

Set For Oral Argument on January 12, 2010

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**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
GLOSSARY	vi
INTRODUCTION	1
ARGUMENT	4
I. THE SECRETARY’S DECISION LACKS SUBSTANTIAL SUPPORT	4
A. The Government, Not PMOI, Carries the Burden of Proof	4
B. The Court Must Conduct a Meaningful Review of the Administrative Record	6
1. The Statute Requires the Court, at a Minimum, to Examine the Record for “Substantial Support”	6
2. Conclusory Allegations Cannot Constitute “Substantial Support”	9
3. Exacting Judicial Review is Necessary to Avoid Constitutional Concerns	10
a. First Amendment Concerns Dictate Construing Section 1189 to Require Concrete, Reliable, and Non-Speculative Evidence that the Statutory Criteria Are Satisfied	10
b. Due Process Concerns Also Require Greater Scrutiny Given the Lack of Opportunity to View, and thus Rebut, the Secretary’s Evidence	13
C. The Record Does Not Demonstrate That PMOI Currently Engages in Terrorism or Retains the Capability and Intent to Do So	14
1. PMOI Is Not Engaged in Terrorism or Terrorist Activity	14
2. PMOI Retains Neither the Capability Nor the Intent to Engage in Terrorism or Terrorist Activity	15

TABLE OF CONTENTS
(continued)

	Page
3. The Newly Declassified Material Fails to Support the Designation.....	19
II. PMOI IS ENTITLED TO GREATER ACCESS TO THE CLASSIFIED PORTION OF THE ADMINISTRATIVE RECORD	22
III. PMOI HAS NOT RECEIVED THE PROCESS DUE UNDER THIS COURT’S PRIOR DECISIONS	27
CONCLUSION	30

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009).....	20
<i>Bismullah v. Gates</i> , 501 F.3d 178 (D.C. Cir. 2007).....	25, 26
<i>Boumediene v. Bush</i> , 128 S. Ct. 2229 (2008).....	25
<i>City Council v. Taxpayers for Vincent</i> , 466 U.S. 789 (1984).....	12
* <i>Clark v. Martinez</i> , 543 U.S. 371 (2005).....	13
<i>Dep't of Navy v. Egan</i> , 484 U.S. 518 (1988).....	24
<i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council</i> , 485 U.S. 568 (1989)	10
<i>Ellsberg v. Mitchell</i> , 709 F.2d 51 (D.C. Cir. 1983).....	26
<i>Gilbert v. Homar</i> , 520 U.S. 924 (1997).....	23
<i>Jifry v. Federal Aviation Administration</i> , 370 F.3d 1174 (D.C. Cir. 2004).....	25
* <i>Kahane Chai v. Dep't of State</i> , 466 F.3d 125 (D.C. Cir. 2006).....	8, 11, 28, 29
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	23, 28
* <i>Morall v. DEA</i> , 412 F.3d 165 (D.C. Cir. 2005).....	17, 22

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972).....	23
* <i>NCRI v. Dep’t of State</i> , 251 F.3d 192, 196 (D.C. Cir. 2001) (“ <i>NCRI I</i> ”)	6, 23, 27, 29
* <i>NCRI v. Dep’t of State</i> , 373 F.3d 152, 155 (D.C. Cir 2004) (“ <i>NCRI II</i> ”).....	6, 9, 13, 23
<i>Nat’l Gypsum Co. v. EPA</i> , 968 F.2d 40 (D.C. Cir. 1992).....	5
<i>PG&E Gas Transmission, Nw. Corp. v. FERC</i> , 315 F.3d 383 (D.C. Cir. 2003).....	5
* <i>PMOI v. Dep’t of State</i> , 182 F.3d 17 (D.C. Cir. 1999) (“ <i>PMOI I</i> ”)	6, 7, 13
* <i>PMOI v. Dep’t of State</i> , 327 F.3d 1238, 1241-43 (D.C. Cir. 2003) (“ <i>PMOI II</i> ”)	8, 11, 13
<i>Schaumburg v. Citizens for a Better Env’t</i> , 444 U.S. 620 (1980).....	12
<i>Sec’y of State of Md. v. J.H. Munson Co.</i> , 467 U.S. 947 (1984).....	12
<i>Serramonte Oldsmobile, Inc. v. NLRB</i> , 86 F.3d 227 (D.C. Cir. 1996).....	5
<i>Taher v. Bush</i> , 585 F. Supp. 2d 94 (D.D.C. 2008).....	26
 STATUTES	
8 U.S.C. §1189(a)(8).....	12
8 U.S.C. §1189(a)(3)(A)	1
8 U.S.C. §1189(a)(4)(B)(iii)	4

TABLE OF AUTHORITIES
(continued)

	Page(s)
8 U.S.C. § 1189(c)(3).....	5, 22
8 U.S.C. §1189(c)(3)(A), (D).....	7
MISCELLANEOUS	
141 Cong. Rec. S7864 (daily ed. June 7, 1995).....	24
FRAP 48(a)	27
Rule 12(b)(6).....	21

