12-1118
No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN, *Petitioner.*

PETITION FOR A WRIT OF MANDAMUS TO ENFORCE THIS COURT'S MANDATE

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February 27, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Petitioner certifies as follows:

A. Parties and Amici

The People's Mojahedin Organization of Iran ("PMOI") is the only party before the Department of State in the administrative proceeding at issue; it is the Petitioner in this Court. The Secretary of State is the Respondent.

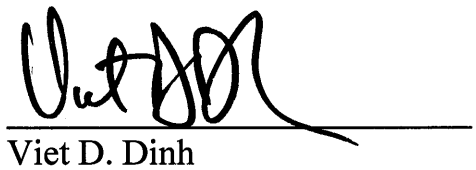
B. Rulings Under Review

Petitioner seeks a writ of mandamus, in the face of unwarranted and unreasonable agency delay, to order the Secretary of State to delist PMOI as a designated "Foreign Terrorist Organization," or, alternatively, to act on PMOI's request for delisting within 30 days (and specifying that, if she does not, the designation shall be revoked). Before the Department of State, the proceeding is styled as "Petition of the People's Mojahedin Organization of Iran for the Revocation of Its Designation as a 'Foreign Terrorist Organization' Pursuant to 8 U.S.C. § 1189(a)(4)(B)."

C. Related Cases

This petition for a writ of mandamus follows from PMOI's previous action in this Court, in which the Court invalidated the Secretary's denial of PMOI's delisting petition and remanded for further proceedings. *See People's Mojahedin*

Org. of Iran v. U.S. Dep't of State, 613 F.3d 220 (D.C. Cir. 2010).



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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Petitioner People's Mojahedin Organization of Iran makes the following disclosure:

People's Mojahedin Organization of Iran has no parent corporation, nor is there any publicly held corporation with a 10 percent or greater ownership interest in People's Mojahedin Organization of Iran.

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INTRODUCTION AND SUMMARY OF ARGUMENT

On July 16, 2010, this Court held that the Secretary violated the due process rights of Petitioner, the People's Mojahedin Organization of Iran ("PMOI"), in denying its application for revocation of its designation as a Foreign Terrorist Organization ("FTO"). In doing so, the Court observed that "a strict and immediate application of the principles of law which we have set forth herein could be taken to require a revocation of the designation." *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 230 (D.C. Cir. 2010) ("*PMOI*") (internal quotation marks and brackets omitted). Nevertheless, the Court left the designation in place and remanded to afford the Secretary an opportunity to remedy the constitutional improprieties. *Id.* at 231. Nearly 20 months later, the application remains in bureaucratic limbo, PMOI remains designated, and its members remain languishing in Camp Ashraf, Iraq—with urgent resettlement efforts severely hampered by PMOI's FTO status. The time has come for the Court to end this unjustified "pocket veto" of PMOI's application.

In staying its remedial hand, the Court followed the example of and cited to *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001) ("*NCRI I*"). But there is a critical baseline difference between the two cases. At the time *NCRI I* was decided, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 8 U.S.C. § 1189, provided that an FTO

designation would lapse after two years. 8 U.S.C. § 1189(a)(4)(B) (2000). The group's designation therefore would have expired within four months had the Secretary not acted on remand. But Congress amended this portion of AEDPA in 2004 to remove the automatic two-year expiration in favor of the right to petition for revocation every two years and a requirement that such petitions be resolved within 180 days. 8 U.S.C. § 1189(a)(4)(B)(iv)(I). Under the new procedures, PMOI's designation does not naturally lapse, and the Secretary's inaction equals a denial of revocation.

Indeed, the *NCRI I* Court emphasized the designation's natural expiration as a reason for not vacating it: "We further recognize the timeline against which all are operating: the two-year designations before us expire in October of this year. We therefore do not order the vacation of the existing designations, but rather remand the questions to the Secretary . . . ." 251 F.3d at 209. By contrast, freed of the automatic statutory expiration, the Secretary now can simply ignore the Court's latest remand and pocket veto PMOI's application for revocation.

The Secretary's inaction frustrates this Court's order directing her to remedy her due process violation and contravenes Congress's command to resolve all revocation petitions expeditiously. By law, the Secretary was required to resolve PMOI's original petition, filed on July 15, 2008, within 180 days. 8 U.S.C. § 1189(a)(4)(B)(iv)(I). It has now been over *1,300* days since PMOI filed that

petition. Even if this Court's mandate triggered a fresh 180-day clock, it has long since run out: more than 500 days have passed with no action, despite repeated representations that a decision would be made expeditiously. More than three and a half years after PMOI demonstrated changed circumstances, the designation remains in place, and the Secretary has never made a constitutionally adequate determination that the statutory criteria for designation are satisfied.

The Secretary's pocket veto of PMOI's petition and disregard of this Court's mandate not only harms the organization but literally imperils the lives of its members at Camp Ashraf. PMOI's continued listing emboldened the Iraqi Government to launch armed raids against Ashraf in 2009 and 2011, killing nearly 50 defenseless residents. And they cannot escape the continuing danger. The Secretary's non-decision threatens a refugee crisis, as other countries are reluctant to accept Ashraf residents for resettlement with the FTO designation still pending. In addition, keeping PMOI in limbo prevents it, on pain of criminal penalty, from participating effectively in the public debate on U.S. policy towards Iran and chills PMOI's supporters' right to associate with the organization.

PMOI is mindful that the Secretary's decisions are guided by myriad foreign policy and national security concerns. But the Secretary has previously acknowledged the strength of "the evidence submitted by [PMOI] that it has

renounced terrorism." J.A. 22.[1] AEDPA forbids her from maintaining PMOI's FTO status given the changed circumstances established by PMOI, which render the group ineligible for designation under the statutory criteria. While the Secretary may *revoke* a designation on the basis of national security considerations, 8 U.S.C. § 1189(a)(6)(A)(ii), she may not *maintain* a designation unless she also finds that the foreign group in question engages in terrorism or has the capability and intent to do so, *id.* § 1189(a)(1)(C).

The time has long since passed for the Secretary to grant PMOI's petition and delist it in accordance with the evidence. PMOI therefore respectfully asks the Court to do now what it acknowledged it could have done in 2010: issue an order directing the Secretary to revoke PMOI's FTO designation. Alternatively, PMOI seeks an order requiring the Secretary to decide its revocation petition within 30 days and specifying that, if she does not, the designation shall be revoked.

JURISDICTION

This Court may issue writs of mandamus pursuant to 28 U.S.C. § 1651. It has jurisdiction to issue a writ in this case because this Court has exclusive appellate jurisdiction to review FTO determinations. *See* 8 U.S.C. § 1189(c)(1); *Telecommc'ns Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("*TRAC*"). The Court also has mandamus authority to effectuate its prior rulings.

[1] "J.A." citations are to the Joint Appendix filed with this Court in Case No. 09-1059. "App." citations are to the Appendix to this petition.

See Potomac Elec. Power Co. v. ICC, 702 F.2d 1026 (D.C. Cir. 1983). And Congress has given the Court the authority—indeed, the responsibility—to set aside the Secretary's "response to a petition for revocation" if it is "not in accordance with law," 8 U.S.C. § 1189(c)(3).

BACKGROUND

A. Statutory Background

Under AEDPA, three specific findings are required for a group to be designated as an FTO: (1) "the organization is a foreign organization"; (2) "the organization engages in terrorist activity . . . or terrorism . . . or retains the capability and intent to engage in terrorist activity or terrorism"; and (3) "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1).

Designation as an FTO has dire consequences for an organization, including seizure of all funds that it has on deposit with any U.S. financial institution, 18 U.S.C. § 2339B(a)(2), and mandatory exclusion or removal of its alien members and representatives from the United States, 8 U.S.C. § 1182(a)(3)(B)(i)(IV)–(V). *See NCRI I*, 251 F.3d at 196, 203. Furthermore, anyone who "knowingly provides material support or resources" to a designated organization—regardless of the nature or intent of that support—faces criminal prosecution and up to 15 years'

imprisonment. 18 U.S.C. § 2339B(a)(1).

Two years after designation, an FTO may petition the Secretary for revocation of its listing. 8 U.S.C. § 1189(a)(4)(B). The Secretary "shall" revoke a designation if, as relevant here, she finds that "the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation." *Id.* § 1189(a)(6)(A). The Secretary "shall" make a determination "[n]ot later than 180 days after receiving a petition for revocation." *Id.* § 1189(a)(4)(B)(iv)(I).

B. PMOI

PMOI was founded in 1965 by students and intellectuals opposed to the dictatorial rule of the late Shah Mohammed Reza Pahlavi. PMOI suffered severe repression in Iran, first by the Shah and later by Ayatollah Khomeini. PMOI's leadership relocated to Paris, then to Iraq. In the 1980s and 1990s, PMOI mounted military operations against the Iranian regime. In June 2001, PMOI's leadership decided to end all use of violence and to focus on political and social efforts to bring about change.

That decision was formally ratified by congresses of the membership in 2001 and 2003. J.A. 57–58, 164–65. The president-elect of the National Council of Resistance of Iran ("NCRI") (the umbrella body of the Iranian opposition, of which PMOI is a constituent member), Mrs. Maryam Rajavi, has also "persistently condemned terrorism and violence." J.A. 146, 539. Like PMOI's leaders, she has

espoused exclusively nonviolent means of achieving the organization's goals, which include democratic regime change and the establishment of a secular, peaceful, and non-nuclear Iran that would protect human rights, particularly the rights of women and religious and ethnic minorities.

For more than a decade, PMOI has not deviated from its commitment to nonviolence. For example, in 2003, after the invasion of Iraq, PMOI voluntarily handed over its weapons to the Multi-National Force-Iraq (MNF-I), and it agreed to consolidate all of its members at Camp Ashraf, 40 miles northeast of Baghdad. PMOI leaders voluntarily signed an agreement with U.S. forces whereby PMOI would remain disarmed under MNF-I protection. And in July 2004, the United States proclaimed every PMOI member at Ashraf a "protected person" under the Fourth Geneva Convention. J.A. 60–62, 180–203. This determination was based on the conclusion that none of them was a combatant or had committed a crime under U.S. law. Every Ashraf resident, moreover, signed a document rejecting violence, disavowing terrorism, and agreeing to obey the laws of Iraq and the orders of the MNF-I. J.A. 183.

For its part, the United States gave a written commitment to protect the residents. Unfortunately, those at Ashraf have suffered greatly since 2009, when U.S. forces handed over responsibility for the camp's security to Iraq's government. Iraqi security forces have raided the camp twice, killing nearly 50

defenseless residents and injuring hundreds more. Iraq has attempted to justify these atrocities by pointing to PMOI's continued presence on the U.S. FTO list. *See infra* pp. 16–17.

In June 2008, the United Kingdom removed PMOI from its list of proscribed organizations. J.A. 418–21. The European Union followed suit in January 2009. Council Decision 2009/62/EC (Jan. 26, 2009). The responsible authorities in these jurisdictions determined that no evidence—classified or unclassified—had been presented suggesting that PMOI had the capability and intent to engage in terrorism or terrorist activities.

C. PMOI's Petition for Revocation and Petition for Review

On July 15, 2008, PMOI petitioned the Secretary of State for revocation of its FTO designation based on changed circumstances ("the 2008 Petition"). PMOI stressed that it had ended all military activities in 2001, completely disarmed in 2003, willingly cooperated with U.S. forces, and had for years consistently and unequivocally rejected terrorism and violence.

On January 7, 2009, Secretary Condoleezza Rice denied the petition. 74 Fed. Reg. 1273, 1273–74 (Jan. 12, 2009). The summary of the administrative record nevertheless acknowledged "the evidence submitted by [PMOI] that it has renounced terrorism" and "the uncertainty surrounding the [PMOI] presence in Iraq"; the Secretary therefore indicated that the group's designation "should be re-

examined by the Secretary of State in the next two years even if [PMOI] does not file a petition for revocation." J.A. 22. It is fair to infer that the Department regarded the evidence supporting continued FTO status as far from conclusive.

PMOI petitioned this Court for review of the Secretary's decision, arguing both that the determination lacked substantial support in the administrative record and that the Department's procedures violated its due process rights. On July 16, 2010, this Court granted the petition, holding that "the Secretary failed to accord the PMOI the due process protections outlined in [this Court's] previous decisions." *PMOI*, 613 F.3d at 222. Specifically, the Court concluded that "due process requires that the PMOI be notified of the unclassified material on which the Secretary proposes to rely and [be given] an opportunity to respond to that material *before* its redesignation" as an FTO. *Id.* at 228.

