withhold jurisdiction did not mean that it could bestow jurisdiction so limited as to violate due process. The judicial power, once granted, must include at a minimum the ability to adjudicate a criminal defendant’s constitutional challenges.”).

can require enforcement of Section 2339B without review in the criminal case, it requires a court in a criminal case to sanction an unconstitutional prosecution without even granting review to the person directly affected by the unconstitutionality. Congress will have found a way to circumvent the supreme law's application even to itself and will have made the courts a partner to the circumvention.

This problem of individual rights, due process, and separation of powers is particularly acute in a Section 2339B prosecution since even a designated foreign terrorist organization entitled to due process may not seek the statutorily-authorized review of the designation. First, the organization is only given thirty days for review, and it may not be aware during that time that a designation has even been made. The organization is not given notice of an impending action and can only learn of the designation by seeing its publication in the Federal Register. *Adamo* questioned whether even members of a regulated industry daily peruse the Register.<sup>118</sup> Surely foreign organizations not normally regulated by the United States read the Federal Register even less avidly, and the organization's highly limited window for review can disappear before the organization knows of the designation.

Furthermore, the organization, even if aware of the designation, may not wish to take the risks that would be associated with a review. To establish its right to due process, it will have to reveal its property and operations in the United States in order to demonstrate the constitutionally-required American presence. This act may inform the government of previously unknown assets and subject them to freezing if the challenge were not successful. If the challenge were upheld, the organization might still expect increased governmental attention to its previously unknown American operations even if those activities are not terrorist related. In addition, the organization faces the possibility of a redesignation after notice and a hearing with the freezing of now disclosed resources. An organization might quite rationally choose not to run these risks and forego challenging the designation even if aware of it and even if the organization could establish a due process violation.

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118. See 434 U.S. at 283 n.2.

If Congress can prevent review in a Section 2339B prosecution of its actions in mandating procedures that violate due process, the courts will be enforcing an unconstitutional prosecution that cannot be challenged by the accused and will not have been challenged by others granted the limited right of review. Congress, then, surely has found a way to circumvent the supreme law.

The conflict between individual rights, due process, and separation of powers can only be avoided by granting review in the criminal case. As we have seen, *Mendoza-Lopez* and the other cases indicate that the accused has that right of review. An accused in a Section 2339B prosecution is entitled to judicial review in the criminal case of the Secretary of State's designation of the organization that provides an essential element of the proceeding.

That review, however, can be limited. Not all aspects of the designation must be considered in the criminal case but only whether the Secretary was acting within his statutory and constitutional authority in making the designation.

## V. REMEDYING THE DUE PROCESS VIOLATIONS

### A. *The Remedy*

The remedy is simple. The statutory scheme should be amended to furnish a constitutionally sufficient notice to all organizations when the Secretary determines that a designation may be imminent. These organizations should then be afforded a reasonable but limited time for a meaningful hearing.

Proper governmental interests would not be harmed by these changes. While the government might be concerned that an organization's assets that would be frozen after a designation will be spirited away when notice is given, a temporary freezing of the assets pending the hearing's outcome can occur consistently with the Constitution.<sup>119</sup> Whatever foreign relations fallout that would come for a pre-designation notice and hearing would come anyway from the actual designation, and with revised procedures the government might get a foreign relations benefit from proceeding more fairly.

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119. See, e.g., *supra* notes 23-24 and accompanying text.

While many organizations given notice will not seek the hearing, more organizations than now may challenge their designations because they will not have to reveal American assets and operations to have a hearing. If there are designations that should be judicially overturned, that is more likely to happen.

Finally, the revised procedures should lead to Section 2339B prosecutions that will not violate due process. Section 2339B should be a valuable tool toward achieving the important societal goal of eliminating the funding of terrorist organizations. With the present scheme, all Section 2339B convictions are suspect and some may be unconstitutional. The convictions now can be sustained only by eroding due process, individual rights, and separation of power. This is not necessary. Simple revisions of the statutory scheme can remove these problems.

