No. 12-1118

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

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

Statutes

* Authorities on which Petitioner principally relies.

Other Authorities

INTRODUCTION

The Government's opposition to PMOI's petition for a writ of mandamus ("Opp.") boils down to a general assertion that the Secretary is too busy and her work too important to be bothered with the laws of Congress and the mandates of this Court. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), disposed of that argument: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. . . . This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record." *Id*. at 170, 173.

The Department of State has admitted that it has no plans to decide PMOI's 2008 petition to revoke its FTO status "anytime soon."[1] The Department thus openly flouts both Congress (by ignoring AEDPA's 180-day deadline) and this Court (which nearly *two years ago* remanded for a constitutionally adequate determination). The Government also has announced that, whenever it does get around to making a decision, a "key factor" will be a statutory irrelevancy—PMOI's "cooperation in the successful and peaceful closure of Camp Ashraf"[2]—not AEDPA's express criteria (whether the group has terrorist "capability and

[1] Nedra Pickler, *Iranian Opposition Asks For Appeals Court Action*, Associated Press, Feb. 27, 2012.

[2] *Quoted in MEK Status on Blacklist Hinges on Iraq Camp Closure*, Reuters, Feb. 29, 2012.

intent").

Of course, PMOI will continue to cooperate fully in resolving the humanitarian crisis at Ashraf (which the Iraqi government, citing PMOI's FTO status, provoked by insisting that the camp be closed immediately and its residents relocated).[3] PMOI has already publicly announced its willingness to leave Ashraf,[4] cooperated in the transfer of 1,200 residents to Camp Liberty/Hurriya under challenging circumstances,[5] and been praised by State Department officials for its cooperation.[6] But that is irrelevant under AEDPA.

The most striking thing about the Government's brief is what it *fails* to say:

First, the Government does not even hint that it has credible evidence to overcome PMOI's showing that it long ago renounced violence and lacks the "capability and intent" necessary to be maintained as an FTO under AEDPA.

Second, the Government never explains why AEDPA's 180-day statutory

[3] Maryam Rajavi has informed the U.S. and U.N. that the people of Ashraf are ready to leave Ashraf by the end of April, but the facilities at Camp Liberty/Hurriya are still entirely inadequate and must be improved.

[4] *See, e.g.*, Maryam Rajavi, *400 Ashraf Residents Are Prepared to Go to Camp Liberty at First Opportunity*, NCR-Iran.org (Dec. 28, 2011), http://www.ncr-iran.org/en/news/ashraf/11575.

[5] *See, e.g.*, UNHCR, *Camp New Iraq (Formerly Camp Ashraf) Residents and the Determination of Their Refugee Status Claims* (Mar. 28, 2012), http://www.unhcr.org/refworld/pdfid/4f7417e72.pdf.

[6] *See, e.g.*, Press Release, U.S. Dep't of State, Update on Camp Ashraf (Feb. 18, 2012), http://www.state.gov/r/pa/prs/ps/2012/02/184204.htm.

deadline is erased by a remand necessitated by its own constitutional mistake. Nor does it deny that it has exceeded that limit many times over.

Third, the Government does not dispute that its ongoing failure to delist PMOI is a major obstacle to resettling the residents of Camp Ashraf.

Fourth, the Government does not deny that its continued inaction prolongs the effects of the due process violation this Court identified in 2010.

Fifth, the Government does not dispute the Court's authority to order PMOI delisted.

The Government urges the Court not to intervene because the petition concerns foreign affairs, and the Secretary of State should not be subjected to this Court's supervisory powers. The Government cannot so easily evade the procedures established by Congress. This Court should now do what it acknowledged it could have done two years ago: end this "marathon round of administrative keep-away," *In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004), by granting PMOI's petition for revocation or, alternatively, directing the Secretary to render a decision within 30 days and ordering the designation revoked if she fails to do so.

ARGUMENT

1. Just hours after PMOI's mandamus petition, the State Department announced that it "is not expected to make a decision" on the request for

revocation "anytime soon," because it "is still evaluating the merits of taking the group off the terrorism list or keeping it on." Pickler, *supra*. But the Government has had years to "evaluat[e] the merits," and its brief does not identify any steps that remain to be completed. Indeed, in May 2011, the Department's Counter-Terrorism Coordinator assured a congressional committee that the decision would be made in "considerably less" than six months.[7] The brazen refusal to make a decision "anytime soon" flouts the will of both Congress and this Court, and constitutes a "transparent violation[] of a clear duty to act"—precisely what justifies a writ of mandamus. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (internal quotation marks omitted).