The Court acknowledged that, given the due process violation, it had the authority to order PMOI's removal from the FTO list: "[A] strict and immediate application of the principles of law" articulated in its decision "could be taken to require a revocation of the designation." *Id.* at 230 (internal quotation marks and brackets omitted). Nevertheless, the Court decided to "leave the designation in place but remand with directions to the Secretary to provide the PMOI the opportunity to review and rebut the unclassified portions of the record on which she relied." *Id.* It specifically instructed that "in doing so, . . . the Secretary should

indicate in her administrative summary which sources she regards as sufficiently credible that she relies on them; and she should explain to which part of section 1189(a)(1)(B) the information she relies on relates." *Id.*

D. Administrative Proceedings Following Remand

In an October 18, 2010 letter, the Government set out the procedures for determining PMOI's petition after remand. App. 19–20. The Government stated that PMOI had "received all of the unclassified material contained in the administrative record to date"; however, it intended to "update that administrative record" with "additional material relevant to the designation." App. 19. The Government promised that any "[a]dditional unclassified material" would be provided by October 29, 2010. *Id.* PMOI would subsequently have "60 days from that date in which to make any new submission or update previous submissions." *Id.* The letter also specified that "the updated administrative record" could contain "additional classified information compiled during the State Department's update of the administrative record." App. 20. If any of this additional classified material could "appropriately be declassified," PMOI would have the chance to "review [it] and comment prior to the Secretary of State's determination." *Id.*

On October 29, 2010, the Government informed PMOI that the State Department had "begun the process of updating the administrative record with additional material" relevant to PMOI's petition but had not yet identified any

additional unclassified exhibits. App. 23. It asked that PMOI "make any submission concerning the unclassified material previously provided" by December 29, 2010, which would allow State to "consider [it] and incorporate it into the updated administrative record." *Id.*

PMOI timely complied, submitting its principal supplement to the petition on December 29, 2010 ("the 2010 Supplement"). In that document, PMOI commented on the unclassified portions of the 2009 administrative record that the State Department had released. It also provided updated information about PMOI's current circumstances, demonstrating again that PMOI has neither the capability nor the intent to engage in terrorism or terrorist activity.

PMOI's counsel met with representatives of the State Department and other interested agencies on April 12, 2011, having received in advance a list of questions that the Government representatives wished to have addressed. Given the time that had passed since the 2010 Supplement was filed, PMOI submitted an update on April 5, 2011 ("the Second Supplement"). It described both the continued deterioration of conditions at Ashraf (three days later, 34 residents would be massacred and dozens more injured by Iraqi forces) and the growing support among U.S. and foreign leaders for delisting PMOI.

On May 20, 2011, the Government informed PMOI that the State Department had identified ten additional documents containing unclassified or

declassified information that it was considering including in the administrative record. App. 26. On June 6, 2011, PMOI commented on each of the ten documents. On August 4, 2011, the Government reported that the "process of declassifying information intended for use in the consideration of the delisting petition" was "complete." App. 28.

Notwithstanding that representation, some seven weeks later, on September 27, 2011, the Government advised PMOI that the State Department had decided to include two more documents in the administrative record, and requested that PMOI provide "any additional views on either of these documents." The first document was an August 16, 2011 paper authored by Ambassador Lincoln Bloomfield, Jr. ("the Bloomfield Report"), which addressed and rebutted ten allegations historically made against PMOI. To the extent the Bloomfield Report dealt with issues relevant to maintaining the FTO listing, PMOI had already addressed those topics in the 2008 Petition and the 2010 Supplement. The second document was prepared by the RAND Corporation in 2009 ("the RAND Report"). The RAND Report had been available to the State Department for over two years, and PMOI's 2010 Supplement had specifically addressed it. On October 4, 2011, PMOI responded, explaining that neither document contained new information or supported PMOI's continued FTO designation.

Since early October 2011, the Government has not asked PMOI for any

additional information, and PMOI has not submitted additional material for consideration. The Department has been completely silent; it has neither decided the petition nor offered any reason for not doing so. PMOI's counsel repeatedly have expressed their client's frustration and dismay at the amount of time that has elapsed since this Court's remand—and indeed since the file in this matter was effectively closed—and they have stated unequivocally that protracted delay is completely improper. In December 2011, PMOI informed the Government that it was considering a mandamus petition. On February 21, 2012, the Government was given a draft of this Petition as a courtesy.

ARGUMENT

This Court should issue a writ of mandamus directing the Secretary of State to grant PMOI's revocation petition or, alternatively, to make a determination as to revocation within 30 days (and specifying that, if she does not, the designation shall be revoked). Indeed, Congress has explicitly directed this Court to "set aside" a "response to a petition for revocation" found to be "not in accordance with law," 8 U.S.C. § 1189(c)(3): precisely what the Court found in 2010. Because circumstances at Camp Ashraf grow more precarious every day, the Secretary's inaction imperils nothing less than the lives and physical safety of PMOI's members, as well as its First Amendment rights and those of its supporters. The time has come to end this "marathon round of administrative keep-away." *In re*

Am. Rivers & Idaho Rivers United, 372 F.3d 413, 420 (D.C. Cir. 2004).

I. THE SECRETARY'S FAILURE TO EFFECT THIS COURT'S MANDATE ENDANGERS THE LIVES OF PMOI MEMBERS AND FRUSTRATES THE INTENT OF CONGRESS AND THE WILL OF THIS COURT.

In assessing whether mandamus is warranted to remedy "unreasonable agency delay," the Court applies the following "hexagonal . . . standard":

> (1) the time agencies take to make decisions must be governed by a rule of reason;
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 79–80 (citations and internal quotation marks omitted).

Applying these factors, this Court has issued numerous writs of mandamus compelling agency action. *See, e.g.*, *In re Core Commc'ns, Inc.*, 531 F.3d 849, 861–62 (D.C. Cir. 2008); *In re Am. Rivers*, 372 F.3d at 414; *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000); *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000); *In re Int'l Chem. Workers*

Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992). These factors compel mandamus here, as the Secretary's unreasonable delay imperils the lives of PMOI members and infringes the constitutional rights of the group and its supporters, circumvents the firm statutory deadline established by Congress, and insulates the Secretary's unlawful actions from further review by this Court. Mandamus is especially appropriate in this case because the Secretary's delay involves a failure to respond not merely "to requests by private parties," but to this Court's own order remanding the case for further proceedings. *Core*, 531 F.3d at 856.

A. The Secretary's Non-Decision Imperils Lives and Infringes Fundamental First Amendment Rights.

A critical consideration for mandamus is "the nature and extent of the interests prejudiced by delay." *TRAC*, 750 F.2d at 80. "[D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *Id.* These factors strongly favor mandamus here, for the delay is severely prejudicing PMOI and its supporters in several respects.

First, the Secretary's delay has already imperiled, and continues to threaten, the lives and well-being of PMOI members at Camp Ashraf. The Government of Iraq has repeatedly announced its intent to expel from the country some 3,300 PMOI members and supporters currently living at Ashraf. In July 2009, after the U.S. handed over responsibility for the camp's security, Iraqi security forces attacked, killing at least 11 of the unarmed and defenseless residents, wounding

hundreds, and detaining 30 others.[2] Iraqi forces conducted another armed raid in April 2011; they killed 34 residents and injured dozens of others.[3] They also occupied about a third of the Camp's surface area, and denied residents access to buildings, goods, and services, as well as to their cemetery. And Iraqi forces have interfered with deliveries of supplies, including food and medicine, to the residents.[4]

Most recently, Prime Minister Nouri al-Maliki has said that the Camp must be evacuated and closed—and the residents expelled from Iraq—by the end of April 2012, little more than two months from now.[5] In the meantime, Ashraf residents are being relocated to an interim facility called Camp Liberty, where they are denied freedom of movement and where there is a serious risk of continued state-sponsored violence. The Prime Minister has attempted to justify his plans for forcible removal of the residents of Ashraf on the pretext that PMOI is a terrorist

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[2] *Iraq Mounts Attack on Iranian Dissidents*, CBSNews (July 29, 2009), http://www.cbsnews.com/stories/2009/07/29/eveningnews/main5196623.shtml.

[3] U.N. Office High Comm'r for Human Rights, *Pillay Condemns Iraqi Operation that Led to 34 Deaths, Calls for Inquiry* (Apr. 15, 2011), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10943&LangID=E.

[4] Brian Murphy, *Iranian Group: Health Care Blocked at Iraq Camp*, Seattle Times (Dec. 4, 2009), http://seattletimes.nwsource.com/html/nationworld/2010423983_apmliraq.html.

[5] Associated Press, *Iraq Sets Deadline for Iranian Exiles to Leave*, Yahoo!News (Dec. 21, 2011), http://news.yahoo.com/iraq-sets-deadline-iranian-exiles-leave-184714849.html.

organization: "one reason that the people in Camp Ashraf are treated the way they are treated by Iraq is because the State Department continues to designate them as a Foreign Terrorist Organization." *Axis of Abuse: U.S. Human Rights Policy Toward Iran and Syria, Part 1: Hearing Before the Subcomm. on Middle East & S. Asia, Comm. on Foreign Affairs*, 112 Cong. 23 (2011) (statement of Hon. Poe).

Likewise, during a hearing on April 14, 2011, Congressman Brad Sherman, the Ranking Member of the House Subcommittee of Terrorism, Non-Proliferation, and Trade, told Ambassador Daniel Benjamin: "In private discussions, the Iraqi Ambassador's office has said the blood is not on the hands of the Iraqi government but is at least partially on the hands of the State Department because [PMOI] is listed as a terrorist group and accordingly Iraq does not feel that it has to respect the human rights of those in the camp." *Hearing Before the Subcomm. on Terrorism, Nonproliferation, and Trade of the Comm. on Foreign Affairs*, 112 Cong. 5 (2011) (statement of Hon. Sherman); *see also* App. 32 (Letter from Embassy of the Republic of Iraq to European Parliament – Protocol Service (Nov. 15, 2011)) (emphasizing that "[t]he Iraqi government is committed to its decision to close Camp Ashraf" because PMOI "has already been classified by the international community as a terrorist organization").

The Secretary's delay in deciding PMOI's revocation petition also hinders meaningful progress regarding the planned resettlement of Ashraf residents outside

Iraq. The U.N. High Commissioner for Refugees ("UNHCR") has already begun its process of determining the refugee status of each resident, the initial step in resettlement. It is much more difficult, however, to persuade other countries to accept Ashraf residents as long as PMOI remains a designated FTO. UNHCR is severely handicapped in resettling Ashraf residents due to PMOI's continued FTO status. *Axis of Abuse*, *supra* at 35 (statement of Hon. Rohrabacher) ("[UNHCR] specifically told me that the terrorist designation by the United States of the people of Camp Ashraf was the major stumbling block in getting these people relocated."); *see also* App. 36 (Letter from Vincent Cochetel, Reg'l Representative, UNHCR to Samantha Power, Senior Dir. for Multilateral Affairs, NSC (Nov. 21, 2011)) ("We have been advised that due to the inclusion of [PMOI] on the [FTO list], none of the Iranians from Ashraf who may be recognized would be admissible to the US . . . .").[6]

If Ashraf residents cannot be speedily resettled outside the country, a humanitarian catastrophe looms. The 2009 and 2011 Iraqi-led armed raids took place while American forces were still on the ground. Now that they are gone, the residents of Ashraf are at enormous risk of their lives. And that risk is sharply

[6] Denmark even has refused to allow sick Ashraf residents to receive medical treatment in that country because PMOI "is known to be on the U.S. terrorist list." App. 35 (E-mail from Villy Sovndal, Minister of Foreign Affairs to Jens Christian Lund, Member of Parliament (Nov. 18, 2011, 12:35 CET)).

exacerbated by the delay in deciding the delisting petition.

Second, the Secretary's inaction infringes the First Amendment rights of PMOI and its supporters. This Court has emphasized that perhaps the "most important[]" of an FTO designation's "dire" consequences is that "all persons within or subject to jurisdiction of the United States are forbidden from 'knowingly providing material support or resources' to the organization." *NCRI I*, 251 F.3d at 196 (quoting 18 U.S.C. § 2339B(a)(1)). Americans thus are prohibited, on pain of criminal sanction, from contributing to PMOI's mission of advocating for peaceful change in Iran. Yet supporting political causes is among the most fundamental of all First Amendment rights. *See Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976). Moreover, PMOI's designation can chill—and has chilled—ordinary citizens from engaging in advocacy and charitable activity. As several Iranian-American groups explained in a brief to this Court in *PMOI*, a 2004 rally at the Washington Convention Center expressing support for the Iranian opposition was disrupted by FBI surveillance and intimidating letters from the Treasury Department because of false rumors that the rally sponsors were a PMOI front. *See* Br. of the Iranian-American Soc'y of Tex., *et al.*, as *Amici Curiae* in Support of Pet'r, *PMOI*, 613 F.3d 220, 2009 WL 6084596.

Needless to say, there is no constitutional right to support terrorism. But that simply begs the question of whether PMOI qualifies as an FTO—a question the

Secretary refuses to answer. And there most certainly is a constitutional right to support a group that is not a terrorist organization, that for over a decade has lacked the capability and intent to engage in terrorism, and that represents a democratic, secular, and non-nuclear alternative to the repressive, theocratic, and hostile regime currently in power in Tehran. The delay in deciding PMOI's status unjustifiably prolongs the enforced boycott of the organization.