GLOSSARY

Congressional Am. Br.	Brief of Members of Congress as <i>Amici Curiae</i> in Support of Petitioner
E.U. Am. Br.	Brief <i>Amici Curiae</i> of the Hon. Alejo Vidal-Quadras, M.E.P. (Spain), Vice President, European Parliament; The Hon. Straun Stevenson, M.E.P. (Scotland), et al., in Support of Petitioner
FTO	Foreign Terrorist Organization
GB	Brief for Respondents
HRW	Human Rights Watch
Iranian-American Am. Br.	Brief of the Iranian-American Society of Texas, et al., as <i>Amici Curiae</i> in Support of the Petitioner
Military Am. Br.	<i>Amicus</i> Brief of Colonel Gary Morsch, M.D., and Major General Paul E. Valley (Ret.) in Support of the Petitioner
PB	Petitioner's Opening Brief
PMOI	People's Mojahedin Organization of Iran
Secretary	Secretary of State
U.K. Am. Br.	Brief <i>Amici Curiae</i> of Lord Robin Corbett et al. in Support of Petitioner
UNAMI	United Nations Assistance Mission for Iraq

INTRODUCTION

It is no secret that PMOI has previously appealed its designation as a foreign terrorist organization. The Government goes to great lengths to remind the Court of this fact—expounding for many pages upon the organization’s history, prior designations, and prior appeals. The Government even invokes the old adage that a tiger cannot “change[] its stripes.” GB 35. Yet the statutory design, with its emphasis on changed circumstances and provision for frequent review, contemplates rewarding groups that renounce violence and discontinue violent actions. And the record here shows dramatically changed circumstances since this Court last reviewed PMOI’s designation.

To appreciate these changes, one need only compare the 2003 and 2009 administrative summaries. The 2003 Summary emphasized that PMOI had “acknowledge[d] engaging in armed attacks in Iran” as recently as two years earlier, disputing only their classification as “terrorism.” App. 155. It also noted that PMOI had not publicly “renounced or disavowed the use of terrorist violence.” App. 157. The unclassified 2009 Summary, by contrast, discusses *no* evidence of any “terrorist” or violent activity since 2001. Likewise, it contains *no* evidence to suggest that PMOI—an organization that has voluntarily disarmed, steadfastly refrained from violence for eight years, and unequivocally embraced nonviolent

means of bringing democratic change to Iran—somehow still engages in terrorist activity or retains the capability and intent to do so.

Indeed, the Government does not dispute that PMOI has taken these steps. It also concedes that three European tribunals, after exhaustive investigation and intensive review of both classified and unclassified evidence, ordered PMOI removed from their nations' lists of terrorist organizations. Without any reasoned explanation, the Government dismisses these developments as irrelevant; yet it does not cite to a single countervailing (public) fact to support the Secretary's conclusion that PMOI still satisfies the statutory criteria for FTO designation.

PMOI knows what it has and has not done and is confident that *no* real facts support the Secretary's findings. For this reason, PMOI is not surprised that the Government principally argues that (1) PMOI bears the burden of proof; (2) this Court's review is exceptionally circumscribed; (3) PMOI has no First Amendment rights and severely limited due process rights; and (4) the Secretary's failure to give PMOI the opportunity to respond to the evidence against it prior to her decision was harmless because the key evidence was classified. Indeed, the crux of the Government's argument appears to be that no one—not even the Court—should give the evidence serious examination.

That is not what the statute says. The statute directs this Court to search the administrative record for “substantial support” for the Secretary's designation. It

places the burden of justifying that designation squarely on the Secretary. And it requires the Secretary to rely on *evidence*, not merely unsupported conclusory allegations. The Secretary has not publicly produced a shred of evidence that PMOI currently engages in or retains the capability and intent to engage in terrorism. PMOI is confident that a close review of the classified record will reveal that there is no “substantial support” for the Secretary’s position.

The Secretary’s action has severe consequences that demand meaningful scrutiny. While the U.S. public debates the future of its Government’s relationship with the theocratic regime in Iran, the regime’s primary opposition is shut out of the conversation. Its assets are frozen, its press office is shuttered, its members are barred from the country, and its viewpoint is marginalized. PMOI’s supporters—including members of the Iranian-American community, whose powerful amicus brief the Government studiously ignores—are severely inhibited in supporting its message for fear that they will be arrested, imprisoned, or removed from the United States. Not least, PMOI members in Camp Ashraf, Iraq—who were under U.S. protection until their protection was transferred to Iraqi authorities in 2009—face serious risks to their lives and liberty by virtue of their membership in a supposed “terrorist” organization. Yet the Government would leave PMOI with no knowledge of the basis for its designation, no ability to rebut the evidence in the record, no assurance of meaningful review, and no fair opportunity to defend itself

against charges that threaten its very existence. This Court should reject that untenable position.

ARGUMENT

I. THE SECRETARY’S DECISION LACKS SUBSTANTIAL SUPPORT

A. The Government, Not PMOI, Carries the Burden of Proof

Under the amended statute, designated organizations can trigger the Secretary’s review obligation by showing “that the relevant circumstances ... are sufficiently different from the circumstances that were the basis for the designation such that a revocation is warranted.” §1189(a)(4)(B)(iii). Citing that provision, the Government repeatedly suggests that PMOI carries the burden of proving that it is *not* properly considered an FTO. See, *e.g.*, GB 24 (claiming that “PMOI did not meet that burden”).