The Government's general plea that mandamus would "interfere[]" with the Secretary's "critical duties," Opp. 2, does not entitle her to avoid her responsibilities under AEDPA. Congress surely knew that all Secretaries of State routinely face geopolitical crises, yet, in recognition of the dire consequences of an FTO listing, it nevertheless set a strict 180-day limit.[8] If the Department finds this

[7] *Hearing Before the Subcomm. on Europe & Eurasia on the H. Comm. on Foreign Affairs*, 112 Cong. 36 (2011) (testimony of Amb. Daniel Benjamin, Coordinator for Counter-Terrorism), *available at* http://foreignaffairs.house.gov/112/66174.pdf.

[8] The Government is correct that AEDPA does not expressly apply the 180-day deadline to action following a remand order by this Court. Opp. 16. But surely the statutory timetable "suppl[ies] content for [the] rule of reason" that governs consideration of mandamus petitions. *Telecommc'ns Research & Action Ctr. v.*

deadline too onerous, its complaints are better addressed to the Congress that enacted the statute, not to this Court, which must apply it.

Moreover, the Government's actions belie any contention that it would be too burdensome for it to make a prompt decision. The Department admits that it *already* "has consulted with the U.S. Intelligence Community" and "the Department of the Treasury and the Department of Justice," Opp. 8, "has met with representatives of the PMOI," *id.*, and "has engaged in extensive internal deliberations," *id.* The only things the Secretary *has not* done are what this Court surely expected would be done promptly—"evaluate the material" in the record, "indicate in her administrative summary which sources she regards as sufficiently credible that she relies on them," "explain to which part of section 1189(a)(1)(B) the information she relies on relates," and finally "make her decision." *PMOI v. U.S. Dep't of State*, 613 F.3d 220, 230–31 (D.C. Cir. 2010).

Instead, Secretary Clinton has publicly stated that her decision on PMOI's status will be based on statutorily irrelevant factors. The Secretary testified to Congress that PMOI's "cooperation in the successful and peaceful closure of Camp

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FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"). With an extensive record already developed, the Government should be able to deal with a remand such as occurred here considerably more swiftly than an initial delisting petition.

Ashraf . . . will be a key factor in any decision regarding [its] FTO status."[9] But as the Government recognizes, Opp. 3, the Department may maintain a designation if and *only* if "the organization engages in terrorist activity . . . or terrorism . . . or retains the capability and intent" to do so *and* such activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1).

The Government gamely proposes that cooperation at Ashraf is somehow relevant to AEDPA's critical "capability and intent" factor because it "might bear on the credibility of PMOI's claims that it has indeed abandoned" terrorism. Opp. 15. But there is no connection in logic or fact between cooperation in resettlement and maintaining the capability and intent to engage in terrorism. The Government has identified no reason to doubt PMOI's commitment to nonviolence. To the contrary, PMOI has completely disarmed Camp Ashraf since 2003, and its residents have proven with their own lives the credibility of PMOI's commitment even in the face of deadly violence by the Iraqi military.[10]

[9] *Quoted in* Reuters, *supra* note 2. The Secretary did not say what she meant by "cooperation" or how she would measure it. One would hope that "cooperation" does not require PMOI to remain silent in the face of the human rights abuses visited on Ashraf residents by Iraqi officials.

[10] The Government's reference to Ashraf as a "paramilitary base" (Opp. 10) is wholly unwarranted. Its residents gave up their weapons, were recognized as

In any event, even assuming that cooperation in the relocation of Ashraf residents were relevant to the statutory criteria, no further delay in revoking PMOI's FTO status could be justified. Some 1,200 residents have already relocated from Camp Ashraf to Camp Liberty, voluntarily and entirely peacefully, over the past two months, despite the very poor conditions of the new camp; and the other Ashraf residents are committed to making the move as soon as the new venue has the minimum infrastructure to accommodate them. Whatever test the Secretary wants to administer, PMOI has passed it with flying colors.

