No. 06-241

IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

Spring 2007 Term

ROYA RAHMANI, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. May the Government prosecute an individual for providing material support or resources to an organization it has designated a "foreign terrorist organization" while prohibiting the defendant from collaterally attacking that designation as improper?

2. Are the procedures surrounding the Secretary of State's designation of a "foreign terrorist organization" under 8 U.S.C. § 1189 sufficient to adequately protect the First Amendment rights of those organizations and individuals prosecuted for providing them with material support?

PARTIES TO THE PROCEEDINGS

Petitioners:

Roya Rahmani
Hossein Afshari
Mohammad Omidvar
Hassan Rezaie
Navid Taj
Mustafa Ahmady
Alireza Mohamad Moradi

Respondent:

The United States of America

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion for the United States Court of Appeals for the Ninth Circuit is published at 426 F.3d 1150. The opinion and dissenting statements on the denial of rehearing en banc are reported at 446 F.3d 915. The opinion for the United States District Court for the Central District of California is published at 209 F. Supp. 2d 1045.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on October 20, 2005. The petition for a writ of certiorari was filed with this Court on August 15, 2006, and granted on January 8, 2007. *Rahmani v. United States*, 127 S. Ct. 930 (2007). This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

STATUTORY AND CONSTITUTIONAL PROVISIONS

8 U.S.C. § 1189 is attached in the Appendix.

18 U.S.C. § 2339B provides in relevant part:

> (a) Prohibited Activities–
> (1) Unlawful conduct.–Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.
> . . .
> (g) As used in this section–
> . . .
> (6) the term "terrorist organization" means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

18 U.S.C. § 2339B(a)(1) (2000); § (g)(6) (2000).

The First Amendment to the United States Constitution states in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const. amend. I.

The Fifth Amendment to the United States Constitution states in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

STATEMENT OF THE CASE

The Mujahedin-e Kalq [hereinafter MEK][1] was founded in the 1960s as a militant group seeking to overthrow the Shah of Iran. The MEK participated in violent acts directed against the United States during the Iranian revolution, including the taking of American hostages in 1979. *United States v. Afshari*, 426 F.3d 1150, 1152 (9th Cir. 2005). Subsequently, the MEK settled in Iraq and carried out terrorist acts against the Iranian government with the support of Saddam

[1] The People's Mojahedin Organization of Iran [hereinafter PMOI] and the National Council of Resistance of Iran [hereinafter NCRI] are both aliases of the MEK.

Hussein's regime. *Id.* at 1153.

In administrative proceedings before the State Department, the MEK has unabashedly acknowledged several acts of terrorism carried out against Iranian officials. *People's Mojahedin Organization of Iran v. Dep't of State*, 327 F.3d 1238, 1243 (D.C. Cir. 2003) [hereinafter *PMOI III*]. The organization admitted to carrying out mortar attacks against the Islamic Revolutionary Prosecutor's office, assassinating a former Iranian prosecutor and his security detail, killing the Deputy Chief of the Iranian Joint Staff Command, attacking the Iranian Central Command Headquarters of the Islamic Revolutionary Guard Corps and the Defense Industries Organization in Tehran, attacking and targeting with mortars the offices of Iran's Supreme Leader Khamenei and the head of the State Exigencies Council, and attacking the central headquarters of the Revolutionary Guards and the headquarters of the Iranian Security Forces in Tehran. *Id.*

Pursuant to 8 U.S.C. § 1189 (2000), Secretary of State Albright first designated the MEK as a foreign terrorist organization [hereinafter FTO] on October 8, 1997. 62 Fed. Reg. 52,650 (1997). The MEK challenged that designation through the statutorily-defined judicial review procedure in the D.C. Circuit. *People's Mojahedin Organization of Iran v. Dept. of State*, 182 F.3d 17 (D.C. Cir. 1999) [hereinafter *PMOI I*]. This appeal was rejected because MEK concededly lacked a presence in the United States sufficient to trigger constitutional due process rights. *Id.* at 22. Upon the two year expiration of this initial designation, on October 8, 1999, the MEK was re-designated as an FTO. 64 Fed. Reg. 55,112 (1999). MEK again contested the designation. *National Council of Resistance of Iran v. Dep't of State*¸ 251 F.3d 192 (D.C. Cir. 2001) [hereinafter *PMOI II*]. The D.C. Circuit found on the basis of subsequent developments in the 1999 administrative record that the MEK had sufficient contact with the United States through an alias organization to trigger due process concerns. *Id.* at 142. The court directed the

Secretary to allow the MEK to submit materials to contest the designation, but in deference to national security concerns, declined to set aside the FTO designation. *Id.* at 209. The Secretary upheld the 1999 designation and re-designated the MEK on October 5, 2001. 66 Fed. Reg. 51,088 (2001). The MEK's challenge to that designation also failed. *PMOI III*, 327 F.3d at 1238.