This argument gets the Government nowhere. The organization’s burden is to produce evidence of materially changed circumstances. Once it does, the burden shifts to the Secretary to “create an administrative record” (§1189(a)(3)(A)) containing “substantial support” for continuing the designation. Here, PMOI made an extensive showing that it had renounced violence, refrained from any acts of violence/terrorism for the seven years preceding the filing of the petition, and disarmed. This was amply sufficient to meet the threshold burden the statute imposes on PMOI. The fact that the Secretary did assemble a record purportedly

containing evidence supporting each statutory prerequisite for designation (see App. 8-16), including those that were not contested, shows her understanding that the ultimate burden rests with her.

That understanding is confirmed by the statute and traditional principles of judicial review. The statute directs this Court to “hold unlawful and set aside” the designation if it “lack[s] substantial support in the administrative record.” §1189(c)(3). As is typical in judicial review of an agency action, *the Secretary* must demonstrate that her decision is supported by substantial evidence. See, e.g., *PG&E Gas Transmission, Nw. Corp. v. FERC*, 315 F.3d 383, 386 (D.C. Cir. 2003) (“*the Commission must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record*”) (quotation marks omitted; emphasis added); *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 233 (D.C. Cir. 1996) (“the Board must nevertheless point to ‘substantial evidence’ in the record to support its conclusion”); *Nat’l Gypsum Co. v. EPA*, 968 F.2d 40, 44 (D.C. Cir. 1992) (“burden was on the EPA” to show that substantial evidence supported its decision). If she fails, PMOI’s FTO designation must be vacated.

B. The Court Must Conduct a Meaningful Review of the Administrative Record

1. The Statute Requires the Court, at a Minimum, to Examine the Record for “Substantial Support”

In its attempt to insulate the Secretary’s decision from meaningful review, the Government next contends that the “substantial support” standard is less exacting than traditional review of administrative action. See GB 22-23, 27, 35. But as explained in PMOI’s opening brief, the Court’s review of the record for “substantial support” is *at least* as exacting as the familiar substantial evidence standard employed in APA actions. PB 24-27. Although this review is “limited” in the sense that it is based solely on the limited record produced by the truncated administrative process, it is not toothless. See Congressional Am. Br. at 16-17. The Government’s surprising insistence to the contrary suggests that the record it must defend is indeed quite weak.

Relying on cherry-picked quotations from prior decisions, the Government argues that judicial scrutiny is “quite limited” and that the Secretary is perfectly entitled to rely upon “mistaken” information, “hearsay,” “press stories,” and the like. *Id.* (quoting *PMOI I*, 182 F.3d at 19, 25, and *NCRI I*, 251 F.3d at 196). In the Government’s view, the Court is not to “make any judgment whatsoever” regarding the administrative record. GB 17.

The statute says no such thing, and neither do this Court's opinions. Nowhere in its prior decisions has the Court "ruled" that the Secretary may act contrary to overwhelming evidence solely "on the basis of third hand accounts, press stories, material on the Internet, or other hearsay regarding the organization's activities." *Id.* at 22. Nor has it suggested that the Court must uncritically accept findings based on obvious evidentiary deficiencies, facially implausible claims, or unsupported assertions. On the contrary, the comments that the Government selectively cites were made as the Court criticized the statute for failing to afford PMOI meaningful process. See, e.g., *PMOI I*, 182 F.3d at 25 (because "the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected," meaning that the Court had "no way of judging" the quality of the Secretary's information). The Court's statements did not describe the appropriate level of *judicial* scrutiny; they described the *administrative process* available to the organization prior to court review.

The Government's unsupported characterization of the review standard is belied by the language of the statute, which specifically directs the Court to review the administrative record "as a whole" and determine if it provides "substantial support" for the Secretary's designation. 8 U.S.C. §1189(c)(3)(A), (D) (invoking the traditional "arbitrary and capricious" and "substantial evidence" test of APA

review); see also PB 24-27. Further, as the Congressional amicus brief explains (at 3-14), Congress intended this review provision to provide a meaningful check on the Executive's ability to saddle a group with the severe consequences of designation absent a substantial basis. Under the Government's proposed standard, however, judicial review would not constrain the Secretary, who could designate an organization based upon the flimsiest of pretenses without fear of reversal.

The Government's proposed standard of review also is contrary to this Court's actual practice. In *PMOI II*, for example, the Court thoroughly discussed the factual support for the Secretary's conclusion—even though the organization had “effectively admitted” the specific allegations against it. 327 F.3d at 1241-44. Similarly, in *NCRI II* the Court carefully examined specific evidence supporting the Secretary's findings. 373 F.3d at 158-59. Indeed, the Court has acknowledged its responsibility to examine the record to ensure that it contains “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Kahane Chai v. Dep't of State*, 466 F.3d 125, 129-32 (D.C. Cir. 2006) (scrutinizing the Secretary's evidence and pointing to specific facts that “make[] more credible the evidence supporting the organization's involvement in threats of assassination”). In its prior cases, moreover, PMOI had *publicly accepted responsibility* for its involvement in recent military activities; it disputed only their characterization as terrorism. Accordingly, exhaustive discussion of the evidence

was far less necessary than in this case, where the public record contains no evidence of *any* activities in the last eight years that could possibly satisfy the statutory definition.