2. To be sure, the Executive Branch ordinarily enjoys a measure of judicial deference in matters of national security and foreign policy.[11] But that truism carries little weight where, as here, the Executive seeks to evade specific statutory limits on its powers. The appropriate judicial response in these circumstances is not to defer, but rather to ensure that the Executive fully and faithfully complies with the law.

"Whether or not the President has independent power" under Article II of

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"protected persons" in 2004, were protected by the U.S. Army for years, and today are being relocated with the State Department's involvement and assistance.

[11] This Court has indeed declined to review the Department's determinations that a group's terrorist activities threaten the national security. Opp. 4. But it has never held that defiance of AEDPA's 180-day deadline may escape judicial review. And the Department's factual determination regarding capability and intent to engage in terrorism is explicitly made reviewable by AEDPA. 8 U.S.C. § 1189(c)(3)(D).

the Constitution, "he may not disregard limitations that Congress has, in proper exercise of its own . . . powers, placed on his powers." *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). Thus "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (citation and internal quotation marks omitted), and the need for robust judicial scrutiny is at its highest.

As the Government appears to concede, Opp. 13, Congress did not tell the Secretary to make FTO determinations based on general concerns about "foreign policy" or "national security." Rather, AEDPA prescribes specific criteria for designating an organization as an FTO and for maintaining or removing that designation. And while "national security" is a sufficient basis for *revoking* an FTO designation, 8 U.S.C. § 1189(a)(6)(A)(ii)—which the Government acknowledges, Opp. 15—it alone cannot support *maintaining* one. AEDPA constitutes the "expressed . . . will of Congress," and the Government's purported power to keep PMOI on the FTO list for non-statutory reasons of its own thus is "at its lowest ebb." *Medellin*, 552 U.S. at 524.

The need for mandamus is confirmed by the legislative origins of the Department's authority to designate FTOs. This is not a case that involves an inherent presidential power. Absent legislative delegation of power through AEDPA, the Executive would have no authority at all to impose the dire

consequences that follow an FTO designation. And Congress, for good reasons, placed strict limits on the exercise of the powers it was delegating—substantive limits on the types of groups that may be listed, 8 U.S.C. § 1189(a)(1), and procedural limits on the timetable for acting on delisting requests, *id*. § 1189(a)(4)(B). The Executive may not cherry-pick the delegated powers it finds useful while simultaneously defying the statutory restrictions that are part and parcel of the delegation. Mandamus is essential for this Court to ensure that these statutory restrictions and its prior mandate are not ignored.

3. The fact that agency delay has exceeded statutory time limits may not automatically justify mandamus, but it is certainly a key factor. Mandamus is necessary when, as here, the Government simply prefers its own timetable (or no timetable at all) to that established by Congress.

Granting the writ is especially appropriate where "human health and welfare are at stake," *TRAC*, 750 F.2d at 75, 79–80, as is the case here. Since PMOI filed its mandamus petition, the severe harm its members and supporters face due to the Department's unjustified inaction—which the Government's brief does not dispute—has become even more acute. The 1,200 PMOI members who have relocated from Camp Ashraf to Camp Liberty live in extremely difficult conditions. The lives of the defenseless residents of both camps are in daily jeopardy, and their resettlement in third countries is unnecessarily complicated by

PMOI's continued designation.

That the PMOI is suffering daily prejudice is underscored by a recently launched investigation by the Treasury Department's Office of Foreign Assets Control. Treasury has issued subpoenas as part of an apparent investigation into whether prominent former government officials have violated the ban on providing material support to an FTO by publicly calling for delisting PMOI and protecting Ashraf residents.[12] Whatever the merits of that investigation—and wherever the hazy line lies between constitutionally protected speech and prohibited support—this development underscores the need for swift action on the delisting petition. When PMOI is delisted—the only outcome consistent with the statute given the facts and the Secretary's actions—a cloud that currently hangs over the activities of its supporters will be removed.

CONCLUSION

Absent this Court's intervention, its prior remand to the Department of State would be meaningless and Congress's statutory policy nullified. The time has come for this Court to enforce the mandate that it issued in 2010 by granting PMOI's petition for a writ of mandamus.

[12] Scott Shane, *U.S. Supporters of Iranian Group Face Scrutiny*, N.Y. Times, Mar. 13, 2012.

Respectfully submitted,

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Dated: April 2, 2012

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: April 2, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2012, I have caused the foregoing brief to be served on all registered parties via the Court's CM/ECF electronic filing system:

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