

NO DATE FOR ORAL ARGUMENT HAS BEEN SET

No. 09-1059

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

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.

**On Petition for Review of an Order
Of the Secretary of State**

BRIEF FOR PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES
(D.C. Cir. R. 28(a)(1))

Pursuant to D.C. Circuit Rule 28(a)(1) and D.C. Circuit Rule 26.1, counsel for Petitioner certifies as follows:

A. Parties and Amici

The People’s Mojahedin Organization of Iran (“PMOI”) was the only party to appear before the Department of State in the administrative proceeding under review, and it appears as Petitioner in this Court.

Respondents in this proceeding are the United States Department of State and Hillary Rodham Clinton, in her capacity as Secretary of State.

COL Gary L. Morsch, MD (U.S. Army Res.), and other former U.S. military personnel; Representatives Bob Filner and Sheila Jackson Lee, and other Members of Congress; Iranian-American Society of Texas and other Iranian-American organizations; Lord Corbett of Castle Vale, House of Lords (UK), and other members of both houses of the UK Parliament; and Hon. Alejo Vidal-Quadras, MEP (Spain), Vice President, European Parliament, and other European Parliamentarians have submitted statements of intent to file amicus curiae briefs in support of Petitioner.

B. Rulings Under Review

Petitioner seeks review of the decision of the Secretary of State, In the Matter of the Review of the Designation of Mujahedin-e Khalq Organization (MEK), and All Designated Aliases, as a Foreign Terrorist Organization Upon Petition Filed Pursuant to Section 219 of the Immigration and Nationality Act, as Amended, Public Notice 6480, 74 Fed. Reg. 1273-74 (Jan. 12, 2009). App. 1-2.

C. Related Cases

This Petition has not previously been before this Court or any other court. The undersigned counsel are not aware of any pending cases related to this Petition.

Respectfully submitted,

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GLOSSARY

AEDPA	Anti-Terrorism and Effective Death Penalty Act of 1996
EU	European Union
FTO	Foreign Terrorist Organization
HRW	Human Rights Watch
PMOI	People's Mojahedin Organization of Iran
Secretary	Secretary of State
UK	United Kingdom

JURISDICTIONAL STATEMENT

On July 15, 2008, pursuant to 8 U.S.C. § 1189, the People’s Mojahedin Organization of Iran (“PMOI”) petitioned the Secretary of State for revocation of its designation as a “foreign terrorist organization” (“FTO”). The Secretary’s decision denying the petition was published in the Federal Register on January 12, 2009. PMOI petitioned for review on February 11, 2009. This Court has jurisdiction under 8 U.S.C. § 1189(c).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether PMOI's designation as an FTO must be revoked because the administrative record lacks substantial support for the conclusion that PMOI either "engages in terrorism or terrorist activity" or retains the "capability and intent" to do so.
2. Whether PMOI or its counsel are entitled to some form of access to the classified portion of the administrative record.
3. Whether the Secretary's failure to give PMOI an opportunity to submit arguments and evidence in response to the administrative record before rendering her decision deprived PMOI of due process of law.

PERTINENT STATUTES AND REGULATIONS

The statutes relevant to this case are set forth in the addendum to this brief.

STATEMENT OF THE CASE

On July 15, 2008, pursuant to 8 U.S.C. § 1189, PMOI petitioned the Secretary of State for revocation of its designation as an FTO. App. 50-138. The Secretary's denial of the petition was published in the Federal Register on January 12, 2009. App. 1-2. The Secretary supplied PMOI with a heavily redacted 20-page summary of the State Department's review (the "2009 Summary"). App. 26-49. The 2009 Summary referenced 33 exhibits, many of which were also entirely redacted.

On February 11, 2009, PMOI filed a timely petition for review. It subsequently moved for greater access to the classified portion of the record. The motion was referred to the merits panel for adjudication.

STATEMENT OF FACTS

This appeal raises the question whether PMOI can reasonably be classified as a terrorist organization when it has rejected violence and terrorism, disarmed, refrained for eight years from any acts that could be classified as terrorist, and committed itself to seeking political change in Iran through peaceful, democratic means. PMOI is a dramatically different entity from such acknowledged terrorist organizations as Al Qaeda, Hamas, or Hezbollah. It has substantial mainstream support and has been removed from the list of proscribed organizations in the United Kingdom and European Union. Although much of the basis for the Secretary's action has been concealed, we are confident that any fair review of the record will demonstrate that there is no support for the conclusion that PMOI currently engages in terrorism or has the capability and intent to do so.

A. The Nature And History Of PMOI²

PMOI³ was founded in 1965 as a movement of students and intellectuals opposed to the dictatorial rule of the late Shah Mohammed Reza Pahlavi. As PMOI gathered popular support, it suffered increasing repression from the Shah's governing apparatus: its leadership was imprisoned and severely mistreated, and it was barred from political activities. Before returning from exile in Paris in 1979 upon the overthrow of the Shah, the Ayatollah Ruhollah Khomeini promised respect for fundamental freedoms, but he instead established a theocratic regime. Because of PMOI's unwillingness to accept a theocratic state, however, PMOI's then-leader, Massoud Rajavi, was not permitted to run in the 1980 presidential election. His disqualification by the ruling mullahs was the first step in the regime's escalating campaign, at first to marginalize, then to prohibit, and finally to exterminate the organization that was a significant opponent of its theocratic rule.

Throughout the 1980s, the mullahs' persecution of PMOI steadily intensified. Tens of thousands of members and sympathizers were killed by agents of the regime. The organization's leadership relocated to Paris, and then to Iraq,

² This discussion of PMOI's history is largely taken from a more detailed chronology contained in App. 213-15.

³ PMOI is sometimes referred to as the Mojahedin-e Khalq, its name in Farsi, or by the initials "MEK." The organization prefers the designation "PMOI."

following pressure from the French Government, which was engaged at the time in negotiating with Iran over the release of its hostages in Lebanon. See Richard Bernstein, *Opponents of Khomeini Said to Leave France For Iran-Iraq Border*, N.Y. Times, June 10, 1986, at A6.

During the 1980s and 1990s, PMOI mounted military operations against the Iranian regime from bases in Iraq. In June 2001, however, PMOI's leadership made the decision to end all military action and to focus instead on political and social efforts to bring about change. The decision was unequivocal: as PMOI's Secretary General, Sedigheh Hosseini, reiterated flatly, "PMOI is opposed to and condemns any type of violence." App. 58, 162. Since 2001, PMOI has not deviated from that position in its statements or its actions.

The Leadership Council's decision to end all military activity in early 2001 was reiterated by Congresses of the membership in 2001 and 2003. App. 57-58, 164-65. Mrs. Maryam Rajavi, head of the National Council of Resistance of Iran ("NCRI") (the umbrella body of the Iranian opposition, of which PMOI is a constituent member⁴), speaking before the Italian Senate in October 2008, stated that since 2001, the Resistance has "persistently condemned terrorism and violence, and it does so again." App. 146, 539. She, like the leaders of PMOI

⁴ The Department of State considers the NCRI to be an "alias" of PMOI and has therefore banned it as well; that decision was affirmed by this Court. *NCRI v. Dep't of State*, 373 F.3d 152, 155 (D.C. Cir 2004).

itself, espouses exclusively democratic means of achieving the organization's goals, which include peaceful regime change in Iran and the establishment of a secular government that would protect human rights, including the rights of women and religious and ethnic minorities in particular. See, *e.g.*, App. 63-65, 208-09, 216-18.

In 2003, after the invasion of Iraq, PMOI voluntarily handed over its weapons, which it had kept after 2001 to defend itself against possible attack by the Iranian regime, to the Multi-National Force-Iraq (MNF-I), and agreed to consolidate all of its members in Iraq at one of its facilities, Camp Ashraf, some 60 miles northeast of Baghdad. App. 59-60, 168-79. PMOI's leaders, who are all based at Camp Ashraf, voluntarily signed a Memorandum of Understanding with the occupying forces, whereby PMOI would remain disarmed under the protection of the MNF-I. The Memorandum expressly acknowledged that it was not a "surrender," since PMOI had committed no hostile act, and had no hostile intent, in regard to the Multi-National Force. App. 168.

General Ray Odierno (now the four-star commander of all U.S. forces in the Iraqi theater) was so impressed by PMOI's conduct that he observed: "[PMOI] clearly is cooperating with us and ... that should lead to a review of whether they are a terrorist organization or not." App. 174. And President Bush later publicly

acknowledged PMOI's role in disclosing information about Iran's secret nuclear program.⁵

In 2004, U.S. law enforcement agencies interviewed all 3,800 residents of Camp Ashraf. In June of that year, the MNF-I announced that every PMOI member at Ashraf had been determined to be a "protected person" under the Fourth Geneva Convention. App. 60-62, 180-203. This determination was based on the conclusion that none of them was a combatant or had committed a crime under the laws then administered by the United States. Moreover, every PMOI member at Ashraf signed a document rejecting violence, disavowing terrorism, and agreeing to obey the laws of Iraq and the orders of the Multi-National Force. App. 183.