2. Conclusory Allegations Cannot Constitute “Substantial Support”

This Court’s prior decisions also make clear that, in carrying out her obligations under the statute, the Secretary may not rely on unsupported, conclusory allegations—even if those allegations (see pp. 19-20, *infra*) are made by unnamed members of the “intelligence community.” The Court must instead ensure that the record contains *concrete factual evidence* that, if credited, would be viewed by a reasonable person as “substantial.”

Tellingly, the last time the Court scrutinized PMOI’s designation, it refused to defer to the “unanimous view of the FBI personnel ... that the NCRI is not a separate organization, but is instead ... an integral part of [PMOI].” *NCRI II*, 373 F.3d at 158. Instead, the Court looked *behind* the conclusion of the FBI and examined with utmost diligence the factual evidence supporting the conclusion. *Id.* at 158-159.

This Court has never permitted the Government to shut down a private association, freeze its assets, shutter its press office, and deny it a voice in the public square on the basis of wholly conclusory, completely unsubstantiated allegations. It should not start now.

3. Exacting Judicial Review is Necessary to Avoid Constitutional Concerns

a. First Amendment Concerns Dictate Construing Section 1189 to Require Concrete, Reliable, and Non-Speculative Evidence that the Statutory Criteria Are Satisfied

Exacting judicial review also is required by First Amendment concerns. While there is no First Amendment right to engage in or provide material support for terrorism, there is certainly a First Amendment right to associate with and provide support for *non*-terrorist organizations. See PB 34. An unjustified FTO designation impairs those rights. Because Congress is presumed to have intended to protect constitutional rights, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1989), the statute must be interpreted to permit an FTO designation and its accompanying restrictions *only* where the Secretary can produce concrete, reliable, and non-speculative evidence that the organization currently satisfies the designation criteria. See PB 34-36; see also Iranian-American Am. Br. 4-7 (exacting judicial scrutiny is essential to avoid a “profound chilling effect”). Indeed, as the amicus brief submitted by Members of Congress explains (at 17-19), Congress deemed “searching judicial review” to be critical to guard against designations that infringe the First Amendment rights of “legitimate organizations” or their supporters.

The Government does not deny the soundness of this argument. Rather, it simply asserts that “foreign” organizations do not have standing to present First Amendment claims. GB 28-30. An initial problem with this argument is that the Government itself has elsewhere alleged that PMOI has members in the United States. See Admin. Record at MEK-09. Moreover, the cases on which it relies stand only for the proposition that foreign organizations “outside the borders, jurisdiction, and control of the United States” generally cannot invoke the protections of the U.S. Constitution *extraterritorially*. See GB 29. But that is not what PMOI seeks to do. Rather, PMOI, which until being designated an FTO had a press office and bank account in the United States, is asserting its right to be free from unlawful restrictions on its political activities *here*, not in Iraq or Western Europe. Moreover, even a wholly foreign entity should have the protection of the First Amendment when it endeavors to speak *in the United States*.¹ That is especially true of an organization like PMOI, which undisputedly had both a voice and a physical presence in the United States before the designation. See *Kahane Chai*, 466 F.3d at 133 (addressing an FTO’s First Amendment claim on the merits, without questioning its standing to bring the claim); *PMOI II*, 327 F.3d at 1245 (same).

¹ Would the Government claim a right to censor all op-ed pieces written by foreign residents before they could be submitted for publication here? That unattractive result is the import of its argument.

Even were the Government's argument sound, the statute must be interpreted with due concern for the First Amendment rights of PMOI's U.S. political supporters. Those individuals' rights of association are impacted by an FTO designation. Moreover, the statute precludes them from collaterally attacking the designation if criminally prosecuted for providing material support to an FTO. 8 U.S.C. §1189(a)(8). Thus, the judicial challenge to the FTO designation is the only opportunity to raise these First Amendment concerns. Accordingly, even if PMOI itself lacks First Amendment rights, it has standing to raise a First Amendment challenge on behalf of its U.S. supporters or members. See *Sec'y of State of Md. v. J.H. Munson Co.*, 467 U.S. 947, 957 (1984); see also *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) ("some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected"); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.").

In any event, PMOI clearly has standing to argue that the statute under which it was designated should be interpreted to avoid constitutional concerns. As the Supreme Court has explained, "when deciding which of two plausible statutory

constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.” *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). Thus, “when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others”; rather, “he seeks to vindicate his own *statutory* rights.” *Id.* at 382. Because the Court should avoid an interpretation of the statute that runs afoul of the First Amendment, it should conclude that exacting judicial review of the Secretary’s designation is mandated.

b. Due Process Concerns Also Require Greater Scrutiny Given the Lack of Opportunity to View, and thus Rebut, the Secretary’s Evidence

Searching judicial review is particularly crucial given that neither PMOI nor its counsel has access to the information allegedly supporting the designation. In previous appeals, the Court concluded that the *public* record contained substantial support for the Secretary’s conclusion. See *NCRI II*, 373 F.3d at 158; *PMOI II*, 327 F.3d at 1243; *PMOI I*, 182 F.3d at 24. Here, by contrast, the Government acknowledges that the Secretary’s conclusion rests primarily on the classified

portion of the record. See GB 45-46. Where the ordinary adversarial process is unavailable, strict judicial scrutiny is even more necessary.²

C. The Record Does Not Demonstrate That PMOI Currently Engages in Terrorism or Retains the Capability and Intent to Do So

The Government's efforts to persuade the Court not to look closely at the record underscore what PMOI has believed all along: The Secretary's decision cannot withstand judicial review under any standard other than complete abdication of the Court's statutory responsibility.