Indeed, it was precisely these First Amendment concerns that led Congress to provide for meaningful judicial review of FTO designations. For instance, Senator Hatch, a sponsor of the legislation, emphasized that judicial review would "ensure that this provision will not violate the Constitution or place inappropriate restrictions on cherished first amendment freedoms." 141 Cong. Rec. S7480 (daily ed. May 25, 1995) (statement of Sen. Hatch); *see also* 141 Cong. Rec. S7487 (daily ed. May 25, 1995) (statement of Sen. Biden); 142 Cong. Rec. H2141 (daily ed. Mar. 13, 1996) (statement of Rep. Conyers); 142 Cong. Rec. H2141 (daily ed. Mar. 13, 1996) (statement of Rep. Hyde). Given the First Amendment interests at stake, and the robust role Congress envisioned for the judiciary to play in reviewing FTO designations, there can be little doubt that mandamus is warranted to remedy the Secretary's unreasonable delay.

B. The Secretary's Inaction Nullifies AEDPA's Requirement that Revocation Petitions Be Decided Within 180 Days.

The delay in resolving PMOI's revocation petition also frustrates Congress's

180-day statutory deadline. "[T]he time agencies take to make decisions must be governed by a rule of reason." *TRAC*, 750 F.2d at 80 (internal quotation marks omitted). Where Congress has "provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute," that statute "may supply content for this rule of reason." *Id.* Indeed, a court may so "assume." *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991).

In this case, AEDPA squarely provides that the Secretary "shall make" a determination regarding a petition for revocation "[n]ot later than 180 days after receiving" the petition. 8 U.S.C. § 1189(a)(4)(B)(iv)(I). The specificity and relative brevity of the 180-day deadline are no accident. They reflect the importance of ensuring that organizations are removed promptly from the FTO list when the criteria for listing are no longer present. Indeed, the current version of AEDPA gives FTOs the right to petition for revocation every two years. *Id.* § 1189(a)(4)(B). This right to seek delisting would be trivialized if the Secretary had unlimited time to decide whether or not to grant such petitions.

Furthermore, if 180 days is sufficient time for the Secretary to make a decision on a *brand new* petition, then it surely is ample time for her to consider a petition on *remand*. By the time this Court remanded, Secretary Rice had already compiled a comprehensive administrative record, and it already had been reviewed to determine whether any of its contents could be declassified. All the Secretary

needed to do was to "indicate in her administrative summary which sources she regards as sufficiently credible that she relies on them; and she should explain to which part of section 1189(a)(1)(B) the information she relies on relates." *PMOI*, 613 F.3d at 230. She then had only to consider PMOI's responses and make her decision. But she still has not done so. Indeed, even if one treated PMOI's 2010 submission as an entirely new petition, the 180-day deadline for a decision would have expired nearly eight months ago.

AEDPA contains no exception to the 180-day deadline, and nothing in this Court's remand order excuses the delay. Even updating the administrative record cannot justify delaying the decision-making process. This is especially true here, as the new material contains nothing that would justify the denial of PMOI's revocation petition. The Court instructed the Department to cure its violation of PMOI's due process rights by providing notice of the unclassified evidence on which the Secretary proposed to rely and the opportunity to rebut that evidence. *PMOI*, 613 F.3d at 230. The Department does not comply with its obligations by continually tinkering with the administrative record (assuming it is doing anything at all).[7]

The Secretary's failure to decide PMOI's revocation petition is especially

[7] In any event, any delay is unwarranted because the Secretary cannot justify her decision with post hoc rationalizations. *See Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974).

untenable given that it was her own violation of the Constitution that triggered the remand for further proceedings. It is a basic principle of equity that no one should benefit from his own wrong. In this case, the Court remanded the matter to the Department because the Secretary's January 2009 decision violated PMOI's right to due process. The fact that the Court caught this error and ordered it remedied hardly entitles the Department to disregard the statutory limitation and help itself to an apparently endless period for deciding—a period to which it would have no claim but for its constitutional violation. It would be unusual, to say the least, if an agency's violation of the Constitution entitled it to abrogate a statutory deadline.

C. The Secretary's Pocket Veto of PMOI's Petition Frustrates the Command of This Court.

Mandamus is further necessary because the Secretary's failure to resolve PMOI's revocation petition allows her to keep the group's designation in place and to perpetuate the due process violation this Court identified, while ignoring the evidence that PMOI does not meet the statutory criteria for designation.

If the Secretary believes it proper to maintain PMOI's status as an FTO, she could do so by affirmatively denying the group's petition for revocation. That denial would be reviewable by this Court. Inaction accomplishes the same thing—PMOI's designation remains in place—but the non-decision is insulated from public accountability or judicial review. Indeed, the pocket veto eliminates the need for the Secretary to make the statutory findings that alone can justify keeping

an organization on the FTO list. Inaction also means less rigor. If the Department affirmatively decided the question, it would have a legal obligation to analyze thoroughly the factual evidence and legal justifications. The need for such analytical discipline disappears if the Department can choose simply to sit on the application. *Cf. TRAC*, 750 F.2d at 79 ("It is obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action.").

Finally, the Secretary's pocket veto also insulates the Department's actions from further judicial review. The Department's failure to act amounts to a decision to maintain the designation, but because that decision does not take the form of an affirmative agency order there is nothing for PMOI to appeal.

This case bears a striking similarity to *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008). There, the Court had invalidated the FCC's intercarrier compensation rules, remanding the matter to the agency with instructions to provide a valid legal justification for those rules. It failed to do so, and this Court therefore issued a writ of mandamus vacating the rules unless the FCC could explain their legal basis within six months. *Id.* at 850. The Court emphasized that mandamus was appropriate because the agency was not simply failing to "respond[] to requests by private parties to take administrative action," but was failing to "respond to our own remand." *Id.* at 856. Because the Court's prior

"remand without vacatur" had "left th[e] rules in place," the agency's inaction had "effectively nullified" the Court's determination that the interim rules were invalid. *Id.* Even worse, without agency action, the petitioner could not "mount a challenge to those rules," meaning that the agency had "insulate[d] its nullification of our decision from further review." *Id.*

Just so here. The Secretary is not simply failing to respond to PMOI's request for revocation but also failing to respond to this Court's remand with instructions to provide PMOI with constitutionally adequate process—process that is meaningful only if it leads to a decision. Until the Secretary renders a final decision, PMOI either lacks the benefit of a favorable ruling or the opportunity to challenge an unfavorable one, and this Court is unable to exercise its powers of judicial review. Mandamus is just as necessary here as it was in *Core*.

The Secretary's unlawful delay maintains the due process violation this Court identified in 2010. In remanding this matter, the Court left the FTO designation in place while directing the Secretary to "afford[] PMOI an opportunity to review and rebut the unclassified portions of the record, coupled with the Secretary's assurance that she has evaluated the material—and the sources therefor—that she relied on to make her decision." *PMOI*, 613 F.3d at 231. The non-decision means all of these steps remain incomplete, and the violation of PMOI's due process rights remains unremedied.

The Court's decision to remand this matter to the Secretary does not in any way enlarge her time to remedy the constitutional violation, nor does it justify her ongoing failure to decide PMOI's revocation petition. Since the remand, PMOI has received some additional materials from the State Department and has made additional submissions of its own (*see supra* pp. 10–12), but the Secretary has not come close to completing the process that the Court ordered. In particular, on October 18, 2010, the Department promised that "[y]ou will be provided an unclassified version of the final administrative record prior to the Secretary of State's determination of your client's petition." App. 20. No such document has been forthcoming. Neither has the Secretary "indicate[d] in her administrative summary which sources she regards as sufficiently credible that she relies on them" or "explain[ed] to which part of section 1189(a)(1)(B) the information she relies on relates." *PMOI*, 613 F.3d at 230. Indeed, she has provided neither an administrative summary nor any explanation. The ability to comment on these critical aspects of the Secretary's decision could be crucial. Until that occurs, the Secretary has failed to remedy the due process violation adjudicated by this Court.

II. THE COURT SHOULD ORDER THE DELISTING OF PMOI.

This Court recognized in 2010 that, given the Secretary's due process violations, it could have ordered PMOI's delisting. "[A] strict and immediate application of the principles of law which we have set forth herein could be taken

to require a revocation of the designation." 613 F.3d at 230 (internal quotation marks and brackets omitted); *see also NCRI I*, 251 F.3d at 209 (same). That the Court stayed its remedial hand out of comity to the Secretary in no way vitiates its authority now to order the same relief. The Court ultimately decided to leave the designation in place, but it directed the Secretary to afford PMOI due process. That the opportunity has been squandered only deepens the prejudice suffered by PMOI and its supporters. PMOI is simply asking the Court to do now through mandamus what it acknowledged it could have done two years ago through vacatur: issue an order directing the Secretary to rescind PMOI's FTO status.[8] In the alternative, we ask the Court to order the Secretary to decide the matter within 30 days of issuance of the Court's mandate and to direct that, if she does not, the designation shall be revoked.[9]

This Court previously has issued writs of mandamus ordering agencies to reach particular outcomes. For instance, in *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000), the Court issued a mandamus ordering the FCC to repeal its personal attack and political editorial rules. Nine months earlier, the Court had required the FCC to explain the rules' legal basis, yet the agency

[8] If the Secretary truly has some substantial basis for believing that PMOI qualifies under AEDPA as an FTO, she can readily relist it in a procedurally proper way that satisfies the Constitution.

[9] PMOI also respectfully asks the Court to expedite issuance of its mandate by setting the government's time to petition for rehearing at 20 days or less.

failed to do so. Citing the delay, as well as the fact that the rules remained in place absent legal justification, the Court found that mandamus was warranted. *Id.* at 272. Just so here. The Court remanded this matter to the Secretary more than 18 months ago—twice the amount of time in *Radio-Television*—for further action, not a filibuster. *See also Core*, 531 F.3d at 861–62 (ordering vacatur of the FCC's intercarrier compensation rules unless the agency provided a justification for them within six months).[10]

In the alternative, the Court should order the Secretary to decide within 30 days or the designation would be revoked. A mandamus ordering the Secretary to act within 30 days would still be of value notwithstanding the possibility that she will deny PMOI's revocation petition. First, if this Court compels the Secretary to decide, we believe she will have no legal alternative but to grant the petition, for there is no substantial basis—indeed, no basis at all—for retaining PMOI on the FTO list. Second, a rejection would at least open the door to judicial review of whether the Secretary's decision "lack[s] substantial support in the administrative

[10] Granting PMOI's request would not adversely affect "agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80. The Department of State completed its assembly of an administrative record in September 2011 and represented that it was addressing the petition "expeditiously." Accordingly, an order from this Court to move forward would not burden the Department.

record." 8 U.S.C. § 1189(c)(3)(D).[11] But critically, such alternative relief should make clear that, should the Secretary not act within 30 days, the Court's order will operate to revoke the designation. It is past time to end this "marathon round of administrative keep-away." *In re Am. Rivers*, 372 F.3d at 420.

To be sure, courts defer to the executive branch in matters of foreign policy and national security. But the Department has already acknowledged the extensive "evidence submitted by [PMOI] that it has renounced terrorism"—so much so that Secretary Rice indicated it should unilaterally reexamine the designation "even if [PMOI] does not file a petition for revocation." J.A. 22. Moreover, Congress has clearly spoken. It has authorized—indeed directed—this Court to "set aside" (not merely remand) designations that are "not in accordance with law." 8 U.S.C. § 1189(c)(3). It has mandated that the Secretary's conclusions—including any finding that designation would further this country's national security interests—be evaluated under the more rigorous "substantial support" standard of review. *Id.* § 1189(c)(3)(D). And it has determined that, given all the relevant considerations, 180 days is a reasonable outer limit for deciding delisting petitions.

In addition, Congress has directed that organizations shall be delisted if, *inter alia*, they lack either the capability or intent to engage in terrorism or terrorist

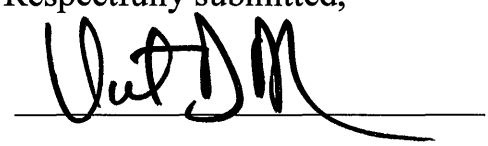
[11] Significantly, this Court has suggested that a decision relying "critically on classified material" may violate due process. *PMOI*, 613 F.3d at 231.

activity. The Secretary may not keep a non-qualifying organization on the FTO list for purely political or diplomatic reasons, or in order to try to achieve some foreign policy objective. Generalized national security considerations are a permissible basis for *removing* a group from the list, *id.* § 1189(a)(6)(A)(ii), but they are not by themselves a permissible basis for *designating* a group or *maintaining* its designation. To add or keep a group on the list, the Secretary must find *both* that the group engages in terrorism or terrorist activity or has the capability and intent to do so *and* that such activity "threatens . . . the national security of the United States." *Id.* § 1189(a)(1)(C). National security considerations thus are a *necessary* but not a *sufficient* condition for designation.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus directing the Secretary to grant PMOI's petition for revocation of its designation as an FTO. In the alternative, the Court should issue a writ of mandamus directing the Secretary to decide PMOI's petition for revocation within 30 days and specifying that, if she does not, the designation shall be revoked.