United States military officers who commanded the battalions protecting Ashraf have attested to the sincerity of PMOI's rejection of violence. On May 25, 2005, for example, Brigadier General David Philips, who as a Colonel had headed the Military Police Brigade at Ashraf for over a year, wrote a letter praising "the dedication of the female units" in Ashraf and noting their "strong support for freedom, democracy, and equality for women." Indeed, he expressed the desire that his own daughters might see the degree of commitment and discipline shown by the women of Ashraf. App. 483-84. Other officers, eyewitnesses to daily life at Ashraf, have stated with similar confidence that PMOI's activities "ha[ve] helped

⁵ The Petition sets out the support for this proposition in great detail. See App. 93-95, 125-29.

to establish a safe and secure environment and should be continued.” App. 85-86, 423.⁶

B. Statutory Background

1. Designation Criteria and Procedures

The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 8 U.S.C. § 1189, authorizes the Secretary of State to designate an entity as an FTO upon making three specific findings:

- A. the organization is a foreign organization;
- B. the organization engages in terrorist activity ... or terrorism ... or retains the capability and intent to engage in terrorist activity or terrorism ... ; and
- C. the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

⁶ Current events have confirmed PMOI’s commitment to nonviolence. In early 2009, the United States, pursuant to its Status of Forces Agreement with Iraq, transferred all authority over Ashraf to Iraqi security forces. At that time, it exacted from Iraqi officials a commitment to treat Ashraf residents humanely, and in particular not to force their involuntary repatriation to Iran, where membership in PMOI is a capital offense. App. 203. In July 2009, however, Iraqi security forces raided Camp Ashraf, killing at least 11 of the residents, wounding over 400, and detaining 36 others, some of whom were seriously wounded, at a police station. Even when confronted with this assault, the people of Ashraf did not respond with any form of violence. Instead, they adhered to the principles of non-violence that they have espoused since at least 2001, forming human chains, standing their ground even in front of armored vehicles, and engaging in negotiations aimed at avoiding the violence directed against them. See, e.g., Amnesty International USA, *Eight reported killed as Iraqi forces attack Iranian residents of Camp Ashraf* (July 29, 2009), at www.amnestyusa.org/document.php?id=ENGNAU2009072911617&lang=e.

8 U.S.C. § 1189(a)(1). The terms “terrorist activity,” “terrorism,” and “engages in terrorist activity” have precise (but lengthy) definitions. See statutory appendix at A-1, *infra*.

Only *after* the Secretary finds as a matter of fact that an organization satisfies the criteria set forth in Section 1189(a)(1)(A) and (B) does she have substantial discretion in making the third determination, whether the organization “threatens ... the national security of the United States.” 18 U.S.C. § 1189(a)(1)(C); see *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (“*PMOI I*”). The great deference afforded to executive branch judgments about national security does not extend to these factual conclusions. *Id.* at 24.

When deciding whether to designate or maintain the designation of an organization as an FTO, the Secretary must compile an administrative record, 8 U.S.C. § 1189(a)(3)(A), which may include classified information, *id.* § 1189(a)(3)(B). Such information is not “subject to disclosure for such time as it remains classified,” but it “may be disclosed to a court *ex parte* and *in camera* for purposes of judicial review.” *Id.*

2. Consequences of Designation

Designation as an FTO has “dire” consequences for the 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 v. Dep't of State*, 251 F.3d 192, 196, 203 (D.C. Cir. 2001) (“*NCRI I*”).⁷

Designation has equally serious consequences for an organization’s political supporters. Anyone who “knowingly provides material support or resources” to a designated organization—regardless of the nature or intent of that support—faces the threat of criminal prosecution and up to 15 years’ imprisonment. 18 U.S.C. § 2339B(a)(1). This threat is not an idle one: in 2001, the government brought criminal charges against Iranian refugees living in the United States who, between 1997 and 2001, allegedly raised funds for PMOI’s humanitarian activities. See *United States v. Afshari*, 446 F.3d 915, 917 (9th Cir. 2006) (Kozinski, J., dissenting from the denial of *en banc* review).

⁷ A U.S. terrorist designation can also have practical consequences outside the United States. For example, a New York Times article published following the Ashraf raid stated that Ambassador Dell L. Dailey, retired Lieutenant General and the State Department’s top counterterrorism official, had in the final days of the Bush Administration “pushed to have the People’s Mujahedeen removed from the list, which would have allowed members of the group to leave Iraq and resettle elsewhere in the Middle East or Europe. Without lifting the terrorist designation, it was unlikely any other country would accept them.” Mark Mazzetti & Mark Lander, *Iranian Dissidents’ Fate In Iraq Shows Limits of U.S. Sway*, N.Y. Times, Aug. 2, 2009, at A8.

3. 2004 Amendments

Before 2004, an FTO designation persisted for two years, after which the Secretary was obligated to undertake a review to determine whether “the relevant circumstances” that initially warranted designation “still exist.” 8 U.S.C. § 1189(a)(4)(B) (2000). Absent re-designation by the Secretary, the FTO classification would lapse. *Id.* Thus, to continue an FTO designation, the Secretary was required to construct a new administrative record every two years.

In 2004, Congress amended Section 1189 in an effort to reduce the Secretary’s administrative burden. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7119, 118 Stat. 3638, 3801-03 (2004). Under the amended statute, an FTO designation must be reviewed every five years (8 U.S.C. § 1189(a)(4)(C)), but a listed organization may petition the Secretary after two years for “revocation” of its designation (*id.* § 1189(a)(4)(B)). The Secretary “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.* § 1189(a)(6)(A).

4. Judicial Review

The statute authorizes an FTO to seek review in this Court of a refusal to revoke a designation. It directs the Court to “hold unlawful and set aside”

designations that it finds to be, *inter alia*, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “lacking 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). In other words, the Court must ensure that the Secretary followed proper procedures and that the administrative record provides “a sufficient basis for a reasonable person to conclude” that the FTO is a foreign organization that currently engages in, or retains the capability and intent to engage in, terrorist activity or terrorism. *Kahane Chai v. Dep’t of State*, 466 F.3d 125, 129 (D.C. Cir. 2006). Otherwise, it must vacate the designation. 8 U.S.C. § 1189(c)(3).

C. Prior Designations And Appeals

PMOI was first designated an FTO in 1997. See *PMOI I*, 182 F.3d at 22, 24-25 (upholding designation). The Secretary re-designated PMOI in 1999, along with its purported alter-ego, the NCRI. On review, this Court held that the Secretary’s procedures did not satisfy due process requirements because they failed to provide notice and a “meaningful” opportunity to “rebut the administrative record.” *NCRI I*, 251 F.3d at 209.

In 2001, the Secretary again re-designated PMOI as an FTO, 66 Fed. Reg. 51,088, 51,089 (Oct. 5, 2001), this time after providing notice and allowing PMOI to submit evidence on its own behalf. See *PMOI v. Dep’t of State*, 327 F.3d 1238,

1241-43 (D.C. Cir. 2003) (“*PMOI II*”). PMOI contended on appeal that this so-called “opportunity to be heard” had not been meaningful because the Secretary’s decision relied upon secret information to which it was denied access. *Id.* In dictum, the Court rejected this contention, but it ruled that it could affirm on the unclassified record alone, noting that PMOI had publicly admitted responsibility for still-recent 2000 and 2001 mortar attacks and other violence aimed at the Iranian regime. *Id.* at 1243-44.

PMOI was re-designated as an FTO in October 2003. 68 Fed. Reg. 56,860-61 (Oct. 2, 2003). The 2003 Summary acknowledged significant positive developments since 2001, including the fact that Ashraf residents were “under the control of U.S. forces in Iraq,” but it concluded that PMOI remained “a well-trained, highly disciplined, and coherent force whose future remains undetermined.” App. 157. It also observed that, although the 2003 disarmament had “resulted in a significant reduction in [PMOI’s] capability,” “[t]here is no indication that the [PMOI] has renounced or disavowed the use of terrorist violence.” App. 157.

Shortly thereafter, Congress promulgated its amendments to Section 1189. PMOI’s designation was subject to automatic, five-year review in late 2008, but the Department decided to address PMOI’s July 2008 Petition for delisting in lieu of such review.

D. Deproscription In The UK And EU

The UK listed PMOI as a “proscribed organization” in 2001,⁸ and the EU followed suit in 2002.⁹ In June 2006, 35 Members of Parliament petitioned the Home Secretary seeking PMOI’s deproscription. They noted that PMOI’s leadership had decided five years earlier to abandon all military activities in favor of pursuing peaceful means to accomplish democratic change in Iran, and cited evidence that no acts of violence had occurred since then. App. 256-59. The Home Secretary denied the petition. He acknowledged that PMOI had ceased military operations several years earlier but nevertheless based his action on what he claimed was a fear that it might one day resume terrorist activity. App. 260. The Members of Parliament then appealed to the Proscribed Organisations Appeal Commission (“POAC”), the special, quasi-judicial body established for purposes of reviewing such decisions.

⁸ Terrorism Act (Proscribed Organisations) (Amendment) Order 2001. The criteria for listing under the UK statute parallel those taken into consideration under AEDPA. Under the UK Act, a group is deemed to be “concerned in terrorism”—and thus subject to “proscription”—if it “(a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or otherwise encourages terrorism, or (d) is otherwise concerned in terrorism.” Terrorism Act 2000, § 3(5).

⁹ Council [of Ministers] Decision 2002/334 (May 2, 2002).

In November 2007, after several days of hearings and extensive review of more than 15 volumes of both open and classified evidence,¹⁰ POAC concluded that “the PMOI *is not* and,” at the time of the Home Secretary’s decision, “*was not* concerned in terrorism.” App. 389 (emphasis added). Indeed, POAC opined that maintaining the designation despite the substantial evidence of changed circumstances would be “perverse”—a term whose use, it stressed, was extremely “uncommon.” It ordered the Home Secretary immediately to remove PMOI from the list of banned organizations. App. 394.

POAC found particularly revealing the fact that PMOI historically had claimed responsibility for a large number of attacks in Iran, culminating in 261 acknowledged military operations in the twelve months prior to July 2001. App. 332. In stark contrast, there were only three claimed attacks from July to August 2001, and not a single claim after the end of August 2001. App. 333. Moreover, POAC underscored, the record lacked any credible claim by anyone else of PMOI terrorist activity since August 2001. *Id.* POAC’s review of the classified evidence did not change its conclusion that PMOI was not engaged in terrorism.

Moreover, POAC found no evidence that PMOI intended to engage in terrorism in the future. It observed that “the nature of the rhetoric employed in [PMOI’s] publications and propaganda” had “changed significantly during 2001

¹⁰ POAC procedures are explained, and its decision analyzed in detail, at pages 17-28 of the Petition. App. 67-78.

and 2002” (App. 320), that its leadership had made several public statements condemning violence (App. 380-81), and that all members at Camp Ashraf had signed declarations “reject[ing] participation in, or support for terrorism” and “reject[ing] violence” (App. 355). Most importantly, it noted, PMOI totally disarmed in May 2003, and “there is no material [suggesting] that the PMOI has sought to restore or bolster its military capability” since then, by obtaining arms, recruiting, or training personnel to carry out acts of violence in Iran or elsewhere. App. 320; see also App. 364, 372, 389. POAC found it particularly “noteworthy” that, “in a case where there is clearly a significant amount of propaganda issued by the Iranian government,” there was “not even the suggestion” from that hostile source that the organization had “taken any steps to re-establish itself as a military force.” App. 364. “In these circumstances,” it concluded, “the only belief that a reasonable decision maker could have honestly entertained ... is that the PMOI no longer satisfies any of the criteria necessary for the maintenance of their proscription.” App. 389.