1. PMOI Is Not Engaged in Terrorism or Terrorist Activity

In denying PMOI's petition, the Secretary asserted "that [PMOI] continues to engage in terrorist activity or terrorism." App. 16. The Government claims there is "substantial information" supporting that conclusion but makes no effort to reconcile that position with the U.S. Intelligence Community's contrary acknowledgment that "[t]here has not been a confirmed terrorist attack by [PMOI] since the organization surrendered to Coalition Forces in 2003." See Supp. Admin. Record, MEK-14 (filed Oct. 27, 2009). The Government does not deny, moreover, that an FTO designation must be supported by more than past history. See PB 27-

² We do not mean that review is *de novo*, merely that the Court is obligated to take a close look at what the Secretary has proffered and determine whether a reasonable factfinder could deem it sufficiently substantial to overcome the organization's contrary showing.

31 (arguing that *current* engagement in terrorist activity or a *present* intent and capability to engage in terrorist activity is necessary).

Given that the Government's brief spends several pages outlining *past* allegations of violent conduct—including decades-old incidents in which PMOI's involvement is disputed (GB 9-11)—its failure to identify a single incident of violence or even of unlawful fundraising after 2001 speaks volumes. In fact, PMOI is not engaged in terrorism or terrorist activity, and the Secretary's unwillingness to acknowledge that sea change in PMOI's circumstances undermines the credibility of her decision.

2. PMOI Retains Neither the Capability Nor the Intent to Engage in Terrorism or Terrorist Activity

Any finding that PMOI “retains the capability and intent to engage in terrorist activity or terrorism” (GB 27) is equally suspect. Indeed, the notion that it retains such capability and intent is flatly inconsistent with the fact that it has not, since 2001, undertaken any action that could be cited in the public record as an act of terrorism. Instead, PMOI's undisputed actions and statements during the last eight years consistently confirm its affirmative *rejection* of violence.

In its petition, PMOI showed that it had unilaterally decided, two years *before* the U.S. invasion of Iraq, to end all military activities. Following that decision, the organization unequivocally rejected terrorism and violence, voluntarily disarmed, completely cooperated with U.S. forces in Iraq, and turned

its efforts to achieving political change in Iran through peaceful, democratic means. See PB 36-43. The Government does not refute PMOI's showing; nor does it explain how the Secretary's conclusion regarding "capability and intent" can be reconciled with the evidence PMOI presented. Indeed, but for the single grudging acknowledgment that PMOI's "status in Iraq has certainly changed" (GB 27), the Government barely acknowledges that PMOI's petition put forward any evidence at all.

Similarly, the Government (GB 30-35) simply dismisses as irrelevant: (1) the United States' extensive investigation of PMOI members at Camp Ashraf, which led to no charge of terrorism against any of them but instead to recognition that all were entitled to protected persons status, see Military Am. Br. 11-16; (2) POAC's determination, after exhaustive review of a voluminous record, that PMOI is no longer "concerned in terrorism," see U.K. Am. Br. 6-8, 11-16; (3) the English Court of Appeal's conclusion, after an independent review, that neither the classified nor unclassified record suggested an intent to resort to terrorism in the future, see *id.* at 9-10; (4) the E.U. Court of First Instance's conclusion that no evidence supported PMOI's continued proscription, see E.U. Am. Br. 5-9; (5) the report that the State Department's former top counterterrorism official had favored removal of the FTO designation; and (6) statements of support for PMOI from U.S.

military officers, members of Congress, members of the European Parliament, and scholars, see Military Am. Br. 1-18; EU Am. Br. 32-47; PB 10, 18.

PMOI has never contended that the conclusions of these various entities are controlling here, but their evidentiary value is indisputable. The U.K. and European tribunals, for example, each made similar determinations based on extensive evidence that was, in all likelihood, not materially different from the record before the Secretary. See U.K. Am. Br. 6-8, 11-16³; E.U. Am. Br. 5-9.⁴ The Secretary's refusal to confront the consistent and well-reasoned conclusions of these independent and respected tribunals—particularly when contrasted with her uncritical acceptance of such utterly unreliable sources as the state-run Iranian news agency—has all the hallmarks of arbitrary and capricious decisionmaking. Cf. *Morall v. DEA*, 412 F.3d 165, 178 (D.C. Cir. 2005).⁵

³ The Government correctly notes (GB 33 n.4) that the English courts have independent investigative powers and conduct something closer to *de novo* review. However, after completing its review, POAC emphasized that “even were we to have adopted the conventional public law yardstick of *Wednesbury* unreasonableness [a standard akin to deferential APA review], on the facts of this case our conclusions would have been the same.” App. 381-82. Regardless of the applicable standard, “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.

⁴ The assertion (GB 32 n.3) that PMOI's removal from the E.U.'s proscribed organizations lists was a purely procedural matter is factually incorrect. See E.U. Am. Br. 5-9.