Respectfully submitted,



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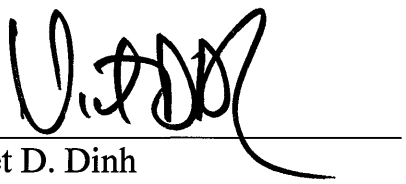
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel hereby certifies that this brief complies with the type-face limitations set forth in Fed. R. App. P. 32(a)(7).

Dated: February 27, 2012



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2012, I have caused the foregoing brief to be served via hand-delivery on the following:

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APPENDIX

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tween 1996 and 2008: Airport congestion had increased significantly. In explaining the need for the Amendments, it detailed congestion at specific airports and recounted the findings of the Federal Aviation Administration about chronic congestion. *See* 73 Fed.Reg. at 40,431–32 (citing Federal Aviation Administration, *Capacity Needs in the National Airspace System 2007–2025: An Analysis of Airports and Metropolitan Area Demand and Operational Capacity in the Future* (May 2007)). It reasoned that congestion pricing "could encourage more efficient use of [congested] airports" and explained how increasing an airport's rate base and allowing it to impose a two-part landing fee could approximate congestion pricing. 73 Fed. Reg. at 40,431–32.

Of course, congestion is not an entirely new problem. More than 40 years ago "the press, the government, the airlines, the airport operators themselves, and a host of others [told us] that our airports are in a state of 'crisis.' " Levine, *Landing Fees,* 12 J.L. & Econ. at 79. The DOT, however, has a continuing mandate to manage the Nation's air transportation system. As the airspace is used ever more intensively, it is unsurprising that the Department would update its approach to landing fees in an effort to relieve airport congestion. So long as it complies with the applicable statutes, its creativity should be welcomed on its merits, not spurned for its novelty.

III. Conclusion

For the foregoing reasons, the petition for review is *Denied.*

PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN, Petitioner

v.

UNITED STATES DEPARTMENT OF STATE and Hillary Rodham Clinton, in her Capacity as Secretary of State, Respondents.

No. 09–1059.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 12, 2010.

Decided July 16, 2010.

Background: Group designated as "foreign terrorist organization" (FTO) by Secretary of State petitioned for judicial review.

Holdings: The Court of Appeals held that:

(1) Secretary of State violated due process;

(2) failure of Secretary to provide required notice and unclassified material to organization in advance of her FTO decision was not harmless; and

(3) affording opportunity to organization to review and rebut unclassified portions of record, coupled with assurance by Secretary of State that she had evaluated material and sources therefor that she relied upon to make her decision to designate organization as FTO, may be sufficient to provide requisite due process.

Remanded.

Karen LeCraft Henderson, Circuit Judge, filed concurring opinion.

1. War and National Emergency ⇐1130

A standard of review like that used under the Administrative Procedure Act

(APA) applies to findings under Anti–Terrorism and Effective Death Penalty Act (AEDPA), as amended as part of Intelligence Reform and Terrorist Prevention Act, by Secretary of State that organization designated as Foreign Terrorist Organization (FTO) was foreign and that it engages in terrorism or terrorist activity or retains the capability and intent to do so. Antiterrorism and Effective Death Penalty Act of 1996, § 302(c)(3), 8 U.S.C.A. § 1189(c)(3).

2. Constitutional Law ⚿4252
War and National Emergency ⚿1130

Secretary of State violated due process by not notifying group designated as Foreign Terrorist Organization (FTO) before her decision was final of unclassified material upon which she proposed to rely and not allowing opportunity to group to present, at least in written form, such evidence as it may have been able to produce to rebut administrative record or otherwise negate proposition that it was FTO; although group had been given opportunity to include its own evidence in record supporting delisting, it did not have opportunity to rebut unclassified portion of record that Secretary was compiling. U.S.C.A. Const.Amend. 5; Antiterrorism and Effective Death Penalty Act of 1996, § 302(a, c), 8 U.S.C.A. § 1189(a, c).

3. War and National Emergency ⚿1130

Failure of Secretary of State to provide required notice and unclassified material to organization in advance of her Foreign Terrorist Organization (FTO) decision was not harmless, even if information at "heart" of Secretary's decision was classified and could not have been shared in any event, since Secretary's decision had been based not on "just the classified information" but rather "on the record as a whole." U.S.C.A. Const.Amend. 5; Antiterrorism and Effective Death Penalty Act of 1996, § 302(a, c), 8 U.S.C.A. § 1189(a, c).

4. War and National Emergency ⚿1130

When reviewing findings by Secretary of State under Anti–Terrorism and Effective Death Penalty Act (AEDPA), as amended as part of Intelligence Reform and Terrorist Prevention Act, in designating an organization as a Foreign Terrorist Organization (FTO), the Court of Appeals does not substitute its judgment for that of the Secretary in deciding which sources are credible but it does determine whether the record before her provides a sufficient basis for a reasonable person to conclude that the statutory requirements have been met. Antiterrorism and Effective Death Penalty Act of 1996, § 302(a)(1)(B), 8 U.S.C.A. § 1189(a)(1)(B).

5. Constitutional Law ⚿4252

Affording opportunity to organization to review and rebut unclassified portions of record, coupled with assurance by Secretary of State that she had evaluated material and sources therefor that she relied upon to make her decision to designate organization as Foreign Terrorist Organization (FTO), may be sufficient to provide requisite due process. U.S.C.A. Const.Amend. 5; Antiterrorism and Effective Death Penalty Act of 1996, § 302(a, c), 8 U.S.C.A. § 1189(a, c).

On Petition for Review of an Order of the Department of State.

Andrew L. Frey argued the cause for the petitioner. Miriam R. Nemetz, Melanie W. Rughani, Steven M. Schneebaum, E. Barrett Prettyman Jr. and Joshua D. Hawley were on brief. Ronald G. Precup entered an appearance.

Paul B. Stephan III was on brief for amici curiae the Honorable Alejo Vidal–Quadras et al. in support of the petitioner.

James C. Martin and W. Thomas McGough Jr. were on brief for amici curiae Colonel Gary L. Morsch, M.D. et al. in support of the petitioner.

Lawrence S. Robbins and Alan E. Untereiner were on brief for amici curiae Iranian-American Society of Texas et al. in support of the petitioner.

Viet D. Dinh and Nathan A. Sales were on brief for amici curiae Members of Congress in support of the petitioner.

Douglas Letter, Attorney, United States Department of Justice, argued the cause for the respondents. Ileana M. Ciobanu, Attorney, was on brief.

Before: HENDERSON and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the court filed PER CURIAM.

Concurring opinion filed by Circuit Judge HENDERSON.

PER CURIAM:

This case is the fifth in a series of related actions challenging the United States Secretary of State's designation of the Mojahedin-e Khalq Organization (MEK) and its aliases as a Foreign Terrorist Organization (FTO). The MEK, also called the People's Mojahedin Organization of Iran (PMOI),[1] has challenged its FTO status before this court three times. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State,* 182 F.3d 17, 18–19 (D.C.Cir. 1999) (*PMOI I*); *Nat'l Council of Resistance of Iran v. Dep't of State,* 251 F.3d 192, 195–96 (D.C.Cir.2001) (*NCRI I*); *People's Mojahedin Org. of Iran v. U.S. Dep't of State,* 327 F.3d 1238, 1239 (D.C.Cir. 2003) (*PMOI II*). The National Council of Resistance of Iran (NCRI), which the United States Department of State (State) considers an alias or alter ego of the PMOI, has challenged its FTO status twice—once with the PMOI and once on its own. *See NCRI I,* 251 F.3d at 197; *Nat'l Council of Resistance of Iran v. Dep't of State,* 373 F.3d 152, 154 (D.C.Cir. 2004) (*NCRI II*). In *NCRI I,* the court remanded the petition to the Secretary to provide certain due process protections to the PMOI and the NCRI. *See* 251 F.3d at 209. In the other three cases, including both petitions for review following remand in *NCRI I,* the court denied the petitioners' challenges.

On July 15, 2008, citing a change in its circumstances, the PMOI petitioned State and its Secretary for revocation of the PMOI's FTO designation. After assembling a record comprised of materials submitted by both the PMOI and the U.S. intelligence community, including classified information, the Secretary rejected the PMOI's petition on January 12, 2009. *See* In the Matter of the Review of the Designation of Mujahedin-e Khalq Organization (MEK), and All Designated Aliases, as a Foreign Terrorist Organization, 74 Fed. Reg. 1273, 1273–74 (Jan. 12, 2009). The PMOI now seeks review of the Secretary's decision. We conclude that the Secretary failed to accord the PMOI the due process protections outlined in our previous decisions and therefore remand.

I.

Although our earlier decisions detail the statutory scheme and the PMOI's prior designations, we briefly review them again together with the events leading to this action.

1. Because the petitioner in this case is the People's Mojahedin Organization of Iran, or the PMOI, we refer to the MEK and all associated aliases as the PMOI.

A.

We begin by describing the Anti–Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which was amended as part of the Intelligence Reform and Terrorist Prevention Act of 2004, Pub.L. No. 108–458, § 7119, 118 Stat. 3638, 3801 (2004). Under AEDPA, the Secretary may designate an entity as an FTO if she determines that (A) the entity is foreign, (B) it engages in "terrorist activity" or "terrorism" and (C) the terrorist activity threatens the security of the United States or its nationals. 8 U.S.C. § 1189(a)(1). "Terrorist activity" is defined in section 1182(a)(3)(B)(iii) and includes hijacking, sabotage, kidnapping, assassination and the use of explosives, firearms, or biological, chemical or nuclear weapons with intent to endanger people or property, or a threat or conspiracy to do any of the foregoing. To "engage in terrorist activity" involves, among other acts, soliciting funds or affording material support for terrorist activities, *id.* § 1182(a)(3)(B)(iv), while "terrorism" means "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents," 22 U.S.C. § 2656f(d)(2).

[1] The FTO designation has at least three consequences: the Secretary of the United States Treasury Department may freeze the FTO's assets, 8 U.S.C. § 1189(a)(2)(C); FTO members are barred from entering the United States, *id.* § 1182(a)(3)(B)(i)(IV), (V); and those who knowingly provide "material support or resources" to an FTO are subject to criminal prosecution, 18 U.S.C. § 2339B(a)(1). *See Kahane Chai v. Dep't of State,* 466 F.3d 125, 127 (D.C.Cir.2006); *NCRI II,* 373 F.3d at 154. A designated organization can attempt to avoid these consequences by seeking review in this court no later than thirty days after publication in the Federal Register of the Secretary's designation, amended designation or determination in response to a petition for revocation. *See* 8 U.S.C. § 1189(c)(1). Our review is based "solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information" that the Secretary used to reach her decision. *Id.* § 1189(c)(2). The review "sounds like the familiar procedure normally employed by the Congress to afford due process in administrative proceedings" and is "reminiscent of other administrative review." *NCRI I,* 251 F.3d at 196–97. Employing "APA-like language," *PMOI I,* 182 F.3d at 22, the statute requires that we "hold unlawful and set aside a designation, amended designation, or determination in response to a petition for revocation" that we find:

> (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.

8 U.S.C. § 1189(c)(3). This standard of review applies only to the first and second requirements, namely, (1) that the organization is foreign and (2) that it engages in terrorism or terrorist activity or retains the capability and intent to do so. We have held that the third requirement—that the organization's activities threaten U.S. nationals or national security—presents an unreviewable political question. *PMOI I,* 182 F.3d at 23.

B.

As originally enacted, AEDPA permitted an FTO designation to remain in effect for only two years, which required the Secretary at the end of that time period to either compile a new administrative record and renew the designation or allow it to lapse. *See* 8 U.S.C. § 1189(a)(4)(A)-(B) (2003). Her determination was subject to review in this court. *Id.* § 1189(b) (2003). The Secretary first designated the PMOI as an FTO under AEDPA in 1997 and made successive designations in 1999, 2001 and 2003. *See* Designation of Foreign Terrorist Organizations, 62 Fed.Reg. 52,650 (Oct. 8, 1997) (1997 Designation); Designation of Foreign Terrorist Organizations, 64 Fed.Reg. 55,112 (Oct. 8, 1999) (1999 Designation); Redesignation of Foreign Terrorist Organizations, 66 Fed.Reg. 51,088, 51,089 (Oct. 5, 2001) (2001 Redesignation); Redesignation of Foreign Terrorist Organizations, 68 Fed.Reg. 56,860, 56,861 (Oct. 2, 2003) (2003 Redesignation). In *PMOI I*, we denied the PMOI's petition for review of the initial 1997 Designation. 182 F.3d at 25. In her 1999 redesignation, the Secretary coupled the PMOI with the NCRI, which the Secretary considered the PMOI's alter ego or alias. *See* 1999 Designation. On review, we held that the Secretary had substantial support to so conclude but we remanded after concluding that the PMOI and the NCRI had been denied due process. *See NCRI I*, 251 F.3d at 209.