After reviewing the evidence and conducting extended hearings of its own, the Court of Appeal affirmed POAC’s decision. The court was emphatic in its finding that “neither in the open material nor in the closed [*i.e.*, classified] material was there *any* reliable evidence that supported a conclusion that PMOI retained an intention to resort to terrorist activities in the future.” App. 415 (emphasis added).

Indeed, the classified material had actually “*reinforced*” this conclusion. App. 417 (emphasis added). PMOI accordingly was removed from the UK list of proscribed organizations in June 2008. App. 418-21.

PMOI’s proscription by the EU faced a similar challenge before the Court of First Instance of the European Communities (“CFI”). The CFI likewise ordered PMOI’s removal from the list of proscribed organizations, concluding that the Council of Ministers had violated both substantive and procedural law in maintaining PMOI’s proscription without any evidence to suggest that the organization was engaged in terrorism. App. 554-60. The EU removed PMOI from the terrorist list in January 2009. Council Decision 2009/62/EC (Jan. 26, 2009).

E. The Instant Petition

On July 15, 2008, PMOI petitioned the U.S. Secretary of State for revocation of its designation pursuant to Section 1189(a)(4)(B). App. 50-138. PMOI submitted evidence of substantial changed circumstances since its previous designation, stressing that it had ended all military activities in 2001, completely disarmed in 2003, willingly cooperated with U.S. forces, and, since 2001, consistently and unequivocally rejected terrorism and violence. It also cited the recent UK and EU determinations that *no evidence*—classified or unclassified—supported the proposition that PMOI maintained the capability or intent to engage

in terrorist activities. The petition further described PMOI's cooperation with the U.S. Government on intelligence matters, including exposing Tehran's covert nuclear program.

PMOI thrice supplemented its petition with updated information, along with additional letters from Members of Congress, scholars, retired U.S. military officers, and members of the UK and European Parliaments, each recounting their own experiences with PMOI and expressing support for the organization's delisting. App. 139-51.

F. The Secretary's Decision

The Secretary rejected PMOI's petition. 74 Fed. Reg. 1273-74 (Jan. 12, 2009). Petitioner is unable to recount for the Court the basis for this decision, however, because it is entirely unsupported by anything in the unclassified portion of the administrative record. Indeed, Petitioner does not even know which designation criteria the Secretary found to be satisfied, the Secretary having stated ambiguously that PMOI "engages in terrorist activity ... *or* terrorism ... *or* retains the capability and intent to engage in terrorist activity or terrorism" (App. 4) (emphasis added), and that PMOI "continues to engage in terrorist activity *and* terrorism *and* retains the capability and intent to engage in such activity" (App. 16) (emphasis added).

The 20-page 2009 Summary purports to summarize the evidence in the

record and the grounds for the Secretary's decision. App. 3-25. But the limited text that survived the heavy redaction is almost entirely uninformative. The meat of the Summary, which presumably describes the Secretary's reasoning, consists of seven almost entirely blank pages. See App. 9-16.

The redacted portion of the Summary cites only two pieces of evidence in support of its conclusion that PMOI either is currently engaged in terrorism or currently retains either the capability or the intent to do so: (a) a reference to the so-called "LA-7" case, in which seven PMOI supporters were accused of soliciting funds for the organization *no later than February 2001*, App. 12-13; and (b) a citation to a 2005 Human Rights Watch ("HRW") report alleging that, *in the late 1990s*, PMOI's leaders had used force and coercion to prevent dissident members from leaving the organization, App. 14. In short, the public portion of the administrative record provides no evidence of any terrorist activity—or anything remotely similar to terrorist activity—occurring after 2001, when PMOI abandoned all military operations against the Iranian regime. Nor does the public portion of the administrative record show any capability or intent on the part of PMOI to resort to such acts.

The Secretary appears to have recognized the dearth of record evidence that PMOI continues to satisfy the statutory designation criteria. The Summary ends as follows:

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

App. 22. Nevertheless, PMOI's petition was denied.

G. PMOI's Petition For Review

Invoking 8 U.S.C. § 1189(c), PMOI petitioned for review in this Court. App. 50-139. Soon thereafter, it moved for some form of access to, or additional disclosure of, the full administrative record, in order to provide a more meaningful opportunity to respond to allegations in the undisclosed material.¹¹ The motions panel referred the matter to the merits panel.

SUMMARY OF THE ARGUMENT

I. PMOI's petition demonstrated that it had undergone a sea change and no longer could be considered an FTO within the meaning of AEDPA. The petition showed that PMOI was not engaged in any "terrorism or terrorist activity" within the meaning of the statute:

¹¹ Thereafter, the Secretary provided a new version of the 2009 Summary, disclosing a few paragraphs of the previously redacted material and adding a few citations. Compare App. 26-49 with App. 3-25 (newly disclosed material bracketed). These new "disclosures" contained nothing supporting the Secretary's decision. Their innocuous character did, however, reveal the extent to which the Secretary had inappropriately wielded her power of redaction in the first instance. For example, the Secretary initially had excised references to news reports from the state-controlled Iranian News Agency, despite their being publicly available. Compare App. 48 with App. 24a.

- In 2001, it decided to cease its military campaign against the Iranian regime, decisively ending the acknowledged operations that this Court previously found sufficient to uphold its FTO designation.
- In 2003, it voluntarily handed over its arms to U.S. forces in Iraq, initiating an unflinching record of cooperation with the U.S. officials who maintained close and continuous contact with PMOI's leadership at Ashraf.
- In 2004, PMOI leadership and members at Ashraf were granted "protected person" status based on the determination by U.S. investigators that none of them was engaged in terrorism or had violated American law.
- In 2008 and 2009, PMOI obtained delisting as a terrorist organization in the UK and EU, based on the recognition by disinterested tribunals that PMOI could no longer be said to be involved in terrorism.

PMOI also demonstrated that it lacked the "capability and intent" to engage in terrorism, showing that:

- It had given up all weapons and disbanded its military units, thus relinquishing any capacity to undertake violent attacks either in Iran or elsewhere.

- Its leadership had chosen to embrace non-violent tactics and explicitly rejected all violence in multiple public statements.
- Its members at Ashraf had each committed individually to reject terrorism and violence.
- It had no plans to rearm, resume military training, or resort to violent activities, but instead was focused on furthering its goals of achieving political change in Iran by peaceful means.

The Secretary's decision to maintain PMOI's designation despite this powerful affirmative showing of changed circumstances should be reversed. The Secretary was obliged to compile an administrative record that contains "substantial support" for continuing PMOI's FTO designation. This Court should vacate the designation unless the record contains a sufficient basis for a reasonable person to conclude that the statutory criteria for designation are satisfied, taking into account the non-speculative evidence on both sides.

Especially in light of the severe impact of an FTO designation on First Amendment-protected activities, the Secretary cannot maintain a designation based on a speculative concern that PMOI may resort to terrorist activities in the future. Instead, the statutory requirement of "substantial" record support must be interpreted to require the Secretary to have concrete, reliable, non-speculative evidence supporting a finding that the organization *currently* engages in terrorism

or terrorist activity or *currently* retains *both* the capability *and* the intent to do so. This is especially true given the petition's strong showing that PMOI ended its military campaign eight years ago and has rejected violence and disarmed, which erects a high hurdle to be overcome in order to justify continued FTO status. In fact, however, the unclassified administrative record contains *no* support for the Secretary's decision, and PMOI is confident that the classified portion of the administrative record also fails to justify the continued designation.

II. Given PMOI's affirmative evidence, it is hard to imagine that anything in the classified portion of the administrative record could justify continuing PMOI's FTO status. If the Court nevertheless finds in the classified record material potentially supporting continued FTO status, then before ruling it should grant PMOI or its counsel additional access to the classified information, employing appropriate safeguards, in order to allow the development of a fully-briefed record. Such access is necessary to ensure that PMOI receives due process and meaningful judicial review.

III. Finally, the Secretary's decision is procedurally infirm because PMOI was given no opportunity to rebut the administrative record as this Court's prior decisions require. For this reason, too, the FTO designation should be vacated.

STANDING

Because PMOI is an organization designated as an FTO pursuant to 8 U.S.C. § 1189, and its petition for revocation of that designation was denied by the Secretary, it has standing to seek judicial review in this Court. See 8 U.S.C. § 1189(c).

ARGUMENT

Standard of Review

AEDPA requires the Court to “hold unlawful and set aside” the Secretary’s designation if it is, *inter alia*, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “lacking substantial support in the administrative record taken as a whole.” 8 U.S.C. § 1189(c)(3)(A), (D). This judicial review formula closely parallels the familiar Administrative Procedure Act (“APA”) standard, which requires reversal of agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “unsupported by substantial evidence.” 5 U.S.C. § 706(2). In adopting language substantially equivalent to that of the APA, Congress signaled its intention to provide petitioners with at least the level of judicial review ordinarily available in administrative law cases. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951); *NCRI I*, 251 F.3d at 196-97 (AEDPA’s review procedure “sounds like the familiar procedure normally employed by the Congress to afford

due process in administrative proceedings” and is “reminiscent of other administrative review”).