⁵ While the Government argues (GB 33) that differences in the European and American records might justify disregard of the U.K. and E.U. rulings, it does not

The only piece of PMOI's evidence to which the Government responds directly is the 2004 declaration, signed by each PMOI member at Ashraf, explicitly denouncing terrorism and rejecting violence. The Government invokes an isolated paragraph in the POAC decision stating that the Home Secretary was entitled to view these declarations "with some caution," as they "do not necessarily amount to a renunciation of carrying out or supporting violent attacks on Iranian targets." GB 18-19. As POAC subsequently pointed out (App. 364), however, "this misses the point." Whatever the evidentiary value of these declarations, it noted, the Home Secretary had produced no affirmative evidence of terrorist capability or intent. *Id.*

Here, too, the Secretary cannot maintain the designation based on mere skepticism regarding PMOI's avowals of nonviolence; she must have affirmative evidence that PMOI retains both the capability and the intent to engage in terrorism. Given that PMOI halted all violence *before* the U.S. invasion of Iraq and has maintained its commitment to nonviolence even despite the challenges accompanying the withdrawal of U.S. protection at Ashraf, there can be no credible basis for any such conclusion.

deny that any relevant classified information in the possession of the U.S. Government was shared with the European agencies.

3. The Newly Declassified Material Fails to Support the Designation

The Government recently filed a Supplemental Administrative Record that disclosed additional portions of the 2009 Summary and its exhibits. The newly disclosed material actually reinforces the view that the record lacks a substantial basis for continuing PMOI's FTO designation.

Most notably, the "Intelligence Community Terrorist Threat Assessment," prepared in response to PMOI's petition, acknowledges that "[t]here has not been a confirmed terrorist attack by [PMOI] since the organization surrendered to Coalition Forces in 2003" and that "[t]here is no information to indicate that [PMOI] is interested in resuming attacks against Iranian targets in the US Homeland or against US interests in general." Supp. Admin. Record, MEK-14. These two statements amount to a near-admission that the statutory designation criteria are not satisfied. They suggest why the State Department's top counterterrorism official recommended granting PMOI's petition (see PB 10 n.7)—and why the Secretary, in denying the petition, stated that "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.

The memorandum also asserts—in a statement parroted in the 2009 Summary—that PMOI "retains a limited paramilitary and terrorist capability and the intent to use violence to achieve its political goals." Supp. Admin. Record,

MEK-14 (quoted in Revised Summary at 11); see also *id.* (stating that “*limited information* indicates that the group has not ended military operations, repudiated violence, or completely and voluntarily disarmed”) (emphasis added). The notion that PMOI retains “limited paramilitary and terrorist capability” is wholly implausible given the undisputed evidence that it had completely disarmed under the close supervision of U.S. military personnel.⁶ See App. 364 (POAC’s conclusion that “PMOI disarmed in May 2003, whether voluntarily or as a pragmatic step”; “disarmament removed the PMOI’s military capability”; and “[t]here is no material ... to suggest that the PMOI has sought to re-establish *any* military capability however small”).

The claim that PMOI retains “the intent to use violence to achieve its political goals” cannot be reconciled with the fact that the organization’s leadership and its members have sworn to the opposite, have actually refrained from violence for the last eight years, and have not advocated or encouraged any kind of violence. If PMOI retained capability and intent, why have all these years passed without any terrorist attacks?

Besides being completely implausible, these allegations are also totally conclusory. There is nothing resembling a *fact* offered to support them. Indeed,

⁶ The United States transferred Ashraf’s protection to Iraq in early 2009, but it continues to maintain a permanent base and a sizable detachment of forces inside Ashraf. Additionally, in November 2009, the United Nations Assistance Mission for Iraq (“UNAMI”) established a permanent monitoring office there.

the memo provides no evidentiary underpinnings to any statement it makes and gives no indication of the nature, source, or reliability of the evidence (if any) on which the allegations are based. If such a conclusory allegation were the sole basis for a civil complaint, the Court would be required to dismiss the case under Rule 12(b)(6). See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

The remainder of the newly declassified “evidence” consists largely of references to publicly available sources, such as press reports and the discredited 2005 HRW Report. These materials—which should never have been classified—demonstrate neither that PMOI is engaged in terrorism, nor that it maintains the capability to do so, nor that it has the intent to do so. See, e.g., Supp. Admin. Record, Revised Summary at 15 (citing “open source reporting” and “public revelations”); *id.* at 16 (discussing a PMOI “press conference”); *id.* at MEK-14 (discussing the 2005 HRW report). While two largely redacted reports—in excerpts first revealed to PMOI on the day that its opening brief was due—purport to link PMOI to mortar fire in Basra (*id.*, MEK-25) and allegedly planned suicide attacks in early 2008 (*id.*, MEK-10), these allegations are so manifestly implausible that they earned no mention in the Government’s brief. See also Military Am. Br. 6-11 (refuting these allegations).

This Court must ensure that “the conclusions drawn by the [Secretary] follow from a fair and reasonable review of the relevant evidence,” and that the

record contains “a substantial basis of fact” that does “more than create a suspicion of the existence of the fact to be established.” *Morall*, 412 F.3d at 176, 178 (quotation marks omitted). The Court may not wait in hopes that the Secretary will reach a different conclusion “in the near future.” GB 35. Because the Government has failed to satisfy its burden, the Court should “set aside” PMOI’s designation. 8 U.S.C. § 1189(c)(3).