On remand, the Secretary allowed the PMOI and the NCRI to respond to the unclassified portions of the Secretary's administrative record and also to supplement it. After reviewing the record so comprised, the Secretary re-entered the 1999 Designation as to the PMOI on September 24, 2001, *see* Letter of Ambassador Francis X. Taylor, Coordinator for Counterterrorism, U.S. Dep't of State, at 2 (Sept. 24, 2001), and began a new two-year designation the following month as to both the PMOI and the NCRI, *see* 2001 Redesignation. We denied the PMOI's petition for review. *See PMOI II*, 327 F.3d at 1245. The Secretary's 2001 Redesignation also concluded that the NCRI was the PMOI's alter ego and was thus also properly designated an FTO. At the same time, State assured the NCRI that it would make a *de novo* determination of its FTO designation after completing a review of the materials the NCRI had submitted to the Secretary. *See NCRI II*, 373 F.3d at 155 (citing Letter of Ambassador Francis X. Taylor, Coordinator for Counterterrorism, U.S. Dep't of State, at 1 (Oct. 5, 2001)). In May 2003, the Secretary left in place the 1999 Designation and 2001 Redesignation of the NCRI as an alias of the PMOI and an FTO and, on review, we upheld the Secretary's decision. *See NCRI II*, 373 F.3d at 154 (denying petition for review because "the Secretary's latest designation complied with the governing statute and all constitutional requirements"). Before our decision issued, the Secretary had already redesignated the PMOI again in October 2003.[2] *See* 2003 Redesignation.

Shortly after *NCRI II*, and while the 2003 Redesignation of the PMOI was still in effect, the Congress lessened the Secre-

2. The Secretary designated the Mujahedin-e Khalq Organization, along with the following aliases: Mujahedin-e Khalq; MEK; MKO; People's Mujahedin Organization of Iran (including its U.S. office and all other offices worldwide); PMOI; Organization of the People's Holy Warriors of Iran; Sazeman-e Mujahedin-e Khalq-e Iran; National Council of Resistance (including its U.S. office and all other offices worldwide); NCR; National Council of Resistance of Iran (including its U.S. office and all other offices worldwide); NCRI; National Liberation Army of Iran; NLA; and the Muslim Iranian Student's Society. 2003 Redesignation.

tary's administrative burden by amending AEDPA to remove the two-year limitation on an FTO designation. *See* Intelligence Reform and Terrorist Prevention Act of 2004 § 7119. A designation no longer lapses. Instead, a designated organization may seek revocation two years after the designation is made or, if the designated organization has previously filed a petition for revocation, two years after that petition is resolved. 8 U.S.C. § 1189(a)(4)(B)(ii). To seek revocation, an FTO "must provide evidence in that petition that the relevant circumstances ... are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the organization is warranted." *Id.* § 1189(a)(4)(B)(iii). The Secretary has 180 days from the date of the petition to make her revocation decision. *Id.* § 1189(a)(4)(B)(iv)(I). In making her decision, the Secretary may rely on classified information, which "shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review." *Id.* § 1189(a)(4)(B)(iv)(II). If five years elapse without a petition for revocation from the FTO, the Secretary conducts her own review to determine if revocation is appropriate. *Id.* § 1189(a)(4)(C)(i). Unlike a determination made in response to a petition for revocation, her *ex mero motu* decision is not judicially reviewable. *Id.* § 1189(a)(4)(C)(ii). While the Secretary may revoke a designation at any time, *id.* § 1189(a)(6)(A), the statute directs that she *shall* revoke a designation if she finds that either "the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation," or "the national security of the United States warrants a revocation," *id.*

C.

This action began in July 2008, when the PMOI filed a petition for revocation of its 2003 Redesignation. The PMOI argued that the 2003 Redesignation should be revoked because of its dramatically changed circumstances since the Secretary's and this court's last reviews. It submitted evidence to the Secretary of its changed circumstances, asserting that, since its initial FTO designation in 1997, it had: ceased its military campaign against the Iranian regime and renounced violence in 2001; voluntarily handed over its arms to U.S. forces in Iraq and cooperated with U.S. officials at Camp Ashraf (where all of its members operating in Iraq are consolidated) in 2003; shared intelligence with the U.S. government regarding Iran's nuclear program; in 2004 obtained "protected person" status under the Fourth Geneva Convention for all PMOI members at Camp Ashraf based on the U.S. investigators' conclusions that none was a combatant or had committed a crime under any U.S. laws; disbanded its military units and disarmed the PMOI members at Ashraf, all of whom signed a document rejecting violence and terror; and obtained delisting as a terrorist organization from the United Kingdom (the Proscribed Organisations Appeal Commission and the Court of Appeal) in 2008 and from the European Union (the European Court of First Instance) in 2009. The PMOI also thrice supplemented its petition with additional information and letters in support from members of the U.S. Congress, members of the UK and European parliaments and retired members of the U.S. military, among others.

After reviewing an administrative record consisting of both classified and unclassified information, the Secretary denied the PMOI's petition and published its denial in the Federal Register on January 12, 2009.

See 74 Fed.Reg. at 1273–74. She also provided the PMOI with a heavily redacted 20–page administrative summary of State's review of the record, which summary referred to 33 exhibits, many of which were also heavily or entirely redacted. *See* Admin. Summ. (Jan. 8, 2009) (Unclassified Version); Revised Admin. Summ. (Apr. 24, 2009) (Unclassified Version). The Secretary's determination was based on the administrative record, "supporting exhibits and supplemental filings by the MEK in support of the Petition, as well as information from a variety of sources, including the U.S. Intelligence Community." Revised Admin. Summ. 2. She wrote that "in considering the evidence as a whole, the MEK has not shown that the relevant circumstances are sufficiently different from the circumstances that were the basis for the 2003 re-designation," and that "[a]s a consequence, the MEK continues to be a foreign organization that engages in terrorist activity ... or terrorism ... or retains the capability and intent to" do so. *Id.*; *see* 74 Fed.Reg. at 1273–74. Nevertheless she also noted:

> In light of the evidence submitted by the MEK that it has renounced terrorism and the uncertainty surrounding the MEK presence in Iraq, the continued designation of the MEK should be re-examined by the Secretary of State in the next two years even if the MEK does not file a petition for revocation.

Revised Admin. Summ. 20. Although the Secretary informed the PMOI of her decision the day before it was published in the Federal Register, she did not provide the organization any unclassified material on which she intended to rely. *See* Resp'ts' Br. 20 (*after* denying revocation petition "[t]he State Department ... provided to the PMOI an unclassified summary of the evidence in the record and the agency's analysis of the issues").

The PMOI filed a timely petition for review on February 11, 2009 under 8 U.S.C. § 1189(c). It asks us to vacate the Secretary's decision and remand with instructions to revoke its FTO designation based on a lack of substantial support in the record. Alternatively, the PMOI asks us to vacate its designation on the ground that the Secretary did not comply with the due process requirements set forth in our earlier decisions by failing to provide it with advance notice of her proposed action and the unclassified record on which she intended to rely, as well as by failing to provide it with any access to the classified record.

State submitted its classified administrative record on March 30, 2009 for ex parte and in camera review under 8 U.S.C. § 1189(c)(2); it subsequently filed a redacted, unclassified version in August 2009. In filing the latter document, State noted that it intended to file additional documents as soon as its declassification review was finished. It later supplemented the record with newly declassified material twice—once on September 8, 2009, the day the PMOI's opening brief was due, and again on October 27, 2009, about two weeks before the PMOI's reply brief due date.[3]

3. Among the disclosures in the declassified material: "the MEK trained females at Camp Ashraf in Iraq to perform suicide attacks in Karbala"; "the MEK solicits money under the false pretext of humanitarian aid to the Iranian population"; "an August 2008 U.S. Intelligence Community Terrorist Threat Assessment, clearly states that the MEK retains a limited capability to engage in terrorist activity or terrorism"; "[t]he MEK publicly renounced violence in 2001, but limited intelligence reporting indicates that the group has not ended military operations, repudiated violence, or completely or voluntarily disarmed"; "[t]he [intelligence community] assesses that although there has not been a confirmed ter-

II.

[2] Ordinarily, we would be required to decide whether to set aside the Secretary's denial of the PMOI's revocation petition on the ground that her conclusion that the PMOI "engages in terrorist activity ... or terrorism ... or retains the capability and intent to engage in terrorist activity or terrorism," Revised Admin. Summ. 2–3, "lack[s] substantial support in the administrative record taken as a whole or in classified information submitted to the court." 8 U.S.C. § 1189(c)(3)(D).

Here, however, we need not determine the adequacy of the record because, as the PMOI argues, our review "is not sufficient to supply the otherwise absent due process protection" of notice to the designated organization and an opportunity for a meaningful hearing. *NCRI I,* 251 F.3d at 208 (designated organization entitled to "opportunity to be heard 'at a meaningful time and in a meaningful manner' " (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976))). In other words, even were we to agree with State that the record is sufficient, we cannot uphold the designation absent the procedural safeguards required by our precedent. Specifically, our cases require the Secretary to notify the PMOI of the unclassified material "upon which [s]he propose[d] to rely" and to allow the PMOI "the opportunity to present, at least in written form, such evidence as [it] may be able to produce to rebut the administrative record or otherwise negate the proposition that" it is an FTO. *NCRI I,* 251 F.3d at 209.

This did not happen here. The PMOI was notified of the Secretary's decision and permitted access to the unclassified portion of the record only *after* the decision was final.[4] And even though the PMOI was given the opportunity to include in the record its own evidence supporting delisting, it had no opportunity to rebut the unclassified portion of the record the Secretary was compiling—an omission, the PMOI argues, that deprived it of the due process protections detailed in our previous decisions. *See* Pet'r's Br. 23 ("[T]he Secretary's decision is procedurally infirm because PMOI was given no opportunity to rebut the administrative record....").

State does not deny that the Secretary failed to provide the type of notice specified in *NCRI I.* But it argues that she complied with our precedent well enough in light of the statutory scheme as altered by the 2004 AEDPA amendments and the "flexible" nature of due process. Arg. Tr. 22:18–21; *see NCRI I,* 251 F.3d at 205 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Within that framework, State argues, the Secretary provided the PMOI with all of the process constitutionally due by informally meeting with the PMOI in October 2008 (at the PMOI's request), by allowing the PMOI to supplement the administrative record with evidence of its own and by sharing unclassified material with the PMOI (but not before her denial

rorist attack by the MEK since the organization surrendered to Coalition Forces in 2003, the MEK retains a limited capability and the intent to use violence to achieve its political goals"; and "UN inspectors say that much of the information provided to the UN by the MEK about Iran's nuclear program has a political purpose and has been wrong." Suppl. Admin. R. (filed Oct. 27, 2009).

4. Although we do not require advance notification of the Secretary's decision upon an adequate showing that "earlier notification would impinge upon the security and other foreign policy goals of the United States," *NCRI I,* 251 F.3d at 208, State does not suggest the Secretary had this concern.

of the revocation petition). *See* Resp'ts' Br. 18, 44–45 (citing *PMOI II*, 327 F.3d at 1242; *NCRI I*, 251 F.3d at 208–09) (PMOI received "notice along with the opportunity to be effectively heard" and "nothing more is required by this Court"). State also urges that, even if the Secretary should have turned over the unclassified portion of the record before its January 2009 decision, her failure to do so was harmless.