This Court has treated the phrases “substantial support” and “substantial evidence” as synonymous, using the former when applying APA-style “substantial evidence” review. See, e.g., *Fund for Animals, Inc. v. Thomas*, 127 F.3d 80, 83 (D.C. Cir. 1997); *Power v. Fed. Labor Relations Auth.*, 146 F.3d 995, 1001 (D.C. Cir. 1998); *Cent. & S. Motor Freight Tariff Ass’n v. United States*, 757 F.2d 301, 322 (D.C. Cir. 1985) (per curiam). Likewise, the Court has explicitly invoked the “substantial evidence” standard described in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), when applying Section 1189(c)(3)(D). See *Kahane Chai*, 466 F.3d at 129 (citing *Consol. Edison*, 305 U.S. at 229, and holding that the record must contain “a sufficient basis for a reasonable person to conclude” that the organization satisfied each of the designation criteria); see also *PMOI I*, 182 F.3d at 25 (the Court’s function is “to decide if the Secretary, on the face of things, had enough information before [her] to come to the conclusion that the organizations were foreign and engaged in terrorism”).

In reviewing the administrative action, the Court “may not find substantial evidence ‘merely on the basis of evidence which in and of itself justified [the agency’s decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.’” *Lakeland Bus Lines, Inc. v.*

NLRB, 347 F.3d 955, 962 (D.C. Cir. 2003); see also *NCRI I*, 251 F.3d at 198 (rejecting interpretation of Section 1189 that would strip judges “of capacity to evaluate independently whether the executive decision is correct” (quotation marks omitted)). It must look to the record “taken as a whole,” 8 U.S.C. § 1189(c)(3)(D), and set aside the Secretary’s determination “when it cannot conscientiously find that the evidence supporting that decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [Secretary’s] view.” *Universal Camera*, 340 U.S. at 488; see also *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008) (Tatel, J., concurring); *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808-13 (D.C. Cir. 2007). In addition, the Court may not uphold a finding based on speculation or conjecture. *Morall v. Drug Enforcement Admin.*, 412 F.3d 165, 167 (D.C. Cir. 2005); *City of Centralia v. FERC*, 213 F.3d 742, 749 (D.C. Cir. 2000).

Careful and searching review by the Court is particularly needed in this case, both because of the serious First Amendment implications of an FTO designation and because the public portion of the administrative record contains nothing remotely sufficient to uphold the designation, while PMOI has been denied access to the classified record. See, e.g., *NCRI I*, 251 F.3d at 197 (“[T]his limited scope is reminiscent of other administrative review, but again, it has the unique feature that the affected entity is unable to access, comment on, or contest the critical

material.”). In the absence of fully informed advocacy by the petitioner, the Court should exercise even greater diligence in reviewing the record.

I. THE SECRETARY’S DECISION LACKS SUBSTANTIAL SUPPORT AND IS ARBITRARY AND CAPRICIOUS.

After PMOI submitted evidence that its circumstances had significantly changed, the burden shifted to the Secretary to assemble an administrative record providing substantial support for the conclusion that PMOI either “engages in terrorist activity or terrorism” or “retains the capability and intent to engage in terrorist activity or terrorism.” 8 U.S.C. § 1189(a)(1)(B). Because she has failed to do so, PMOI’s designation as an FTO must be held unlawful and set aside.

A. An Organization May Not Be Designated As An FTO Unless It Currently Engages In Terrorist Activities Or Currently Retains The Capability And Intent To Do So.

1. AEDPA authorizes the Secretary to designate an organization an FTO only if it “engages” in terrorist activity or “retains” both the “capability” and the “intent” to do so. 8 U.S.C. § 1189(a)(1)(B). Congress’s decision to use the present tense in setting forth the designation criteria is “significant” and must be given effect. *United States v. Wilson*, 503 U.S. 329, 333 (1992); see also, *e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003); *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987); *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004). In employing the present tense, Congress made clear that an organization’s prior history of terrorism,

without more, is insufficient to warrant its continued designation. Rather, to maintain a designation, the Secretary must demonstrate that the organization either *presently* “engages” in terrorist activity or *currently* “retains the capability and intent” to do so. 8 U.S.C. § 1189(a)(1)(B).

2. AEDPA’s provision for periodic review of FTO designations reinforces this conclusion. As noted, the Secretary must automatically review an organization’s designation at least every five years “in order to determine whether such designation should be revoked.” 8 U.S.C. § 1189(a)(4)(C)(i). Additionally, an organization may petition for revocation after a mere two years based upon a showing of changed circumstances. *Id.* § 1189(a)(4)(B). Although the Secretary “*may* revoke a designation ... at any time,” *id.* § 1189(a)(6)(A), she “*shall*” revoke it if, upon completion of this review, “the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation.” *Id.* (emphasis added). This Court has previously recognized that the Secretary’s findings must be based on current information. *Cf. NCRI v. Dep’t of State*, 373 F.3d 152, 155 (D.C. Cir 2004) (“*NCRI II*”) (stating that NCRI’s challenge to its designation could succeed “if the new record materials establish its independence from [PMOI]” such that “we can no longer affirm that ‘the Secretary, on the face of things, had enough information before [her] to come to the conclusion’ that NCRI is an alias of [PMOI]”).

Indeed, given that the Secretary has the discretionary authority to revoke a designation at any time, the two provisions for mandatory review would be pointless if an organization's past terrorist activities were sufficient to warrant the indefinite maintenance of a designation. Congress obviously meant for an FTO designation to survive only as long as an organization continues to engage in, or currently retains both the capability and intent to engage in, terrorist activity or terrorism.

3. AEDPA's legislative history confirms that Section 1189 was designed to cut off funding for terrorist activities, not to create a permanent blacklist of organizations that are alleged to have been engaged in such activities in years past. See, *e.g.*, H.R. Rep. 104-518, 104th Cong. at 35 (1996) (Conf. Rep.); see also 141 Cong. Rec. S7661 (daily ed., June 6, 1995) (statement of Sen. Feinstein); 142 Cong. Rec. H3616 (daily ed., Apr. 18, 1996) (statement of Rep. Deutsch). Rep. Brad Sherman, Chairman of the House Subcommittee on International Terrorism, Nonproliferation, and Trade, emphasized the benefit of providing "a road map to those organizations on the terrorist list that would like to get off, particularly those ... that do not threaten Americans," and noted that, if given a path to revocation, these groups "could and would be encouraged to modify their behavior to better meet American international norms." Hearing Before the Subcomm. on Int'l

Terrorism & Nonproliferation of the H. Comm. on Int'l Relations, 109th Cong., at 30 (2006).

In 2004, when Congress amended Section 1189 to allow organizations to petition the Secretary for revocation, the chair of the Homeland Security Subcommittee on Intelligence and Terrorism Risk Assessment observed that “allowing the Secretary of State to remove groups from the list of foreign terrorist organizations if they renounce terrorism” is “one way of using our soft power instead of relying solely on military power to influence groups on the list.” 150 Cong. Rec. H4841 (daily ed. June 23, 2004) (statement of Rep. Harman). Such goals cannot be achieved by maintaining a permanent list of organizations that once engaged in terrorism, without providing a genuine mechanism for them to achieve revocation upon a showing of reform.

4. The State Department has recognized that Section 1189 was intended to reach only organizations that currently engage in terrorist activity or retain both the intent and capability to engage in terrorism. It has de-listed several other organizations on the ground that they had not engaged in terrorist activity for the two years following their last designation. In October 1999, the Secretary declined to re-designate both the Manuel Rodriguez Patriotic Front Dissidents and the Democratic Front for the Liberation of Palestine, “primarily because of the absence of terrorist activity, as defined by relevant law, by those groups during the past *two*

years.” App. 433 (emphasis added) (noting that these groups had been dropped from the list “because their involvement in terrorist activity had ended and they no longer met the criteria for designation”); see also App. 450 (“[W]e look at the facts based on the statute of whether an organization is involved in terrorist activity over the past two years. If they are not, then they will be dropped from the books, and that is what happened with the DFLP.”). Armed with the ability to re-designate the organization immediately if speculation ripened into more plausible evidence, then-Secretary Colin Powell admitted in 2001 that he removed the Japanese Red Army from the list of FTOs, despite the fact that he “remain[ed] concerned about their potential for renewed terrorist activity” and would “continue to monitor them closely,” because he had “not received sufficient information during the past two years to justify designation” under the statute. App. 453. This is in sharp contrast to the Secretary’s treatment of PMOI, which has not engaged in any activity that could be defined as terrorism under the statute for *eight years*.

B. To Avoid First Amendment Concerns, Section 1189 Must Be Construed To Require Concrete, Reliable, and Non-Speculative Evidence That The Statutory Criteria For Designation Are Satisfied.

First Amendment considerations require that AEDPA’s “substantial support” provision be read to require concrete, reliable, and non-speculative evidence of engagement in terrorism or a capability and intent to engage in terrorism.

An FTO designation imposes severe limitations on the exercise of First Amendment rights. Non-citizen FTO members are subject to exclusion or removal from the United States (8 U.S.C. § 1182(a)(3)(B)(i)(IV)-(V)), seriously restricting their freedom of association and that of United States residents who wish to join with them in political activity. Funds on deposit within the United States that an FTO owns or controls are subject to seizure (18 U.S.C. § 2339B(a)(2)), thereby preventing the FTO from engaging in effective political advocacy. Although the organization's U.S. resident supporters are theoretically free to give speeches on a soapbox in the public square,¹² the organization cannot maintain an office, hire personnel, purchase a telephone or computer, print fliers, make posters, or take out newspaper advertisements. See *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976) (per curiam) (“The right to join together ‘for the advancement of beliefs and ideas’ is diluted if it does not include the right to pool money through contributions, for funds are often essential if ‘advocacy’ is to be truly or optimally ‘effective.’”) (citation omitted); see also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981). These restrictions have severely impeded the communication of PMOI's message and the solicitation of support for its views

¹² Of course, designation chills even this basic exercise of free speech rights, as any non-US citizen member of the organization (or supporter mistaken for a member) risks being removed from the United States under 8 U.S.C. § 1182(a)(3)(B)(i)(IV)-(V).

regarding Iran’s political future—virtually silencing the organization at a time when that issue is the subject of daily headlines in the popular press.