II. PMOI IS ENTITLED TO GREATER ACCESS TO THE CLASSIFIED PORTION OF THE ADMINISTRATIVE RECORD

If this Court’s initial, independent review leads it to conclude, as did POAC, that the entire record lacks “substantial support,” for continuing the FTO designation, then PMOI has no need for access to the classified portions of the record. If, however, the Court is inclined to sustain the FTO designation based on classified information, then it has both the power and the obligation to ensure that the review process is meaningful by providing PMOI or its counsel with greater access to the classified material.

The Government correctly notes that this Court has previously rejected PMOI’s requests for classified information. GB 37. But this Court has never faced a situation where the open record shows compelling evidence of changed circumstances, and the entire proffered basis for maintaining the designation is secret. As the Supreme Court has made clear, “‘due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and

circumstances.” *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *NCRI I*, 251 F.3d at 205.

In this Court’s prior decisions, its statements regarding access to classified information constituted dictum because the unclassified portion of the record sufficed, “by a comfortable margin,” to establish substantial support for the Secretary’s decision. See, e.g., *NCRI II*, 373 F.3d at 158.⁷ Here, however, the Government admits (GB 37, 45-46) that the “heart” of the evidence on which it relies has not been disclosed to PMOI or otherwise subjected to the adversary process. Much of that classified information may in fact consist of outlandish allegations disseminated by the Iranian intelligence services, whose task is to ensure that PMOI’s FTO designation is maintained. Thus, one of the key factors identified by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)—the “risk of an erroneous deprivation”—is significantly higher here than in the earlier cases.

The Government argues (GB 37) that the requested relief is contrary to the statute, which “directs that classified information ... ‘shall not be subject to

⁷ The Government characterizes these statements as “alternative holdings” (GB 16), but they plainly are not holdings at all, as they would be insufficient to support the judgment. Rather, they stand as observations that proved unnecessary to the ultimate outcome.

disclosure” except “to a court ex parte and in camera for purposes of judicial review.” But the limited sharing of classified information with counsel possessing a security clearance, for the purpose of facilitating review where the petitioner has made a strong case of changed circumstances and the public record contains nothing to support continuation of the FTO designation, would not constitute “disclosure” in the statutory sense. Moreover, the statement that classified information is not “subject to disclosure” does not preclude classified information from being *permissibly* disclosed where necessary to satisfy due process concerns or simply to facilitate meaningful review. Indeed, an earlier, rejected version of the provision stated that “[c]lassified information ... *shall not be disclosed* to the public or to any party, but may be disclosed to a court ex parte and in camera.” 141 Cong. Rec. S7864 (daily ed. June 7, 1995) (emphasis added). Congress having elected not to adopt such a blanket prohibition, the statute should not be read to impose one—particularly since such a construction would cast doubt on its constitutionality.

The Government also cites (GB 39-40) the Supreme Court’s statement that the Executive Branch “has control and responsibility over access to classified information and thus has a ‘compelling interest’ in withholding national security information from unauthorized persons in the course of executive business.” *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988). *Egan* held that the Court may not

review the State Department's decision to deny a particular individual a security clearance. *Id.* at 528-29. We ask only that a counsel or special master who *is* able to obtain an appropriate security clearance be allowed to view the classified evidence and argue before this Court on behalf of PMOI.

The Government, which elsewhere argues for virtual abdication of any duty to engage in meaningful judicial review, here asserts (GB 39) that PMOI's interests will be adequately protected by the Court's *ex parte* review of the classified materials. Such review may suffice in a case such as *Jifry v. Federal Aviation Administration*, 370 F.3d 1174, 1181 (D.C. Cir. 2004), which involved the FAA's determination that the petitioners themselves presented a "security threat" and therefore were not entitled to pilot's licenses. But this case involves the application of a far more complex statute that impinges on the fundamental rights of both PMOI and its U.S. supporters. Accordingly, *ex parte* review is not sufficient here, any more than in the recent Guantanamo appeals.

The Government does not deal in any meaningful way with the Guantanamo cases; but in fact this case is much more like *Boumediene v. Bush*, 128 S. Ct. at 2269, and *Bismullah v. Gates*, 501 F.3d at 180, than it is like *Jifry*. In *Bismullah*, this Court rejected *ex parte in camera* review of classified information and concluded that it could not "discharge its responsibility" unless petitioner's counsel had "access to as much as is practical of the classified information regarding his

client.” *Id.* at 187; see also *Taher v. Bush*, 585 F. Supp. 2d 94, 98-99 (D.D.C. 2008). The Government asserts (GB 41) that these decisions “involve a legal and factual scenario obviously different from this one,” but it does not explain why any differences should lead to a different outcome. If it was necessary for the detainees’ counsel to review classified material “to enable [the Court] to engage in meaningful review of the record” (*Bismullah*, 501 F.3d at 180), then, given the importance of the rights at stake here, it is equally necessary for PMOI’s counsel to have access to such material.