### B. *The Review's Limited Subject Matter*

If the statutory scheme is not amended, then the solution is to permit challenges in the criminal cases to designations made in violation of due process. Supreme Court cases granting judicial review not statutorily authorized in the criminal case of an administrative order limit that review to the basic question of whether the administrative agency was acting within the authorized power granted to it by Congress and the Constitution. *Estep* limited the review to whether the draft board had jurisdiction to issue the order; *Mendoza-Lopez* to whether the deportation order was issued in violation of due process;<sup>120</sup> *Adamo* to whether the regulation was an “emission standard;” *Touby* granted review of the administrative order to ascertain whether the will of Congress had been obeyed. *Estep*,

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120. Language read in isolation in *Mendoza-Lopez* could support a right to a broader review. The Court stated, “Persons charged with crime are entitled to have the factual and legal determinations upon which convictions are based subject to the scrutiny of an impartial judicial officer.” 481 U.S. at 841. The Court elsewhere in the opinion indicated that it was not reviewing the issue of whether the Immigration Judge in ordering the deportation had correctly weighed evidence. Instead the due process violation consisted of the Immigration Judge not explaining adequately to the aliens their right to seek suspension of the order or their right to appeal. The Court held, “[A] collateral challenge to use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review . . . .” *Id.* at 839. What was reviewable was not the propriety of the order but “the legitimacy of an adjudicative order . . . .” *Id.* at 839 n.15.

*Adamo*, and *Touby*, although phrasing the subject matter of the review differently, all really limited it to the same question - did the administrative agency exceed its statutory mandate? An agency would be acting outside its congressionally-granted role if it acted without jurisdiction, if it issued a regulation of a different kind from that authorized by Congress, or if it did not act within the standards set as its boundaries by Congress.<sup>121</sup> *Mendoza-Lopez* allowed review of the even more basic but related question - did the administrative agency exceed its constitutionally-authorized mandate?<sup>122</sup>

The cases are consistent in allowing review of whether the agency or administrator had the basic authority to take the action creating the element of the prosecution. Such a review does not evaluate the correctness of the administrative action.<sup>123</sup> If the order was made within the lawful authority granted by Congress and the Constitution, the criminal court cannot review it. *Estep* stressed this when it said:

The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards

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121. *Touby* relied on *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989), for the proposition that "so long as Congress provides an administrative agency with standards guiding its actions such that a court 'ascertain whether the will of Congress has been obeyed' no delegation of legislative authority trenching on the principles of separation of powers has occurred." 490 U.S. 212, 218-19 (1989) (quoting *Mistretta v. United States*, 488 U.S. 361, 379 (1989)); see Alexander, *supra* note 72 at 628 ("one of the reasons for requiring Congress to articulate some 'intelligible principle' when delegating authority is to give the courts some basis on which to judge whether an agency has exceeded its statutory mandate.").

122. *Sattar* distinguished *Touby* because the *Sattar* defendants were not relying on a nondelegation argument: "[T]he issue in *Touby* was whether there was sufficient judicial review to comply with the nondelegation doctrine such that Congressional standards were followed. The defendants here have not relied on any argument based on an impermissible delegation of powers." 272 F. Supp. 2d at 367. If there had been an impermissible delegation, then the administrator would not have had the constitutional authority to create the element of the crime. A Section 2339B defendant makes the same basic claim, that is, that the Secretary does not have the constitutional authority to create an element of the prosecution in violation of the Constitution.

123. *Cf. Sattar*, 272 F. Supp. 2d at 367 ("The element of the offense is . . . not the correctness of the determination . . ." of a designation.).

was justified. The decisions made by the local boards made in conformity with the regulations are final even though they may be erroneous.<sup>124</sup>

*Adamo* in requiring review in a criminal case of whether an EPA regulation was an emission standard stressed that

[t]he narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding. The question is only whether the regulation which the defendant is alleged to have violated is on its face an 'emission standard' within the broad limits of the congressional meaning of that term.<sup>125</sup>

The Section 2339B defendant cannot have review of whether the Secretary of State properly weighed the statutory factors in making a designation. Even if the designation were erroneous, it cannot be challenged in the criminal case. But just as the defendants in *Estep*, *Mendoza-Lopez*, *Adamo*, and *Touby* could have judicial review of whether the administrative predicate was made without statutory or constitutional authority, a Section 2339B defendant has the right of judicial review of whether the administrative action that created an essential element in his prosecution violated the Constitution.