The FTO designation also implicates First Amendment concerns of non-members by “criminaliz[ing] monetary contributions that would otherwise be protected.” *Afshari*, 446 F.3d at 917 (Kozinski, J., dissenting from the denial of *en banc* review); see also Ilya Podolyako, *Nowhere to Hide: Overbreadth & Other Constitutional Challenges Facing the Current Designation Regime*, 14 TEX. J. C.L. & C.R. 193, 223 (2009). Under 18 U.S.C. §§ 2339A and B, any individual who knowingly provides material support to a designated FTO faces the threat of criminal prosecution and up to 15 years’ imprisonment. Such threats cripple the ability of the organization and its supporters to advocate or spread their political message. See *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 713 (7th Cir. 2008) (Rovner, J., concurring and dissenting) (noting First Amendment concerns inherent in prohibiting donations to an FTO), petition for cert. filed, 77 U.S.L.W. 3657 (U.S. May 1, 2009) (No. 08-1441); *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1133-36 (9th Cir. 2007) (concluding that certain terms in 18 U.S.C. § 2339A are impermissibly vague and risk “abut[ting] upon sensitive areas of basic First Amendment freedoms”). As the Supreme Court has cautioned, financial and other forms of contributions “to support concerted action by a committee advocating a position” are, “beyond question, a very significant form of

political expression,” and “regulation of First Amendment rights is always subject to exacting judicial scrutiny.” *Citizens Against Rent Control*, 454 U.S. at 298.

We of course do not question the proposition that there is no First Amendment right to engage in or support terrorism. See *Kahane Chai*, 466 F.3d at 133; *Holy Land Found. for Relief & Dev.t v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003); *PMOI II*, 327 F.3d at 1244. This is something of a *non sequitur*, however, when applied to the argument we are making. After all, there is no First Amendment right to publish obscene or defamatory materials either, yet the courts have been careful to provide special safeguards where regulatory efforts create risks of chilling protected First Amendment activity. Here, there is unquestionably a First Amendment right to associate with and provide material support to *non*-terrorist organizations, and such organizations themselves have the right to raise and spend money for the purpose of spreading their message. If the Secretary has maintained PMOI’s designation based on long-past conduct alone, or speculation about the organization’s possible intentions without substantial and concrete evidence of current capability and intent to engage in terrorism, then the designation amounts to nothing more than a naked restriction on protected conduct that is plainly unconstitutional.

Wherever possible, courts are to interpret statutes in a manner that avoids raising serious constitutional questions. *Clark v. Martinez*, 543 U.S. 371, 381-82

(2005); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). Here, the Court should read Section 1189, consistent with its terms, to allow FTO designations only when the Secretary possesses concrete, reliable, and non-speculative evidence that the organization currently engages in terrorism or has the capability and intent to do so. See *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (concluding that, even under the intermediate scrutiny applicable to commercial speech restrictions, the government’s burden of justifying the restriction “is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real, and that its restriction will in fact alleviate them to a material degree”); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (concluding, even under the intermediate scrutiny applicable to content-neutral speech restrictions, that “[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’ It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way”) (citation omitted); see also *Humanitarian Law Project v. U.S. Treasury Dep’t*, No. 07-55893, 2009 WL 2581855, at *2 (9th Cir., Aug. 24, 2009) (noting that Section 1189 does not facially

violate the First Amendment because “the Secretary’s authority to designate only those groups that engage in terrorist activities sufficiently cabined his discretion”).

As we discuss below, it seems clear that the Secretary possesses no such evidence regarding PMOI. Accordingly, the designation should be vacated.

C. PMOI Has Made A Powerful Affirmative Case That It Neither “Engage[s] In Terrorist Activity Or Terrorism” Nor “Retains The Capability And Intent” To Do So.

In the past, this Court has held that PMOI’s designation as an FTO was justified by its then-recent campaign of military actions against the Iranian regime. See *PMOI I*, 182 F.3d 17; *NCRI I*, 251 F.3d 192; *PMOI II*, 327 F.3d at 1239-40. In its petition to the Secretary, however, PMOI compellingly demonstrated a dramatic change in the circumstances that led to its designation. It made a clear showing that the organization and its members had (1) refrained from violent activities for eight years; (2) explicitly eschewed violent tactics as a means to secure political change; (3) totally disarmed; (4) cooperated fully with U.S. forces in Iraq while earning treatment by them as “protected persons”; and (5) obtained delisting after review by disinterested tribunals in both the UK and the EU. That showing—which PMOI is confident is not reliably contradicted by any part of the administrative record—establishes that PMOI no longer qualifies as an FTO and is entitled to immediate delisting.

1. PMOI Does Not “Engage in Terrorist Activity or Terrorism.”

For current purposes, PMOI does not dispute this Court’s prior rulings that its military activities until 2001 provided adequate support for the Secretary’s previous decisions to list it as an FTO. However, PMOI decided to end these violent activities—not just the *two years* that sufficed for delisting of the Japanese Red Army and other groups discussed above, but *eight years ago*. Since then, PMOI has not engaged in any conduct that could be considered “terrorism or terrorist activities” under Section 1189, and we are confident that nothing in the classified record will prove otherwise. Accordingly, PMOI cannot be designated as an FTO under this criterion.

The June 2001 decision to abandon the organization’s campaign of military actions against the Iranian regime (App. 160-65) was implemented quickly and effectively: PMOI’s military actions ceased almost immediately and have not since been resumed. As POAC noted, “an organisation which had consistently claimed responsibility for large numbers of violent terrorist attacks on Iranian interests inside Iran each year ... simply ceased to claim responsibility for such attacks at all” after the summer of 2001. App. 333. Indeed, even in arguing to maintain PMOI’s listing as a terrorist organization, the UK’s Home Secretary accepted that the organization “was not actually committing acts of terrorism.” App. 263.

The U.S. government's conduct also reflects its understanding that PMOI is not engaged in or planning violence. The government has repeatedly praised PMOI's cooperation with U.S. forces; decided to treat PMOI's core leadership and members at Ashraf as "protected persons" after investigating their conduct; and, possessing knowledge of PMOI's activities derived from close supervision of Ashraf for an extended period, has made no allegations of recent violence.

Indeed, if the Secretary had any reasonable basis to believe that PMOI had engaged in terrorism or terrorist activities since 2001, she surely would have disclosed these events in the public record. The administrative summaries supporting the Secretary's prior designation decisions specifically referred to recent military actions acknowledged by PMOI. See, *e.g.*, *PMOI II*, 327 F.3d at 1243-44. The current administrative record refers to no such incidents because there have been none: PMOI simply is not engaged in any actions satisfying the definitions of terrorism or terrorist activity.

2. PMOI Does Not "Retain the Capability and Intent to Engage in Terrorist Activity or Terrorism."

Given the absence of any evidence of recent terrorist activities, we can only posit that the Secretary relied on a finding that PMOI "retains the capability and intent" to commit terrorist acts. We respectfully submit that, in this case, any such finding would necessarily be impermissibly speculative and not substantiated by the kind of concrete evidence that the statute and the First Amendment require.

When AEDPA was initially enacted, an organization could be designated as an FTO only if it *currently* engaged in terrorism or terrorist activities. PMOI's prior appeals challenged its designation under that version of the statute. In October 2001, however, as part of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 107th Cong. (2001), Congress amended Section 1189 to allow designation of an organization that "retains the capability and intent" to commit terrorism. See *id.* § 411(c), 115 Stat. at 349.

That an organization has the "capability *and* intent" to commit terrorism means that it presents a significant threat because it is *both* willing *and* able to commit terrorist acts. We assume it to be beyond dispute that this ground for designation fails if the organization lacks *either* the capability *or* the intent to engage in such acts.

To maintain an FTO designation based on the "capability and intent" criterion, the Secretary may not rely on mere speculation that an organization might someday obtain weapons and use them to resume terrorist activities. She must marshal "substantial support" for the proposition that the organization (1) is currently *able* to engage in terrorism *and* (2) has the current *purpose* to do so. See 8 U.S.C. § 1189(a)(1). Unsupported predictions, especially predictions based on relatively ancient history, cannot satisfy the statutory requirements. While we suspect that such speculation may have been the basis for the Secretary's decision,

mere nervousness about lifting the terrorist designation is insufficient—particularly given PMOI’s strong affirmative showing that it possesses *neither* the capability *nor* the intent to engage in terrorism.

a. “Capability.” The State Department justified PMOI’s prior FTO designation by pointing to its armed struggle against the Iranian regime and its possession of substantial armaments at its bases in Iraq. PMOI no longer retains the capability to engage in these activities, however, having entirely disarmed in May 2003. See App. 168-73. Indeed, PMOI’s complete disarmament was repeatedly praised by U.S. forces and prompted General Odierno to declare publicly that the U.S. Government should reconsider PMOI’s status as an FTO. App. 174-79.

The State Department has questioned whether PMOI’s decision to disarm was voluntary—insisting that PMOI had little choice but to disarm when U.S. forces entered Iraq. But U.S. military officials have acknowledged that PMOI voluntarily agreed to disarm. App. 174-77. In any event, whether the disarmament was entirely voluntary or not is of little moment to the capability inquiry: the fact remains that PMOI no longer retains the capability to engage in the activities that led to its designation. This was starkly illustrated in recent weeks, when Iraqi forces brutally attacked Camp Ashraf, yet PMOI members refrained from any violent acts even in self defense. See *supra* n.6.

The Secretary may argue that PMOI has many adherents who have been trained in military activities. But that too is ancient history: as POAC noted, there is no indication that any such training has occurred since at least 2003 (App. 354, 364), and the mere presence of unarmed individuals, even with past training, cannot constitute terrorist capability.

Simply put, an organization that has dismantled its military units and given up all its weapons has no terrorist “capability.”

b. “Intent.” PMOI also lacks the intent to engage in terrorism or terrorist activity. To the contrary, since 2001 it has wholeheartedly and consistently embraced a path of non-violence and has manifested no desire to resume violent operations.