We disagree on both counts. Nothing in the 2004 amendments provides a basis for relaxing the due process requirements we outlined for the redesignation decision at issue in *NCRI I*. Although phrased slightly differently, the Secretary's fundamental inquiry is the same for both redesignation under the old statute and revocation under the new. *Compare* 8 U.S.C. § 1189(a)(4)(B) (2003) (redesignation appropriate if "relevant circumstances" initially warranting designation "still exist") *with id.* § 1189(a)(6) (revocation appropriate if "circumstances that were the basis for the designation have changed in such a manner as to warrant revocation"). So, too, is our standard of review the same under both versions of the statute whether we review a "designation," a "redesignation" or a "petition for revocation." *See id.* § 1189(c)(3). And while the amended version of the statute puts the burden on an FTO to "provide evidence" of changed circumstances, *see id.* § 1189(a)(4)(B)(iii), the Secretary must still compile a record supporting the continued designation, *see id.* § 1189(a)(6)(B). In short, we have held due process requires that the PMOI be notified of the unclassified material on which the Secretary proposes to rely and an opportunity to respond to that material *before* its redesignation; nothing in the amended statute suggests that this protection is any less necessary in the revocation context.[5]

[3] Nor do we find the Secretary's failure to provide the required notice and unclassified material in advance of her decision harmless because the information at the "heart" of the Secretary's decision is classified and could not have been shared in any event. Resp'ts' Br. 45–46. State's characterization notwithstanding, at argument it acknowledged that the Secretary's decision was based not on "just the classified information" but rather "on the record as a whole." Arg. Tr. 31:24–32:1–7; *see* Suppl. Admin. R. 19 ("In considering the body of evidence as a whole, intelligence and national security experts conclude that the MEK has not demonstrated that the circumstances that were the basis for the original designation have changed in such a manner as to warrant revocation."). Hence, State asks us to assume that nothing the PMOI would have offered—not even evidence refuting whatever *unclassified* material the Secretary may have relied on—could have changed her mind. We explicitly rejected this argument in *NCRI I*. *See* 251 F.3d at 209 ("We have no reason to presume that the petitioners in this particular case could have offered evidence which might have either changed the Secretary's mind or affected the adequacy of the record[, but] ... without the due process protections which we have outlined, we cannot presume the contrary

5. At oral argument, State noted that, unlike the procedure originally set forth in AEDPA, whereby the Secretary compiled a new administrative record on a biennial basis, today no record is compiled until the FTO files a petition for revocation. *See* Arg. Tr. 29–30. This leaves the Secretary only 180 days from that filing to contact multiple defense and intelligence agencies, compile the administrative record and make a determination—and thus inadequate opportunity to complete the "extremely difficult and time consuming process" of providing declassified portions of the record in advance of her decision. *Id.* 25:20–21. Time constraints, however, cannot override constitutional constraints.

either."). Far from *assuming* that the classified record obviated further review, we held that our limited role "is not sufficient to supply the otherwise absent due process protection." *Id.* at 209.[6]

To illustrate, during the briefing in this case, the Secretary twice supplemented the unclassified record with formerly classified materials. These disclosures include the statement that PMOI members planned suicide attacks in Karbala. Because it learned of this information only after it petitioned for judicial review, the PMOI attempts to distinguish and discredit it for the first time before us. *See* Pet'r's Reply Br. 21 (calling allegations "so manifestly implausible that they earned no mention in the Government's brief"). Citing *PMOI I*, 182 F.3d at 19, 25, State argues that the Secretary may consider "sources named and unnamed, the accuracy of which we have no way of evaluating," and that we cannot make any "judgment whatsoever regarding whether the material before the Secretary is or is not true." Nevertheless, to the extent we defer to the Secretary's fact-finding process, we have done so with the understanding that the Secretary has adhered to the procedural safeguards of the due process clause, *see NCRI I*, 251 F.3d at 209, and afforded the designated organization a fair opportunity to respond to the unclassified record.

At oral argument, State suggested that the PMOI, now in possession of the unclassified portions of the record (including the newly declassified material), may go back to the Secretary and provide evidence to rebut it. *See* Arg. Tr. 26:19–20. We think a better approach is the one the then-Secretary took after remand in *NCRI I*, when, apparently faced with a similar time crunch, he made a designation that was to be reevaluated once he fully reviewed the supplemented record. *See NCRI II*, 373 F.3d at 155 ("At that time, the State Department assured NCRI that although 'the present situation ... requires continued designation of [NCRI] as an alias of MEK for now,' upon the completion of review of NCRI's submissions, 'the Secretary will make a *de novo* determination in light of the entire record, including the material you have submitted.' " (quoting Letter of Ambassador Francis X. Taylor, Coordinator for Counterterrorism, U.S. Dep't of State, at 1 (Oct. 5, 2001))).

Our reluctance to accept State's "no harm, no foul" theory is greater in light of the fact that we are unsure what material the Secretary in fact relied on or to what portion of 8 U.S.C. § 1189(a)(1)(B) she found it relevant. While "it is emphatically not our province to second-guess the Secretary's judgment as to which affidavits to credit and upon whose conclusions to rely," the Congress has required us to determine "whether the 'support' marshaled for the Secretary's designation was 'substantial.' " *NCRI II*, 373 F.3d at 159 (quoting 8 U.S.C. § 1189(b)(3)(D)). Some of the reports included in the Secretary's analysis on their face express reservations

6. In *NCRI I*, by declining to assume that the PMOI could not have changed the Secretary's mind in the absence of due process protections, we cast doubt on whether any denial could be found harmless, perhaps because a convincing response by the FTO to the unclassified material might affect the Secretary's view not only of that evidence but of the classified material as well. *See* 251 F.3d at 209. In other words, because of the due process denial, we declined to consider whether the record nevertheless substantially supported the Secretary's determination. And while it is true that we held a similar due process denial harmless in *Kahane Chai*, we did so only because the government, in response to the petitioners' objections, "offered to do and in 2004 did a *de novo* determination of their status" with the attendant "opportunity to inspect and to supplement the record upon which the review would be based." 466 F.3d at 132.

about the accuracy of the information contained therein. *See, e.g.,* Suppl. Admin. R., MEK–11 (describing "possible plans to attack [the] international zone in Baghdad" but conceding that "the ultimate sources of the information was [sic] unknown and as such, their access, veracity, and motivations were unknown"). Similarly, while including reports about the Karbala suicide attack plot described above, the Secretary did not indicate whether she accepted or discredited the reports and we do not know whether the PMOI can rebut the reports.

[4] In other instances, the Secretary cited a source that it seemed to regard as credible but did not indicate to what part of the statute the source's information was relevant. For example, her analysis described a federal grand jury indictment alleging that MEK has engaged in fraud in fundraising operations and she faulted the PMOI for failing to discuss its finances in its submission to the Secretary. Suppl. Admin. R. 11. It is unclear, however, whether the Secretary believes that fundraising under false pretenses is direct evidence of terrorist activity or instead bears on the PMOI's "capability" to engage in terrorist activity in the future or its "intent" to do so. 8 U.S.C. § 1189(a)(1)(B). While we will not substitute our judgement for that of the Secretary in deciding which sources are credible, we must determine whether the record before her provides "a sufficient basis for a reasonable person to conclude" that the statutory requirements have been met. *Kahane Chai,* 466 F.3d at 129 (citing *PMOI I,* 182 F.3d at 25). Without knowing whether, or how, the Secretary evaluated the record material, we are unable to do so.

III.

As we noted in *NCRI I*, "[w]e recognize that a strict and immediate application of the principles of law which we have set forth herein could be taken to require a revocation of the designation[ ] before us[, but] ... we also recognize the realities of the foreign policy and national security concerns asserted by the Secretary in support of th[e] designation." 251 F.3d at 209. We thus leave the designation in place but remand with instructions to the Secretary to provide the PMOI the opportunity to review and rebut the unclassified portions of the record on which she relied. In so doing, we emphasize two things:

[5] First, as earlier explained, the Secretary should indicate in her administrative summary which sources she regards as sufficiently credible that she relies on them; and she should explain to which part of section 1189(a)(1)(B) the information she relies on relates. Second, although the Secretary must give the PMOI an opportunity to rebut the unclassified material on which she relies,[7] AEDPA does not allow access to the classified record as it makes clear that classified material "shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review." 8 U.S.C. § 1189(a)(4)(B)(iv)(II); *see id.* § 1189(c)(2) (providing for court's "ex parte and in camera review" of "classified information used in making the designation"). Our cases under AEDPA have suggested that this procedure can satisfy due process requirements, at least where the Secretary

7. State agrees that "only legitimately classified information should be redacted from the public version of the Administrative Record" and thus has reviewed and disclosed all material that it believes can be safely declassified consistent with national security interests. Resp'ts' Br. 41.

has not relied critically on classified material and the unclassified material provided to the FTO is sufficient to justify the designation. *See NCRI II,* 373 F.3d at 159–60; *PMOI II,* 327 F.3d at 1243 ("We already decided in [*NCRI I*] that due process required the disclosure of *only* the unclassified portions of the administrative record.") (emphasis in original); *NCRI I,* 251 F.3d at 202, 208–09 ("We acknowledge that in reviewing the whole record, we have included the classified material[, but] ... we will not and cannot disclose the contents of the record," which "is within the privilege and prerogative of the executive"); *see also Jifry v. Fed. Aviation Admin.,* 370 F.3d 1174, 1182, 1184 (D.C.Cir. 2004) (pilot denied licensure has no right to access to classified record because "[t]he due process protections afforded ... parallel those provided under similar circumstances in [*NCRI I* and *PMOI II*], and are sufficient to satisfy our case law"); *Holy Land Found. for Relief & Dev. v. Ashcroft,* 333 F.3d 156, 164 (D.C.Cir.2003) ("HLF's complaint, like that of the Designated Foreign Terrorists Organizations in [*NCRI I* and *PMOI II*], that due process prevents its designation [under a different law] based upon classified information to which it has not had access is of no avail."). We note, however, that none of the AEDPA cases decides whether an administrative decision relying critically on undisclosed classified material would comport with due process because in none was the classified record essential to uphold an FTO designation. But they do indicate that, for the purpose of today's remand, affording PMOI an opportunity to review and rebut the unclassified portions of the record, coupled with the Secretary's assurance that she has evaluated the material—and the sources therefor—that she relied on to make her decision, may be sufficient to provide the requisite due process.

For the reasons set forth above, the Secretary's denial of the People's Mojahedin of Iran's petition for revocation of its 2003 designation as a foreign terrorist organization is remanded to the Secretary for further proceedings consistent with this opinion.

So ordered.

KAREN LECRAFT HENDERSON, Circuit Judge, concurring:

We are to uphold the Secretary's determination unless it "lack[s] substantial support in the administrative record taken as a whole *or in classified information submitted to the court.*" 8 U.S.C. § 1189(c)(3)(D) (emphasis added). In my view, the classified portion of the administrative record provides "substantial support" for her determination that the PMOI either continues to engage in terrorism or terrorist activity or retains the capability and intent to do so and, consequently, for her denial of the PMOI's revocation petition. Further, our cases have repeatedly emphasized what the statute makes clear: the PMOI enjoys no right to access classified material the Secretary relied on. *See NCRI I,* 251 F.3d at 208 (state's notice to designated entities "need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute"); *see also PMOI II,* 327 F.3d at 1242 (we "already decided in [*NCRI I*] that due process required the disclosure of *only* the unclassified portions") (emphasis in original). And we have upheld against due process challenge an AEDPA designation that relied on *both* classified and unclassified material. *See NCRI II,* 373 F.3d at 152 ("*Based on our review of the entire administrative record and the classified materials appended thereto,* we find that the Secretary did have an adequate basis for his conclusion.") (emphasis added). Although we acknowledged later in the same opinion that the unclassified record alone would have sufficed to support the designation, we have consistently and unambig-

uously followed this reading of *NCRI I* in virtually every AEDPA case.[1] *See id.* at 159–60 (access argument is "foreclosed by our earlier decisions in [*NCRI I*] and *PMOI II*"); *cf. Kahane Chai v. Dep't of State*, 466 F.3d 125, 129 (D.C.Cir.2006) (declining to resolve due process claim because "we can uphold the designations based solely upon the unclassified portion of the administrative record"). Moreover, other precedent also affirms administrative decisions relying on classified material, each rejecting a due process challenge on the basis of *PMOI II* and *NCRI I*.[2] While these decisions are not under AEDPA, they treat our AEDPA precedent as binding and are, in any event, binding themselves.

According to the Secretary, however, as in *NCRI I* her decision was based on both classified and unclassified material. Because the PMOI had no opportunity to access/rebut the unclassified portions before the Secretary's decision was final, it is not clear that she would have denied the revocation petition had that material been made available to the PMOI earlier. In addition, the Secretary herself appears to have recognized the ambiguity of the record by recommending a *sua sponte* reexamination of the PMOI's status in two years. Revised Admin. Summ. 20 ("In light of the evidence submitted by the MEK that it has renounced terrorism and the uncertainty surrounding the MEK presence in Iraq, the continued designation of the MEK should be re-examined by the Secretary of State in the next two years even if the MEK does not file a petition for revocation."). In short, were I confident that she had evaluated and relied on what I consider to be the substantial support contained in the classified record only (along with the sources therefor), I would affirm. Because I am not, I join my colleagues in remanding to the Secretary.

1. For example, in *PMOI II* we rejected the contention that the PMOI's redesignation under AEDPA was unconstitutional because "the Secretary relied on secret information to which [the PMOI was] not afforded access": "We have already established in [*NCRI I*] the process which is due under the circumstances of this sensitive matter of classified intelligence in the effort to combat foreign terrorism. The Secretary has complied with the standard we set forth therein, and nothing further is due." *PMOI II*, 327 F.3d at 1242–43. The court went on to note that "even if we err in describing the process due, even had the Petitioner been entitled to have its counsel or itself view the classified information, the breach of that entitlement has caused it no harm." *Id.* at 1243. But I read the subjunctive phrase beginning with "even if" as an alternative holding which means both holdings constitute precedent. *See Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1189 (D.C.Cir. 2000) (" '[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter [dictum], but each is the judgment of the court, and of equal validity with the other.' " (quoting *Dooling v. Overholser*, 243 F.2d 825, 828 (D.C.Cir.1957) (internal quotations omitted))).