The Government also pays little attention to PMOI’s request that the Court implement alternative remedies if its counsel does not receive access to the classified information, other than to note that it has since disclosed a few previously-redacted sentences and documents. GB 41-42. As it reviews the record, the Court should ensure that classification of the still-undisclosed evidence is reasonable. See *Ellsberg v. Mitchell*, 709 F.2d 51, 63 (D.C. Cir. 1983). Additionally, as the Government raises no objection to preparing non-classified summaries of the omitted information, the Court should order that it do so—providing details sufficient to enable PMOI to prepare a meaningful response.

The Government contends that this Court has “no authority” to appoint a Special Master and suggests that the plan is foreclosed because “the Executive Branch controls access to classified material.” GB 42. This assertion of exclusive

Executive power is flatly contrary to the statute, which provides for judicial review of the classified material on which the Secretary has relied. A Special Master appointed under FRAP 48(a) would be an arm of this Court and therefore would be covered by the statute's explicit authorization of *in camera* judicial review. The precise scope of the Special Master's duties would be a matter within this Court's discretion, but we would suggest that the Master be assigned to replicate adversarial proceedings by applying PMOI's legal and factual arguments to the evidence in the record.⁸

III. PMOI HAS NOT RECEIVED THE PROCESS DUE UNDER THIS COURT'S PRIOR DECISIONS

Even if notice and an opportunity to view and rebut the unclassified portion of the administrative record is all that due process requires, PMOI did not receive even that.

This Court held in *NCRI I* that, "as soon as the Secretary has reached a tentative determination that the designation is impending, the Secretary must provide notice of those unclassified items upon which he proposes to rely to the

⁸ The Government contends that there is no authority for a special master here because FRAP 48(a) allows special masters to make only "ancillary" findings, and our proposal would involve matters central to the issue before the Court. But the master's submission would be "ancillary" to the Court's decision. Additionally, our proposal does not involve making findings but rather review of the entire record and submission of a memorandum on PMOI's behalf in order to replicate the adversary process without disclosing classified information to PMOI or its counsel. The Government does not deny that the Court has the inherent authority to fashion remedies as necessary to provide for meaningful judicial review.

entity to be designated. There must then be some compliance with the hearing requirement of due process jurisprudence—that is, the opportunity to be heard at a meaningful time and in a meaningful manner recognized in *Mathews*, *Armstrong*, and a plethora of other cases.” 251 F.3d at 209.

The Court reiterated that holding in *Kahane Chai*, 466 F.3d at 132. There, the Secretary provided notice of an impending redesignation but did not disclose the unclassified evidence that informed the decision. The Court declined to reverse, but only because the error there was clearly harmless: the Government had made a new determination after providing Kahane Chai with an “opportunity to inspect and to supplement the record upon which the review would be based.” *Id.*

Here, by contrast, PMOI received no advance notice of the unclassified items upon which the Secretary proposed to rely. Accordingly, it had no opportunity to be heard at a meaningful time and in a meaningful manner. True, the State Department met with PMOI’s counsel (upon PMOI’s request) on an informal and unofficial basis about two months before the decision was announced, so that counsel could summarize PMOI’s case. During that meeting, however, the Department provided no indication of the direction of the Secretary’s thinking, nor was there disclosure of any adverse information that the Secretary was considering.

Counsel for PMOI were informed of the Secretary's decision *after* it had been reached. The simple courtesy of a day's advance warning of publication was nothing like the pre-decisional notification to which this Court adverted in *NCRI I* and *Kahane Chai*. Moreover, at that point the decision was not "tentative": it was already in the hands of the publishers of the Federal Register.

This procedural violation was not harmless. Had PMOI known, for example, that the Government would give credence to the thoroughly discredited Human Rights Watch Report, it would have provided the Secretary with the report of the European Parliamentary group that carefully investigated (and conclusively debunked) each of the HRW allegations. See European Parliament Am. Br. 3, 9-15. It would also have pointed out that the HRW Report, even if credited, said nothing to link PMOI with involvement in terrorism or the intention or capacity for such involvement, and was limited to events predating 2003. Similarly, had it known that the Secretary was worried about PMOI's fundraising activities, it could have addressed these concerns.

To make matters worse, the Government furnished one set of declassified documents to PMOI for the first time on the morning its opening brief was due, and it provided a second round of documents shortly before the due date for the reply. See Supp. Admin. Record. The anonymous allegations contained in these "newly available" materials, including somewhat ambiguous suggestions that

PMOI members may have been planning suicide attacks in Karbala while under the round-the-clock watch of the U.S. military and that they may have been responsible for mortar attacks in Basra, are not only facially implausible but could have been easily rebutted—for example, by testimony from U.S. military officers who were present in Ashraf at the time—had the organization been given timely notice.⁹

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.

⁹ As this Court is aware, the members of PMOI at Camp Ashraf lived under the full-time supervision of U.S. Army detachments from May 2003 until the beginning of this year. Residents were not permitted to leave the Camp except with U.S. military escorts. It is inconceivable that suicide bombers were trained, and mortar attacks planned, under such circumstances (the heavily redacted materials provided by the Secretary do not reveal whether her informants allege that the attacks were actually carried out). Had PMOI known that the Secretary planned to rely on such material—obviously false and readily refuted—it would have been able to address these issues before the decision was made, as required in *NCRI I*, rather than while review of the decision is pending in this Court.

Respectfully submitted.

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Dated: November 13, 2009

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

I hereby certify that the foregoing Reply 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 6945 words.

/s/Andrew L. Frey
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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 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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