Since it disarmed, PMOI has made no attempt to reestablish any military or terrorism capability, either through procurement of weapons or training of personnel. App. 364, 369, 389 (POAC findings); App. 486, 488 (personal statements of a U.S. military doctor who spent considerable time in Camp Ashraf as part of his duties, and of a number of noted academics). On the contrary, in July 2004, all PMOI members at Camp Ashraf formally declared that they had handed over all weapons under their control and unequivocally “rejecte[d] participation in, or support for terrorism” and “violence.” App. 183. These statements were verified when, after an extensive investigation by various U.S. agencies, including

the Army Judge Advocate General's Corps, the FBI, and the Department of State, every single one of the 3,400 Ashraf residents was acknowledged to be entitled to "protected person" status under the Fourth Geneva Convention. App. 180-81, 184-88.¹³ PMOI's leadership also has publicly and consistently repudiated violence and terrorism. App. 218, 539.

PMOI's actions have been consistent with its words. Apart from an isolated incident in early 2002,¹⁴ not a single attack, terrorist or otherwise, has been attributed to PMOI since the summer of 2001. See, *e.g.*, App. 332-34, 351. The U.S. officials who interacted closely with PMOI leaders at Ashraf, and concluded that Ashraf residents were entitled to protected-person status, never accused them of any departure from their commitment to non-violence. Indeed, far from planning rearmament or violence, PMOI has devoted its energies to pursuing

¹³ In their investigation, U.S. officials considered whether PMOI members were involved in any terrorist crimes, war crimes, or crimes against humanity. App. 187. After extensive interviews, the government found no basis for any such charges. See, *e.g.*, App. 180-199. Of course, as the Secretary notes, this finding does not control her FTO determination. But surely it has some bearing on the present inquiry; indeed, it is highly revealing that several government agencies with access to classified information concluded, after a thorough investigation, that PMOI's members have committed no violations of American law and satisfied the conditions for "protected persons" status.

¹⁴ As POAC found, in May 2002 alleged representatives of PMOI claimed responsibility for a single armed attack inside Iran, but this claim was almost immediately repudiated by the organization. The Commission gave no weight to this alleged event, noting that PMOI had disclaimed responsibility for an action that in any event occurred too long ago to be significant. App. 333.

democratic change in Iran and obtaining international legitimacy. With the support of many political leaders, and after an extended court battle, PMOI obtained deproscription in both the EU and the UK. PMOI certainly has no intention of putting its hard-earned achievements in jeopardy.

Thus, the Secretary can have had no basis to believe that PMOI intends to pursue terrorist activities in the future. In fact, as next discussed, the administrative record assembled by the Secretary entirely fails to support her conclusion that PMOI satisfies any of the statutory designation criteria.

D. The Administrative Record Fails To Support A Finding That PMOI Currently Satisfies Section 1189’s Designation Criteria.

Although much of the record remains secret, PMOI is confident that nothing in it justifies continuation of the FTO designation.

1. The Public Record

The portion of the administrative record disclosed to PMOI contains *no* support—let alone substantial support—for the conclusion that PMOI engages in terrorism or retains the capability and intent to engage in terrorism.

First, the Secretary’s proffered bases for disregarding PMOI’s powerful evidence of changed circumstances were insufficient. For example, the Secretary discounted the UK delisting decision by stating that the UK proceeding “involve[d] different law,” and did “not include an examination of our 2008 Administrative Record.” App. 20. But she did not identify any meaningful differences in the

laws, nor give any hint that she actually possessed information unavailable to the UK tribunal that justified a different outcome. Likewise, the Secretary noted formalistically that “[p]rotected persons status applies only to individuals, not groups” (App. 19), but she failed to address the practical contradiction between the U.S. Government’s finding, after extensive investigation, that PMOI’s core leaders and members at Ashraf qualified for such status, and its continued insistence that the organization comprised of these same people is a terrorist organization.

Second, the public portion of the record discusses the following evidence, none of which demonstrates that PMOI currently satisfies the criteria for designation as an FTO.

a. History of terrorism. The 2009 Summary emphasizes PMOI’s history of military actions against the Iranian regime, going back to the 1970s and extending through the summer of 2001. App. 5-6, 16. Evidence of violent activities that occurred nearly a decade ago cannot possibly support a finding that the organization currently engages in terrorism.

Nor is this history sufficient to establish that PMOI currently retains the capability and intent to engage in terrorism. The Secretary is not permitted simply to speculate that PMOI’s rejection of violence might be disingenuous. A “substantial” basis for continued designation requires concrete and specific evidence that an organization has a contrary intent; a finding “based on sheer

speculation” is insufficient. *City of Centralia*, 213 F.3d at 749; see also *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 840 (D.C. Cir. 2005) (reversing an agency’s finding “based only on sheer speculation”); *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 121 (D.C. Cir. 2000) (concluding that the agency’s decision “rested on pure conjecture, and is therefore not supported by any—let alone substantial—evidence”); *Arizona Pub. Serv. Co. v. United States*, 742 F.2d 644, 649 n.2 (D.C. Cir. 1984) (“[M]ere conjecture and abstract theorizing offered in a vacuum are inadequate to satisfy us that the agency has engaged in reasoned decisionmaking.”).

b. Fundraising. The Secretary alleges that, “during the period 1994 continuing through about February 27, 2001,” certain individuals engaged in various forms of unlawful fundraising for the benefit of PMOI. It is doubtful that fundraising alone, on behalf of an organization that remains designated as an FTO but has eschewed all violence, can provide “substantial” support for the conclusion that the organization should remain an FTO. If it could, then an entirely peaceful organization could remain on the list indefinitely because of accusations of isolated, non-coordinated fundraising by putative members. Moreover, unless there is evidence that such individuals were acting as agents of PMOI or under its direction, it is unwarranted to ascribe their activities to the organization.

In any event, the Secretary does not allege any illegal fundraising by or on behalf of PMOI after 2001. Since nearly a decade has passed, this alleged fundraising, like pre-2002 acts of violence, cannot evidence current terrorism or otherwise supply a basis for maintaining the FTO designation.

c. Alleged human rights abuses. The Secretary cites a 28-page Human Rights Watch report, published in 2005, which alleges that PMOI leadership, in the years before 2001, committed various forms of “human rights abuses,” including beatings, psychological abuse, and torture, against dissident members at Camp Ashraf. App. 14. The HRW report’s allegations—though certainly serious—do not involve hostage-taking, assassinations, or any other acts that fall within the statute’s definitions of terrorist activity or terrorism. See 8 U.S.C. § 1189; *id.* § 1182(a)(3)(B); 22 U.S.C. § 2656f(d)(2). Furthermore, the vast majority of the conduct alleged in the report, if it occurred at all, occurred in the 1990s. Even if the Secretary were permitted to accept unquestioningly the poorly substantiated and stale charges raised in this report, these allegations cannot provide the basis for an FTO designation in 2009.

Moreover, this report—based on only 12 hours of telephone interviews with 12 people (all but one of whom had left Ashraf well before 2001) (HRW Report at 3)—has been thoroughly discredited. See, *e.g.*, App. 483-90. Its authors made no attempt to substantiate their allegations by seeking out additional witnesses,

consulting U.S. military officers who had overseen the camp for several years, or visiting the camp themselves; and PMOI received no opportunity to submit evidence or respond to the authors of the report before they published their findings. The HRW Report accordingly does not merit serious consideration, and certainly does not support the Secretary's decision.

d. Prior designations. The Secretary's 2009 Summary (App. 4) incorporates by reference the summary issued in support of PMOI's 2003 designation. But none of the purported bases for designation set forth in the 2003 Summary are legitimate grounds for designation today. For example, the 2003 Summary stated that PMOI had not renounced the use of terrorist violence to accomplish its political objectives (App. 157), but PMOI and NCRI both have unequivocally rejected violence on multiple occasions since then. See, *e.g.*, App. 162-64, 183, 218, 539. The 2003 Summary also relied heavily on the fact that NCRI offices in Paris had been raided by French police in June 2003, and that two PMOI members had immolated themselves in protest. App. 156. The French raid is not even mentioned in the 2009 Summary, however, presumably because, six years later, no terrorism-related charges have been filed as a result of that raid. Moreover, a French court ruled that the two individuals who committed suicide had acted on their own and were not controlled by PMOI. See App. 554-557.

e. Other allegations. The other allegations in the public part of the record raise more questions about the Secretary’s methods and sources than they do about the genuineness of PMOI’s transformation.

For example, the Secretary cites otherwise uncorroborated “newspaper reporting” from the Iranian state-run “news agency” for the propositions that (1) “UK Justice Secretary Jack Straw told the Iranian Deputy Foreign Minister for European Affairs that the British government still considers the MEK to be a terrorist organization” (App. 20), and (2) PMOI hired 50 to 60 actors to appear at large demonstrations in Brussels, New York, and Berlin (App. 21).¹⁵ It is surprising that the U.S. Secretary of State would rely upon such self-serving reports from the government of Iran, an unrelenting enemy of PMOI, which the Secretary herself has identified as the world’s leading state sponsor of terrorism.¹⁶ Her citation of such unreliable sources in the public record casts doubt on the information in the classified record, a substantial portion of which PMOI suspects

¹⁵ The invocation of “facts” like this, having nothing to do with whether PMOI remains a terrorist organization, suggests a paucity of real evidence supporting the Secretary’s finding. Beyond that, the notion that PMOI would need to hire persons to attend their rallies is especially ludicrous when one considers, for example, that its rally in Paris in June 2008—an event discussed in the Petition—drew over 70,000 supporters. App. 64, 243-47.

¹⁶ The Secretary’s decision to give unquestioning credence to the statements of the Iranian regime is even more ironic when juxtaposed with her utter refusal to credit the conclusions of the UK Court of Appeal, POAC, and the European Court of First Instance, as well as retired U.S. military officers. See App. 19-20.

derives from known agents of the Iranian regime.¹⁷ See, *e.g.*, App. 248-50 (German intelligence report explaining that the Iranian Ministry of Intelligence and Security agents have recruited former PMOI members—often by threats of force and coercion—and compelled them to spread disinformation to discredit PMOI). Of course, because PMOI has not seen this evidence, it cannot assist in identifying such sources; nevertheless, such evidence should be viewed with extreme skepticism by the Court.

In sum, none of the evidence relied upon by the Secretary in the unclassified portion of the administrative record provides any support—much less substantial support—for the finding that PMOI presently engages in, or retains the capability and intent to engage in, terrorist activity or terrorism.