2. *See Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1184 (D.C.Cir.2004) ("While the pilots protest that without knowledge of the specific evidence on which TSA relied, they are unable to defend against the charge that they are security risks, the court has rejected the same argument in the terrorism listing cases. The due process protections afforded to them parallel those provided under similar circumstances in [*NCRI I* and *PMOI II*], and are sufficient to satisfy our case law."); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C.Cir.2003) ("That the designation comes under an Executive Order issued under a different statutory scheme makes no difference. HLF's complaint, like that of the Designated [FTOs] in the earlier cases, that due process prevents its designation based upon classified information to which it has not had access[,] is of no avail.").

No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In Re PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN, Petitioner.

DECLARATION OF MIRIAM R. NEMETZ
IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS
TO ENFORCE THE COURT'S MANDATE

I, Miriam R. Nemetz, hereby declare as follows:

1. I am a partner in the law firm of Mayer Brown LLP, attorneys of record for the People's Mojahedin Organization of Iran ("PMOI") in this proceeding. I participated in representing the PMOI in proceedings before the Department of State following this Court's decision in *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220 (D.C. Cir. 2010). I make the statements herein based on my personal knowledge.

2. On October 18, 2010, Douglas Letter of the Department of Justice, who represents the State Department in these proceedings, sent a letter to counsel for the PMOI describing the procedures to be followed by the State Department, following this Court's remand, in determining the PMOI's petition for revocation of its status as a Foreign Terrorist Organization ("petition"). A true and correct copy of the letter is attached as Exhibit 1.

3. On October 29, 2010, Mr. Letter wrote to counsel for the PMOI stating that the State Department had "begun the process of updating the administrative record with additional material" relevant to the PMOI's petition but had not yet identified any additional unclassified exhibits. The letter asked that the PMOI "make any submission concerning the unclassified material previously provided" by December 29, 2010, which would allow State to "consider [it] and incorporate it into the updated administrative record." A true and correct copy of the letter is attached as Exhibit 2.

4. On December 29, 2010, the PMOI submitted to the State Department its principal supplement to the petition ("the 2010 Supplement"). In that document, the PMOI commented on the unclassified portions of the 2009 administrative record that the State Department had released. It also provided updated information about the PMOI's current circumstances.

5. On April 5, 2011, the PMOI submitted an update to the 2010 Supplement (the "Second Supplement"). The Second Supplement described both the continued deterioration of conditions at Ashraf and the growing support among U.S. and foreign leaders for delisting the PMOI.

6. On April 12, 2011, the PMOI's counsel met with representatives of the State Department and other interested agencies, having received in advance a list of questions that the Government representatives wished to have addressed.

7. On May 20, 2011, Mr. Letter sent an e-mail to the PMOI's counsel stating that the State Department had identified ten additional documents containing unclassified or declassified information that it was considering including in the administrative record and inviting comment on the documents. A true and correct copy of the e-mail is attached as Exhibit 3.

8. On June 6, 2011, the PMOI commented in writing on the ten documents.

9. On August 4, 2011, Mr. Letter sent an e-mail to one of counsel for the PMOI reporting that the "process of declassifying information intended for use in the consideration of the delisting petition" was "complete." A true and correct copy of the e-mail is attached as Exhibit 4.

10. On September 27, 2011, Mr. Letter sent an e-mail to counsel for the PMOI stating that the State Department had decided to include two more documents in the administrative record, and requesting that the PMOI provide "any additional views on either of these documents." A true and correct copy of the e-mail is attached as Exhibit 5.

11. On October 4, 2011, counsel for PMOI submitted written comments on the two documents.

12. Since early October 2011, DOJ has not requested that counsel for the PMOI provide any additional information relevant to the petition, and counsel for the PMOI have not submitted any additional material for consideration.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 23, 2012, at Washington, D.C.

Miriam R. Nemetz

EXHIBIT 1

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7513
DNL Washington, D.C. 20530-0001

Douglas Letter
Terrorism Litigation Counsel

Tel: (202) 514-3602
Fax: (202) 514-8151

October 18, 2010

Andrew L. Frey, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019-5820

Re: People's Mojahedin Organization of Iran v. U.S. Dept. of State, No. 09-1059

Dear Mr. Frey: Andy

Thank you for your letter of August 31, 2010, containing your views regarding the procedures your client would like to see followed by the U.S. Department of State on remand from the D.C. Circuit in the above-referenced case. I am sorry for the delay in responding to your letter. I circulated your proposal to the interested offices immediately after receiving it, but have been very heavily engaged in other matters and have been out of the office traveling and for religious holidays on various days in September.

We have considered the suggestions in your letter concerning the administrative procedure to be followed by the State Department on remand. Some of the procedures you have suggested dovetail with the procedures that will be afforded to your client by the State Department, while others go far beyond the accepted process for this type of agency action and would create a substantial and unwarranted administrative burden. We have carefully considered the procedures that the State Department has utilized in the FTO redesignation and review process in the past, the terms of the applicable statute, and the D.C. Circuit's opinion, and intend to proceed in the following way.

As you know, you now have received all of the unclassified material contained in the administrative record to date pertaining to your client's request to vacate its designation as a Foreign Terrorist Organization. The State Department intends to update that administrative record with additional material relevant to the designation. Additional unclassified material relevant to the designation will be provided to you by October 29, 2010. Your client will have 60 days from that date in which to make any new submission or update previous submissions. As soon as your client makes that submission, we will as speedily as possible schedule a meeting with relevant officials from the State Department and possibly other interested agencies at which you or other authorized attorneys for you client may make an oral presentation.

The updated administrative record will also contain previously compiled relevant classified information, as well as any additional classified information compiled during the State Department's update of the administrative record. If in the course of reviewing this classified information, it is determined that any portion of that information can be appropriately declassified, the State Department will provide your client with an opportunity to review and comment prior to the Secretary of State's determination on your client's petition.

The State Department, in consultation with appropriate other agencies, will analyze the materials compiled for the administrative record, including information you have provided in writing and in person. The final state Department administrative record will include the type of analysis of the evidence discussed by the D.C. Circuit in its July 16 opinion. You will be provided an unclassified version of the final administrative record prior to the Secretary of State's determination of your client's petition. Based on this final administrative record, the Secretary will make a *de novo* determination regarding your client's petition to vacate the existing FTO designation, in light of the governing statutory standards.

If the Secretary's ultimate decision is adverse to your client, the organization will have 30 days from the date of publication of that decision in the Federal Register within which to seek judicial review in the D.C. Circuit should it wish to do so. Should your client choose to seek judicial review, the classified material in the record will be made available to the D.C. Circuit.

We believe this process meets the terms of the remand ordered by the D.C. Circuit, as well as the statement by Secretary Rice that her decision should be internally examined within two years.

If you have any questions about the procedures to be followed, please do not hesitate to contact me.

Sincerely,

Douglas Letter
Terrorism Litigation Counsel
Civil Division

cc:

Steven M. Schneebaum, Esq.
Greenberg Traurig, LLP
2101 L St., NW
Suite 1000

EXHIBIT 2

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7513
DNL Washington, D.C. 20530-0001

Douglas Letter
Terrorism Litigation Counsel

Tel: (202) 514-3602
Fax: (202) 514-8151

October 29, 2010

Andrew L. Frey, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019-5820

Re: People's Mojahedin Organization of Iran v. U.S. Dept. of State, No. 09-1059

Dear Mr. Frey:

Per my letter to you of October 18, 2010, the Department of State has begun the process of updating the administrative record with additional material relevant to the petition for revocation of the designation of the People's Mojahedin Organization of Iran as a Foreign Terrorist Organization. This letter is to inform you that, at this time, there are no additional unclassified exhibits that the Department of State intends to incorporate into the administrative record. The Department of State is still in the process of reviewing additional classified information that will be added to the updated administrative record. In the course of that review, there may be additional unclassified information, either drawn from or otherwise related to, classified documents that will be included in the administrative record. The Department of State intends to give your client sufficient opportunity to review and comment on such unclassified information if it becomes available.

We request that you make any submission concerning the unclassified material previously provided to you no later than December 29, 2010, so that the Department of State may consider your submission and incorporate it into the updated administrative record.

Sincerely,

Douglas Letter
Terrorism Litigation Counsel
Civil Division

cc:

Steven M. Schneebaum, Esq.
Greenberg Traurig, LLP
2101 L St., NW
Suite 1000
Washington, D.C. 20037

Miriam R. Nemetz, Esq.
Mayer Brown LLP
1999 K St., NW
Washington, D.C. 20006-1101

EXHIBIT 3

Nemetz, Miriam R.

From: Letter, Douglas (CIV) [Douglas.Letter@usdoj.gov]
Sent: Friday, May 20, 2011 6:17 PM
To: Frey, Andrew L.; Nemetz, Miriam R.; schneebaums@gtlaw.com
Subject: FW: Documents for Release to the MEK Counsel
Attachments: Document 3.pdf; Document 4.pdf; Document 5.pdf; MEK List of Documents (5-20-11).docx; Document 2.pdf; Document 6.pdf; Document 7.pdf; Document 8.pdf; Document 9.pdf; Document 10.pdf; Document 1.pdf

Andy, Miriam, Stephen:

As described in my letter of October 18, 2010, the Department of State has identified additional information relevant to the MEK's petition for revocation that may be used in the administrative record. For additional classified documents relevant to the review, the Department of State has coordinated with relevant U.S. government agencies to examine whether any information from those documents could be declassified and released to your clients. As a result, the Department of State has identified additional unclassified information related to the Department of State's consideration of your client's petition for revocation of the FTO designation.

Attached are 10 documents. Documents 1-4 are unclassified redacted versions of classified documents. Document 5 is an unclassified summary of 10 other classified documents. Documents 6-10 are from unclassified sources. There were also 10 documents for which it was determined that there was no unclassified information that could be released at this time.

In providing these documents, the Department of State notes that no decision has yet been made as to whether to include information from these documents, or related classified information, in the administrative record. The Department of State remains prepared to consider any written information that your client wishes to provide related to these materials.

The Department of State also notes that it is only providing unclassified material that has not previously been provided to the MEK, and is not again providing the MEK with the unclassified information from the 2009 administrative record. The Department of State is in receipt of the MEK's response to the unclassified information from the 2009 administrative record, and is considering that response in updating the administrative record.

Given the desire of all parties to complete this process as soon as possible and have the Secretary of State take a decision on your client's petition, the Department of State requests that you provide any responsive information by June 6.

EXHIBIT 4

From: Letter, Douglas (CIV) [mailto:Douglas.Letter@usdoj.gov]
Sent: Thursday, August 04, 2011 1:42 PM
To: Frey, Andrew L.
Subject: MEK petition

Andy:

I am sorry for the delay in getting back to you with regard to your telephone call to me about State Department testimony in a House hearing indicating that State was engaged in declassification review with regard to the MEK petition. I have now confirmed with the State Department what I had thought: the process of declassifying information intended for use in the consideration of the delisting petition is complete. At this point, as I indicated to you on the telephone, State is working as quickly as possible on its review of the designation.

EXHIBIT 5

Nemetz, Miriam R.

From: Letter, Douglas (CIV) [Douglas.Letter@usdoj.gov]
Sent: Tuesday, September 27, 2011 6:26 PM
To: Nemetz, Miriam R.; Frey, Andrew L.; schneebaums@gtlaw.com
Subject: MEK record materials
Attachments: akin gump pt 1.pdf

Andy, Miriam, Steven:

On August 17, 2011, Akin Gump Strauss Hauer & Feld LLP, which represents the Iranian-American Community of Northern California, provided the Department of State with a new, independent assessment entitled "Mujahedin-e Khalq (MEK/PMOI) and the Search for Ground Truth About its Activities and Nature". We appreciate this report was not submitted by your client, nor has your client requested that it be included as part of the Department of State's review of the FTO designation. However, since some of the information in the report does directly relate to the Department of State's FTO review, the Department has decided to include this new report as part of the review of the FTO designation.

Additionally, the Department of State intends to incorporate material from the 2009 RAND report into the Administrative Record. The 2009 RAND Report is discussed in your client's December 29, 2010 Supplement to its Petition for Revocation, but was not included as an Exhibit. *See* pp. 81-83 and Exhibit 127.

If your client has any additional views on either of these documents that it would like to see reflected in the Administrative Record, please inform us by October 11, 2011. The Department of State is working expeditiously on completion of its review so that a decision can be made on your client's petition. To avoid delaying the completion of this review, the Department of State will not accept any additional submissions, except for any response you wish to provide to these two documents, after the date of this message.

Because these documents are lengthy, I am sending them in three separate emails. The first two are the Akin-Gump assessment. The third message contains the Rand study. Please respond to let me know that you received these three messages. Thank you.

Douglas Letter

Embassy of the Republic of Iraq Brussels

بسم الله الرحمن الرحيم

سفارة جمهورية العراق
بروكسل

Ref: ١/٦/١١٥٦
Date: ١٥/١١/٢٠١١

The Mission of the Republic of Iraq to the European Communities presents its compliments to the European Parliament – Protocol Service and has the honor to enclose herewith a paper explaining the position of the government of Iraq regarding the issue of the New Iraq Camp known previously as (Camp Ashraf)

The Mission of the Republic of Iraq avails itself of this opportunity to renew to European Parliament – Protocol Service the assurance of its highest consideration.