With review limited as it can be, the basics of the statutory review scheme remain intact. That core, as *Sattar* summarized it, is that

Congress intended for judicial review of FTO designations to occur solely within the Court of Appeals for the District of Columbia within 30 days of publication in the Federal Register. . . . Centralized review under the statute is important because FTO designations have significant foreign relations implications that Congress could reason-

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124. 327 U.S. at 122-23; *accord* *Dickinson v. United States*, 346 U.S. 389 (1953).

125. 434 U.S. at 285.

ably conclude should be resolved by a court that is able to develop a unified body of relevant law.<sup>126</sup>

The limited review required in Section 2339B prosecutions leaves this centralized review intact. The result is much like in *Adamo* where the statutory scheme prohibited review in a criminal case and only authorized review within thirty days in the D.C. Circuit. In upholding the trial court's review of whether the regulation was an emission standard, the Supreme Court stated that the trial "court did not undermine the twin congressional purposes of insuring that the substantive provisions of the standards would be uniformly applied and interpreted and that the circumstances of its adoption would be quickly reviewed by a single court intimately familiar with administrative procedures. The District Court did not presume to judge the wisdom of the regulation or to consider the adequacy of the procedures which led to its promulgation, but merely concluded that it was not an emission standard."<sup>127</sup>

Similarly in a Section 2339B prosecution, centralized review will remain in the D.C. Circuit of all issues concerning designations except whether the required procedures for creating an element of the crime violate the Constitution. The required due process review will not implicate foreign relation concerns any more than other due process evaluations. Courts, of course, should not intrude on the foreign relations operations and choices of the political branches because the Constitution does not give the judiciary this authority. The Constitution, however, gives the courts authority to evaluate whether a governmental action complies with due process, and the law controlling these assessments is not the law affecting foreign relations. A due process analysis does not review foreign relations choices but only weighs general constitutional principles that apply in a wide variety of situations. All courts, not just the Court of Appeals for the District of Columbia, are competent to determine whether a due process violation has occurred. It is the kind of decision courts regularly make, and individual rights, due process, and the preservation of separation of powers require the courts in Section 2339B proceedings to determine whether an

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126. 272 F. Supp. 2d at 367.

127. *Adamo*, 434 U.S. at 284.

element of the prosecution has been created in violation of the Constitution.

*C. The Difficulties of Proving the Due Process Violations*

A due process violation will not be easy to establish even if one has occurred. The accused has the burden of showing that the law being used for the prosecution is unconstitutional.<sup>128</sup> If the organization has sought judicial review of the designation, there should be few proof problems. The organization will presumably have marshaled the evidence showing the necessary presence, and this could be relied on in the criminal prosecution. On the other hand, if the organization has not sought the review, a likely situation,<sup>129</sup> the accused would have to prove the organization's necessary presence in the United States to establish a due process violation, and the accused is unlikely to have access to the information demonstrating that presence.

Because an accused may not have the information establishing a due process violation even when one has occurred, and the organization with the information may avoid review and not marshal the information, it is entirely possible for a Section 2339B prosecution to be in fact illegal but impossible for the accused to prove it. The present statutory scheme can easily lead to convictions and punishments that look valid only because of hidden unconstitutionality.

## VI. CONCLUSION

Section 2339B makes it a crime to give material support or resources to groups designated foreign terrorist organizations by the Secretary of State. Section 1189's designation process, however, can create an element of the crime in violation of due process. If so, the resulting prosecution violates the Constitution, and the accused is entitled to judicial review of that unconstitutionality. The statutory scheme should be changed to eliminate the possibility of

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128. See WAYNE R. LAFAVE, CRIMINAL LAW 61 (3rd ed. 2000) ("It has been held that the burden of proving facts showing unconstitutionality is upon the defendant, partially at least because there is a presumption of validity and a reluctance on the part of courts to strike down legislation as unconstitutional.").

129. See *supra* text accompanying note 118.



unconstitutional designations by affording organizations notice of an imminent designation and a meaningful hearing to contest the designation.