2. The Classified Record

Of course, neither PMOI nor its attorneys have reviewed the classified portion of the administrative record. We are confident, however, that it contains

¹⁷ The unreliability of information emanating from the Iranian regime was illustrated most recently by Amnesty International’s report that the fiancé of Neda Agha Sultan, a young woman killed in broad daylight and before many witnesses by the Iranian security militia during the recent protests in Iran, had been told that he would be released from Evin prison in Tehran if he signed a “confession” stating that PMOI killed her. See Amnesty International, *Neda Agha Sultan Murder Witness At Risk of Torture In Tehran Prison* (Sept. 4, 2009), at <http://www.amnesty.org/en/news-and-updates/news/neda-gha-soltan-murder-witness-risk-torture-tehran-prison-20090904>. That the Iranian regime would attempt to manufacture such an absurd accusation reveals its determination to discredit the PMOI by any possible means.

no evidence capable of supporting PMOI's continued designation, particularly when considered in light of its powerful affirmative showing of changed circumstances.¹⁸

Indeed, as noted above, a highly qualified and neutral tribunal *has* examined most of the information available to the Secretary and found it to contain *no evidence* to support the conclusion that PMOI engages in or retains the capability and intent to engage in terrorism. The 2007 POAC proceedings in the UK involved a detailed investigation of PMOI's activities, more than 15 volumes of both open and classified evidence, and several days of open and closed hearings. This voluminous record likely included most of the classified materials before the Secretary. If the United States had possessed substantial evidence that PMOI was currently engaged in terrorism or posed a credible threat of resuming terrorism in the future, it surely would have shared that information with its closest ally, which was attempting to determine this very question.

After an exacting review of all the evidence in the record, however, POAC concluded that PMOI is no longer "concerned in terrorism." App. 389; see pages 14-16, *supra*. The English Court of Appeal agreed with POAC's view of the

¹⁸ It is extremely unlikely that Ambassador Dell Dailey, retired three-star General and the State Department's top counterterrorism official, would have supported the removal of PMOI's FTO designation had the classified record contained any reliable information that the organization constitutes a present and credible terrorist threat. See n.5, *supra*.

record, concluding that “neither in the open material nor in the closed material was there *any* reliable evidence that supported a conclusion that PMOI retained an intention to resort to terrorist activities in the future.” App. 415 (emphasis added). Pointedly, it also noted that the classified material had actually “*reinforced*” this conclusion. App. 417 (emphasis added). The Home Secretary’s inability to marshal any evidence, classified or unclassified, in support of his conclusion that PMOI remained concerned in terrorism strongly supports the inference that no such evidence exists.

II. PMOI IS ENTITLED, WITH ADEQUATE SAFEGUARDS, TO ACCESS TO THE CLASSIFIED PORTION OF THE ADMINISTRATIVE RECORD

As previously explained, the Secretary’s extensive redaction of both the summary and administrative record has left PMOI in the dark regarding even the ostensible grounds for its continued designation. See *supra* at 18-19; cf. *Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989) (noting the inherent difficulty in a statutory scheme in which the petitioner, “like Joseph K in [Kafka’s] *The Trial*,” can prevail “only if he can rebut the undisclosed evidence against him, *i.e.*, prove that he is not a terrorist regardless of what might be implied by the Government’s confidential information”). If this Court concludes that the administrative record as a whole does not support PMOI’s continued designation, then PMOI has no need for access to the classified record. If, however, the Court is inclined to

uphold the Secretary's decision based on the classified portion of the record, then it should order the Secretary to make additional disclosures to PMOI¹⁹ or vacate the designation. Continued designation in the absence of such disclosure violates PMOI's due process rights and denies it meaningful appellate review.²⁰

The government may argue that PMOI, as a foreign entity that has been excluded from the United States, is not entitled to due process even as a party in a judicial proceeding. Whatever other limits there may be on foreigners' constitutional rights in this country, we are aware of no authority that supports the proposition that they are not entitled to fundamentally fair judicial proceedings. In any event, this Court has previously held that NCRI (and hence PMOI, as its "alias") has "developed substantial connections with this country" sufficient to

¹⁹ If PMOI is afforded greater access to the classified materials, then the Court should permit additional briefing so that PMOI may address the asserted bases for the continued designation.

²⁰ On the morning of this brief's filing, the Government provided PMOI's counsel with newly declassified portions of three documents in the administrative record (MEK-10, MEK-11, and MEK-25). The disclosures contain vague and unsubstantiated allegations, which bear no indicia of reliability and are facially implausible in several respects. Yet, the documents' (partial) disclosure at this extremely late stage of the proceedings has denied PMOI the opportunity to examine the accusations, let alone respond to them substantively. Although we are confident that the classified portion of the administrative record cannot override the public portion when it is considered as a whole, the sparseness of the new disclosures nevertheless further underscores PMOI's need for access to the classified information. PMOI will have great difficulty engaging such accusations constructively without knowing their context and source. And, of course, PMOI cannot respond at all to allegations that may be contained in the parts of the documents that remain classified.

invoke its constitutional protections. *NCRI I*, 251 F.3d at 202. And PMOI itself currently maintains an interest in a bank account frozen by the U.S. government because of its FTO status,²¹ a fact that also entitles it to protection under the Due Process Clause. *Id.* at 204.

“The fundamental requirement of due process” includes “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Due process further requires “the opportunity to *effectively* be heard”—which in this context includes “the opportunity to present, at least in written form, such evidence as those entities may be able to produce *to rebut the administrative record* or otherwise negate the proposition that they are [FTOs].” *NCRI I*, 251 F.3d at 208-09 (emphases added). The mere opportunity for a petitioner to be “heard,” without any knowledge of the evidence used against it, is neither “meaningful” nor “effective.” See *Bismullah v. Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007), vacated on other grounds, 128 S. Ct. 2960 (2008). Likewise, an organization designated as an FTO cannot receive meaningful appellate review when it is unable to make arguments to the Court addressing the specific bases for its designation.²²

²¹ OFAC, Terrorist Asset Report at 8 (Oct. 10, 2008), available at <http://www.treas.gov/offices/enforcement/ofac/reports/tar2007.pdf>.

²² For example, if PMOI were to learn that the classified portion of the record contained an allegation that one of its members had recently attempted to assassinate an Iranian official, PMOI should be permitted to adduce evidence that

In *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Supreme Court set aside a temporary restraining order implicating free speech because the order had been issued *ex parte*, a process that the Court found unacceptable because it did not “assure the fullest presentation and consideration” permitted by the circumstances. *Id.* at 180-81. Similarly, under the procedures set forth in Section 1189, “[t]he value of [the] judicial proceeding ... is substantially diluted” because “the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.” *Id.* at 183. In the absence of meaningful participation, “there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.” *Id.*

This Court has rejected arguments that Section 1189 is facially unconstitutional because it allows the Secretary to rely on classified information without disclosing that information to the affected entity. See *PMOI II*, 327 F.3d at 1239-40; *NCRI I*, 251 F.3d at 196; *PMOI I*, 182 F.3d at 25. But this Court has not considered an as-applied challenge where the entire basis for the Secretary’s conclusion lies, as it does here, in the undisclosed portion of the record. In these

the event never occurred, that the alleged perpetrator could not have committed the offense, or that the individual was not associated with PMOI. Without even having knowledge of such allegations, however, PMOI risks remaining forever condemned as an FTO based on claims that it possesses the evidence to demonstrate are simply false.

circumstances, due process should guarantee PMOI, at a bare minimum, disclosure to its counsel or some other meaningful form of access to the evidence on which the Secretary relied. Particularly when fundamental rights such as free expression are implicated, due process requires that the procedures used to safeguard government secrets must “reach no farther than is necessary” to protect the “strong and legitimate state interest” at stake. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974); see also *Carroll*, 393 U.S. at 183-84. Put another way, accepting that the government has a compelling interest in combating terrorism, the importance of the individual rights affected by an FTO designation requires narrow tailoring of any significant constraint on the ability to mount an effective challenge to that designation. A blanket prohibition on even limited access to classified information on which a designation rests does not satisfy that requirement.

Even if the Court determines that the Secretary’s reliance on secret information does not violate PMOI’s due process rights, it can and should take reasonable and appropriate measures to facilitate effective review. *United States v. Hasting*, 461 U.S. 499, 505 (1983). Indeed, noting its obligation to “implement such measures to govern the[] proceedings as are necessary to enable [it] to engage in meaningful review of the record,” this Court recently has acknowledged that meaningful judicial review requires the participation of fully informed counsel from both sides. *Bismullah*, 501 F.3d at 180. In *Bismullah*, the Court concluded

that it could not effectively review an “enemy combatant” determination by a Combatant Status Review Tribunal unless petitioner’s counsel was granted access to the government’s evidence, including all but the most sensitive classified information. Because “counsel who has seen only the subset of the Government Information presented to the Tribunal is in no position to aid the court,” *id.* at 185, the Court rejected the government’s contention that *ex parte, in camera* review was an adequate substitute for informed participation by counsel, *id.* at 187. Instead, it constructed a detailed protective order adopting procedures aimed at maximizing counsel’s access to the information while at the same time guarding against inappropriate dissemination of classified material, *id.* at 194-204. Similarly, in *Al Odah v. United States*, 559 F.3d 539, 542-48 (D.C. Cir. 2009) (per curiam), this Court concluded that access by petitioner’s counsel to the entire record (pursuant to a court-approved protective order) is “necessary to facilitate meaningful review.” *Id.* at 548.

The Supreme Court itself has recently acknowledged the inadequacy of judicial review when the government makes undisclosed classified information the basis of its case in a supposedly adversarial proceeding. In *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008), the Supreme Court pronounced the Detainee Treatment Act constitutionally deficient as a substitute for habeas corpus partly because the law denied detainees access to the classified materials used in

designating them “enemy combatants.” On remand, the district court ruled that detainees’ counsel must be given access to the classified material relied upon by the government to justify detention. *Taher v. Bush*, 585 F.Supp.2d 94, 98-99 (D.D.C. 2008) (“If any information ... is classified, the Government shall provide Petitioner with an adequate substitute and, unless granted an exception, provide Petitioner’s counsel with the classified information ...”).²³

The logic of the Supreme Court’s decision in *Boumediene* and that of this Court in *Bismullah* and *Al Odah* applies with equal force here: review of an agency’s determination without the participation of an informed advocate for the petitioner denies the petitioner meaningful judicial review and needlessly complicates this Court’s task in conducting its review. For these reasons, PMOI respectfully requests that the Court, implementing the mandates of due process and relying on its inherent power and discretion to ensure fairness and substantial justice, direct that Petitioner’s counsel be permitted, after obtaining an appropriate security clearance, to review the classified information in the Record and to file supplemental briefs as necessary.