EMBASSY OF THE REPUBLIC OF IRAQ BRUSSELS

The European Parliament - Protocol Service
60 , Rue Wiertz
1047 Brussels

App. 31

The Iraqi government's position
on People's Mujahidee Khalq Organization of Iran - Camp Ashraf

A – The Iraqi government is committed to its decision to close Camp Ashraf by the end of 2011. Iraq's position is based on the hereafter mentioned legal points:

1. The Organization has already been classified by the international community as a terrorist organization.
2. The presence of the Organization is prohibited under the Iraqi Constitution that prohibits the presence of any terrorist entity on Iraqi territory (Article 7).
3. Its presence violates the provisions of the Iraqi Constitution, Article 8, which obligates Iraq not to interfere in the internal affairs of neighboring countries; the existence of this Organization however raises problems with Iran.
4. The Organization cannot be considered as a liberation movement as the relevant international law rules are not applicable in this case because of the non-existence of its members on the territory of their country, and because of their engagement in terrorist activities on the territory of the Republic of Iraq.
5. The relevant articles of Geneva Convention (IV) related to the protection of civilian under occupation are not applicable, because the occupation of Iraq has come to an end since the entrance into force of "The withdrawal agreement in 2009".
6. The presence of this Organization in Iraq threatens the internal security of Iraq and the security of neighboring countries and gives an excuse to neighboring countries to interfere in the internal affairs of Iraq.
7. Iraqi law did not grant efugee status to the members of this Organization.
8. Iraq is dealing with the residents of the camp as individuals and in accordance with the human rights principles and rules of international law enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The control over the Camp was formally transferred from the U.S. forces to the Iraqi government according to a bilateral memorandum in 2009, in which the following points were reaffirmed:

- The residents of the Camp are subject to the Iraqi law, and must abide by Iraqi rules and regulations.
- Refrain from forced repatriation of the Camp's residents to Iran.
- To take into account the humanitarian conditions of the population of the camp and respect for international humanitarian law.
  Iraq has allowed visits by international organization as the UNAMI mission and the Red Cross, and has guaranteed the provision of humanitarian supplies such as food, medicine and health care.

9. The Organization was part of the military and security institution of the dictatorial regime and participated in repressive acts against the Iraqi people. There are many complaints from Iraqi citizens who have been subjected to repression and kidnappings by the members of this Organization during the rule of the previous regime and beyond. Large numbers of them are wanted on Iraqi and international arrest warrants (by Interpol).
10. Iraq, as a democratic and peaceful country, wants to build peaceful relations with the neighboring countries and not to interfere in internal affairs and to preserve regional and international peace and security, especially in the Gulf, and has already rejected the existence of terrorist organizations on its territory and does not deal with them, stressing that the undermining of Iraq's sovereignty and security cannot be tolerated.

B: The Iraqi government has made efforts to cooperate with European Union countries, the United States; countries of asylum and Iran to resettle the residents of the camp, since a large portion of them hold the nationalities of those countries. It also offered to cooperate with Iran to send back those who wish to return upon amnesty given by Iran. These efforts, however, did not lead to any results because of either refusal by the inhabitants of the Camp to evacuate, or non-willingness of those States to receive them. Accordingly the Iraqi government was left with no choice but to evacuate the Camp based on principle of sovereignty, and transfer its residents to other camps in Iraq and facilitate their travel outside Iraq during the period left from this year.

Denmark (Danish and English) letter

---------- Videresendte meddelelser ----------
Fra: Udenrigsministeriet <um@um.dk>
Dato: 18. nov. 2011 12.35
Emne: Svar fra udenrigsminister Villy Søvndal
Til: "jens.c.lund@gmail.com" <jens.c.lund@gmail.com>

Kære Jens Christian Lund

Tak for din mail om Camp Ashraf. Som du ved, har jeg har fået en tilsvarende henvendelse fra organisationen National Council of Resistance of Iran (NCRI).

Jeg ser ikke en klar parallel mellem behandling af de sårede libyere i Danmark og de syge beboere i Camp Ashraf. Tværtimod ser jeg flere forskelle mellem de to sager.

Anmodningen om behandling af de sårede libyere kommer fra en statsmyndighed anderkendt af Danmark (det libyske overgangsråd), der er blevet til som et resultat af Danmarks og en række andre landes politiske, militære og humanitære engagement i Libyen. Da det libyske hospitalssystem ikke har mulighed for selv at behandle det store antal sårede har Danmark sammen med en række lande besluttet at dispensere fra de almindelige betingelser for hospitalsbehandling i Danmark og modtage et antal sårede libyere til hospitalsbehandling.

I tilfældet med de syge fra Camp Ashraf er der tale om en henvendelse fra en organisation (NCRI), der er den politiske arm af organisationen MEK, der bl.a. er kendt for at være på den amerikanske terrorliste. Det kan tilføjes, at ledende menneskerettighedsorganisationer (Human Rights Watch, 2005 og Rand Corporation, 2009) vurderer, at MEK styrer Camp Ashraf beboerne uden respekt for beboernes ønsker og basale rettigheder.

Fra både kilder i FN og andre landes ambassader i Bagdad er det blevet oplyst, at Camp Ashraf beboerne hidtil er blevet behandlet i Irak – enten i lejren, på nærliggende hospitaler eller i Bagdad. Jeg finder, at de syge beboere i Camp Ashraf fortsat bør behandles i Irak.

Som jeg anførte i mit svar i oktober til dig, så støtter vi bilateralt og gennem EU og FN, at der findes en fredlig løsning på lejrens fremtid, der respekterer internationale konventioner og garanterer lejrbeboernes fundamentale rettigheder.

Tak for din fortsatte interesse for sagen.

Med venlig hilsen

Villy Søvndal

Dear Jens Christian Lund,

Thanks for your mail on Camp Ashraf. As you know, I have received a similar request from the organization National Council of Resistance of Iran (NCRI).

I do not see a clear parallel between the treatment of the wounded Libyans in Denmark and the sick residents of Camp Ashraf. Rather, I see more differences between the two cases.

The request for treatment of the wounded Libyans come from a state government acclaimed by Denmark (the Libyan Transitional Council) who has become as a result of Denmark and a number of other countries' political, military and humanitarian engagement in Libya. Since the Libyan hospital system does not have the opportunity to handle the large number of wounded, Denmark together with a number of countries decided to dispense with the general conditions for hospital treatment in Denmark and receive a number of wounded Libyans for hospital treatment.

In the case of the sick from Camp Ashraf, there is a request from an organization (NCRI), which is the political arm of the organization MEK, which is known to be on the U.S. terrorist list. It may be added that leading human rights organizations (Human Rights Watch, 2005, Rand Corporation, 2009) estimates that MEK manages Camp Ashraf residents with no respect for residents' wishes and basic rights.

From both sources at the UN and other countries' embassies in Baghdad, it was announced that Camp Ashraf residents have so far been treated in Iraq - either in the camp at nearby hospitals or in Baghdad. I find that the remained sick residents of Camp Ashraf should be treated in Iraq.

As I stated in my answer to you in October, so we support bilaterally and through EU and UN, to find a peaceful solution to the camp's future that respects international conventions and guarantees the camp residents' fundamental rights.

Thank you for your continued interest in the matter.

Sincerely

Villy Sovndal

UNHCR
United Nations High Commissioner for Refugees
Regional Representation in Washington

1775 K Street NW
Suite 300
Washington, DC 20006

Tel.: (202) 296.5191
Fax: (202) 296.5660
Email: usawa@unhcr.org

21 November 2011

Dear Ms. Power,

I am writing to follow up further on the situation of Iranians and other people residing in Ashraf. UNHCR continues to be fully engaged in seeking a solution for the individuals residing in Ashraf who are in need of international protection. Some 3200 persons have filed individual refugee applications. UNHCR is prepared to deploy staff to conduct refugee status determination once the government of Iraq agrees to the process and provides an appropriate site for the interviews to be conducted.

UNHCR believes the onward movement of individuals in Ashraf to other countries will be essential to ensure their protection and to allow for the process to go forward. UNHCR has contacted 30 states, including the US, to request that resettlement places be made available for this purpose. The most recent request made to the US was on 04 November 2011 in a letter from the High Commissioner to the US Permanent Mission in Geneva [see attached.]

As we discussed, UNHCR has also been in discussions with the Departments of State and Homeland Security (DHS) about what options might exist for resettlement or other movement to the US. Clearly, resettlement would be the preferred option for refugees. We have been advised that due to the inclusion of the Mujahedin-e Khalq Organization (MEK) on the US State Department list of Foreign Terrorist Organizations (FTO), none of the Iranians from Ashraf who may be recognized would be admissible to the US nor could exemptions be issued for those individuals found inadmissible.

An examination of the Department of State's FTO list reveals that the US has used discretion when defining the exact scope of an organization. We note, for example, that the denomination "al-Qa'ida" is not inclusive of all al-Qa'ida organizations. The US has separately identified and listed al-Quaida in Iraq, al-Qa'ida in the Arabian Peninsula and al-Qaida in the Islamic Maghreb. We assume the characteristics used to distinguish these organizations from the parent organization were organizational structure and geographic location. We would query whether the definition of MEK might similarly be drawn in a more precise manner so as not to include persons currently in Ashraf. In addition to their specific geographic location and organizational structure, an additional characteristic which distinguishes this group from MEK, is the prior US recognition of it under the Fourth 1949 Geneva Convention and provision of protection to them that followed.

Ms. Samantha Power
Senior Director for Multilateral Affairs
National Security Council
The White House
Washington, DC 20504

UNHCR

We recognize treating the group in Ashraf as distinct from the rest of MEK would not necessarily prevent it from being designated as a terrorist organization under tier III, nor would it prevent deeming persons in Ashraf inadmissible on the basis of their individual activities if those activities are deemed to be of a terrorist nature. A tier III designation, however, would allow for the exercise of exemption authority which is available for tier III groups.

We understand that the issue of material support and grounds of inadmissibility to the MEK has arisen previously and was resolved. This was in the context of certain US military personnel who were providing material support to the people "residing" in Ashraf and the MEK. In her paper on this subject, US Army Lt. Colonel Margaret D. Stock stated: "Nor do the criminal statute or the immigration laws make an exception for U.S. military personal who provided the material support or resources pursuant to orders by the chain-of command."[1] We assume that a resolution was found that allowed non-US citizen members of the US military to be readmitted to the US and that others were not prosecuted despite their provision of material support to the MEK. The mechanism used in this previous instance to overcome the terrorism related inadmissibility grounds would prove instructive to finding a remedy in the current situation.

If the US were not able to find a way to admit refugees from Ashraf into the US, we would urge that the US parole such individual into the US. Starting in 2007, when persons from Ashraf fled into another camp that was under the administration of the US Department of Defense, we have been inquiring with the DHS about the possibility of granting humanitarian parole. To date, we have not received any official reply as to whether refugees from Ashraf could be granted parole; however, it is our understanding that DHS is unwilling to exercise its discretion to do so.

Also we would note that in addition to the Iranian nationals in Ashraf, there are some 900 persons who are nationals of other states. These may include up to 55 persons who hold US passports. We would urge that these individuals be permitted to return to the US together with their family members.

In her recent remarks before the House Foreign Affairs subcommittee on the Middle East and South Asia, Secretary Clinton reiterated US support to assist UNHCR to get the "residents of Ashraf" to a "safe place." We are grateful for US engagement with the government of Iraq and other countries to achieve this end. The Secretary expressed the view that the US terrorism bars to admission would not pose an obstacle for European states to accept residents associated with the MEK. Resettlement or other movement of some Iranian refugees from Ashraf to the US, however, would appear to be integral to enlist the support of other states in this cause. It is our hope, therefore, that the US Administration will find an effective means to facilitate a solution.

UNHCR has been approached on this issue repeatedly by media, NGOs, family members in the US with relatives in Ashraf, and members of Congress. To date, we have responded that we are in dialogue with the US and other countries to find appropriate solutions for the residents. Given that the closure of Ashraf is fast approaching we hope that a US response on resettlement or parole will be forthcoming soon. Absent any US response in the near term, UNHCR will have no option but to advise those inquiring that the US has not indicated a willingness to allow the residents resettlement or other safe haven in the US.

[1] Stock, Lt. Col. Margaret D. "Providing Material Support to a Foreign Terrorist Organization: The Pentagon, the Department of State, The People's Mujahedin of Iran, & the Global War on Terrorism." Bender's Immigration Bulletin, 2006. p.26.

UNHCR

I want to thank you again for your assistance in helping to address this complex issue. I remain at your disposal if you should have questions or are in need of additional information.

Sincerely yours,

Vincent Cochetel
Regional Representative

Cc: Alejandro Mayorkas, Director
USCIS, DHS
David Robinson, Acting Assistant Secretary of State
U.S. Department of State