If the Court concludes that it would be inappropriate to permit direct access

²³ Accord, *Aweda v. Bush*, 585 F. Supp. 2d 101, 106 (D.D.C. 2008); *Razak v. Bush*, 585 F. Supp. 2d 108, 111 (D.D.C. 2008); *Alhami v. Bush*, 585 F. Supp. 2d 114, 118-19 (D.D.C. 2008); *Ansi v. Bush*, 585 F. Supp. 2d 121, 125 (D.D.C. 2008); *Ahmed v. Bush*, 585 F. Supp. 2d 127, 130-31 (D.D.C. 2008); *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 148-52 (D.D.C. 2008).

by counsel to the classified information, we respectfully request that it adopt other measures that, while falling short of such disclosure, would materially increase the prospects for fair, efficient, and meaningful judicial review. First, the Court could direct the Government to minimize the amount of information withheld by ensuring that *only* properly classified material has been redacted from the public record, tailoring its redactions more narrowly, and preparing meaningful non-classified summaries of the omitted information.²⁴ Second, the Court itself could review the classified material to ensure that the government’s refusal to disclose it is justified. See *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003).²⁵

Alternatively, PMOI respectfully suggests that the Court consider appointing a special master to participate on behalf of PMOI in any *in camera* review in this case. Under Federal Rule of Appellate Procedure 48(a), the Court may appoint a special master “to recommend factual findings and disposition in matters ancillary to proceedings in the court.” This Court could grant a master with appropriate

²⁴ Such a requirement has a direct parallel in the Classified Information Procedures Act (“CIPA”), 18 U.S.C. App. 3 § 6(c). Although CIPA directly applies only in criminal cases, its procedures have been analogized in other cases involving classified information. See, e.g., *Al Odah*, 559 F.3d at 542-43.

²⁵ Of course, this review must be conducted with “the appropriate degree of deference” concerning classification decisions. *Stillman*, 319 F.3d. at 549. Nevertheless, this Court has authority to review the classified material in the first instance, ask Respondent to explain why the material has been withheld from PMOI, and may thus determine whether any portion should be declassified and disclosed. *Id.*

security clearance unrestricted access to the classified material, while prohibiting communication of its contents to PMOI or its counsel. The master then could prepare and file briefs and participate in closed sessions.²⁶ In this way, the Court could to some extent balance the government's interest in preventing disclosure of classified information with both PMOI's right to defend itself and this Court's duty to perform its judicial functions adequately.

III. THE SECRETARY'S PROCEDURE VIOLATED DUE PROCESS BECAUSE PMOI WAS GIVEN NO OPPORTUNITY TO CONFRONT AND EXPLAIN THE EVIDENCE AGAINST IT

The Secretary also failed to follow the procedures mandated by this Court as necessary to afford due process in connection with an FTO designation. In *NCRI I*, 251 F.2d at 209, this Court held that due process requires that the Secretary “provide notice of those unclassified items upon which [s]he proposes to rely” and “afford to entities considered for imminent designation the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are [FTOs.]” In this case, the Secretary failed to provide such notice. Instead, she simply rejected PMOI's petition without affording Petitioner any opportunity to view even the unclassified portion of the record until after the ruling was final.

²⁶ While the master would not be permitted to disclose classified information to PMOI, he or she should be authorized, after reviewing the entire file, to elicit relevant information from PMOI and its counsel to facilitate effective advocacy.

In *PMOI II*, the Court noted that the Secretary had followed *NCRI I*'s directive by "provid[ing] PMOI with an opportunity to respond to the unclassified evidence." 327 F.3d at 1241. Likewise, in *NCRI II*, the Court specifically noted that NCRI had been given the opportunity to respond to the Secretary's evidence. See 373 F.3d at 156 (noting that "the State Department provided for NCRI's review additional materials obtained by the FBI" regarding the relationship between NCRI and PMOI and that "[w]ithin two months, NCRI submitted its response"). Here, by contrast, the Secretary gave PMOI no advance notice of the administrative record upon which she intended to rely. Instead, PMOI was given the heavily redacted administrative record after the renewal of the FTO designation was published, and was given no opportunity to respond.

We believe that the record before this Court is adequate to allow it to rule on the merits that the Secretary lacked substantial support for her refusal. But if the Court disagrees, the failure to afford PMOI due process makes the designation procedurally flawed and requires that it be vacated.

CONCLUSION

This Court should grant the petition for review, vacate the decision of the Secretary, and remand with instructions to revoke PMOI's designation as an FTO.

Respectfully submitted.

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Dated: September 8, 2009

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)

I hereby certify that the foregoing Final Brief for Petitioner complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is composed in a 14-point typeface, Times New Roman. As calculated by my word processing software (Word), the Brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 13,906 words.

/s/Andrew L. Frey
Andrew L. Frey

ADDENDUM: STATUTES AND REGULATIONS

STATUTES AND REGULATIONS

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8 U.S.C. § 1189 provides in pertinent part:

(a) Designation

(1) In general

The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—

(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 1182 (a)(3)(B) of this title or terrorism (as defined in section 2656f (d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism) [1]; and

(C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

(2) Procedure

(A) Notice

(i) To congressional leaders Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate, in writing, of the intent to designate an organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor.

(ii) Publication in Federal Register The Secretary shall publish the designation in the Federal Register seven days after providing the notification under clause (i).

(B) Effect of designation

(i) For purposes of section 2339B of Title 18, a designation under this subsection shall take effect upon publication under subparagraph (A)(ii).

(ii) Any designation under this subsection shall cease to have effect upon an Act of Congress disapproving such designation.

(C) Freezing of assets

Upon notification under paragraph (2)(A)(i), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court.

(3) Record

(A) In general

In making a designation under this subsection, the Secretary shall create an administrative record.

(B) Classified information

The Secretary may consider classified information in making a designation under this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c).

(4) Period of designation

(A) In general

A designation under this subsection shall be effective for all purposes until revoked under paragraph (5) or (6) or set aside pursuant to subsection (c) of this section.

(B) Review of designation upon petition

(i) In general The Secretary shall review the designation of a foreign terrorist organization under the procedures set forth in clauses (iii) and (iv) if the designated organization files a petition for revocation within the petition period described in clause (ii).

(ii) Petition period For purposes of clause (i)—

(I) if the designated organization has not previously filed a petition for revocation under this subparagraph, the petition period begins 2 years after the date on which the designation was made; or

(II) if the designated organization has previously filed a petition for revocation under this subparagraph, the petition period begins 2 years after the date of the determination made under clause (iv) on that petition.

(iii) Procedures Any foreign terrorist organization that submits a petition for revocation under this subparagraph must provide evidence in that petition that the relevant circumstances described in paragraph (1) are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the organization is warranted.

(iv) Determination

(I) In general Not later than 180 days after receiving a petition for revocation submitted under this subparagraph, the Secretary shall make a determination as to such revocation.

(II) Classified information The Secretary may consider classified information in making a determination in response to a petition for revocation. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c) of this section.

(III) Publication of determination A determination made by the Secretary under this clause shall be published in the Federal Register.

(IV) Procedures Any revocation by the Secretary shall be made in accordance with paragraph (6).

(C) Other review of designation

(i) In general If in a 5-year period no review has taken place under subparagraph (B), the Secretary shall review the designation of the foreign terrorist organization in order to determine whether such designation should be revoked pursuant to paragraph (6).

(ii) Procedures If a review does not take place pursuant to subparagraph (B) in response to a petition for revocation that is filed in accordance with that subparagraph, then the review shall be conducted pursuant to procedures established by the Secretary. The results of such review and the applicable procedures shall not be reviewable in any court.

(iii) Publication of results of review The Secretary shall publish any determination made pursuant to this subparagraph in the Federal Register.

(5) Revocation by Act of Congress

The Congress, by an Act of Congress, may block or revoke a designation made under paragraph (1).

(6) Revocation based on change in circumstances

(A) In general

The Secretary may revoke a designation made under paragraph (1) at any time, and shall revoke a designation upon completion of a review conducted pursuant to subparagraphs (B) and (C) of paragraph (4) if the Secretary finds that—

(i) the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation; or

(ii) the national security of the United States warrants a revocation.

(B) Procedure

The procedural requirements of paragraphs (2) and (3) shall apply to a revocation under this paragraph. Any revocation shall take effect on the date specified in the revocation or upon publication in the Federal Register if no effective date is specified.

* * *

(c) Judicial review of designation

(1) In general

Not later than 30 days after publication in the Federal Register of a designation, an amended designation, or a determination in response to a petition for revocation, the designated organization may seek judicial review in the United States Court of Appeals for the District of Columbia Circuit.

(2) Basis of review

Review under this subsection shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review,

classified information used in making the designation, amended designation, or determination in response to a petition for revocation.

(3) Scope of review

The Court shall hold unlawful and set aside a designation, amended designation, or determination in response to a petition for revocation the court finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), [2] or

(E) not in accord with the procedures required by law.

* * *

8 U.S.C. § 1182(a)(3)(B) provides:

(iii) “Terrorist activity” defined

As used in this chapter, the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) Engage in terrorist activity defined

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

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

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

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

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

(aa) for the commission of a terrorist activity;

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

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing

evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) “Representative” defined As used in this paragraph, the term “representative” includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) Terrorist organization defined. As used in this section, the term “terrorist organization” means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

22 U.S.C. § 2656f(d)(2) provides:

(2) the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents[.]

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2009, I electronically filed the foregoing Brief for Petitioner with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel:

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