Petitioners were indicted for conspiracy and 58 substantive counts of providing material support to the MEK from October 8, 1997, through February 27, 2001 under 18 U.S.C. § 2339B (2000). During this period, Petitioners funneled more than $1 million to the MEK. Jessica Garrison & David Rosenzweig, *Terror Funding Charges Rejected*, L.A. TIMES, June 22, 2002, at B1.[2] Petitioners gave money and credit cards to the MEK, *Afshari*, 426 F.3d at 1152, wired money to an MEK bank account in Turkey, *id.*, and in 1999 alone, laundered at least $400,000 through an auto parts store in the United Arab Emirates which was then used to purchase rocket-propelled grenades, mortars, and other weapons. Garrison & Rosenzweig, *supra*, at B1. In 1997 Petitioners participated "in a conference call with an MEK leader, in which they learned that the State Department had designated the MEK as a foreign terrorist organization." *Afshari*, 426 F.3d at 1152. Petitioners continued to provide material support to the MEK after the call. *Id.*

The District Court granted Petitioners' motion to dismiss the indictment on June 21, 2002. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1059 (C.D.C.A. 2002). The Government appealed, and on September 9, 2003, the Ninth Circuit Court of Appeals reversed the District Court, holding that § 1189 is not facially unconstitutional, that § 1189(a)(8)'s prohibition on allowing a defendant to challenge the underlying designation does not violate due process, and that the statute does not impermissibly restrict the speech rights of Petitioners. Petitions for rehearing and rehearing en banc were denied, *United States v. Afshari*, 446 F.3d 915 (9th Cir.

[2] Under the rules of this Court, counsel may not cite the trial record, but may cite news sources to supplement the factual record. *See* The Morris Tyler Moot Court of Appeals at Yale, *Manual for Competitors*, Rule III.D.8 (2006).

2006). Petitioners subsequently appealed to this Court, which granted certiorari on January 8, 2007. *Rahmani v. United States*, 127 S. Ct. 930 (2007) (mem.).

SUMMARY OF THE ARGUMENT

In the interests of national security, the Government may prevent a defendant from challenging the underlying basis of her offense. This Court has consistently held that the requirements of "due process [are] flexible and call[] for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Congress has moved to address the significant threat associated with providing material support to foreign terrorist organizations by passing 18 U.S.C. § 2339B (2000) and 8 U.S.C. § 1189 (2000). Section 2339B(a)(1) makes it illegal to provide material support or resources to an FTO, and § 1189(a)(8) prohibits a defendant from challenging the designation of an FTO at any trial or hearing. This ensures that the foreign policy decisions of this country go forth with a single voice by preventing different branches of the government from issuing multifarious pronouncements about the legitimacy of a designation.

The plain language of § 2339B explicitly states that the validity of the underlying designation is not an element of the offense, and the applicability of the reasonable doubt standard "has always been dependent on how a State defines the offense that is charged in a given case." *Patterson v. New York*, 432 U.S. 197, 211 (1977). This Court should therefore, follow the accepted principle that a defendant may be legitimately denied the opportunity to challenge an underlying designation when the validity of that designation is not a specific element of the offense charged. Additionally, the accuracy of a designation is a political question that cannot be considered by a single judge, and especially not by a jury. Thus, the framework laid out in *McKinney v. Alabama*, 424 U.S. 669 (1976), is inapplicable to the present situation.

It is "obvious and unarguable" that the Government has a compelling interest in acting swiftly to limit the capacity of FTOs to attack United States nationals and interests. *Haig v. Agee*, 453 U.S. 280, 307 (1981). Given the Executive's constitutional responsibilities in the realms of foreign affairs and national security, and the unique expertise and access to information that the Executive holds in these areas, the judiciary should exercise restraint in its review of the underlying validity of the statutory scheme for designating an FTO.

The Government's designation and prosecution schemes are limited mechanisms for dealing with the threat of international terrorism that do not run afoul of the First Amendment. Designated terrorist organizations and individuals prosecuted under § 2339B engage in conduct, not speech, and thus actions under both statutes are subject only to intermediate scrutiny. The regulation of FTOs is consistent with *United States v. O'Brien*, 391 U.S. 367 (1968), and the prosecution of defendants under this scheme is consistent with *McConnell v. FEC*, 540 U.S. 93 (2003). The sweep of these statues is not so broad as to render them facially unconstitutional under *Virginia v. Hicks*, 539 U.S. 113 (2003), and the statutes do not limit a substantial amount of speech, either in absolute terms or as a percentage of its total possible applications.

Petitioners are statutorily barred from challenging the validity of the underlying designations of the MEK outside the normal review procedures of § 1189. Notwithstanding this fact, § 1189 provides adequate procedural protections to protect the First Amendment rights of organizations and defendants. The lack of pre-designation notice and comment is justified by the Government's need to immediately freeze assets to effectively cut off the provision of material support to FTOs. The statute comports with the principles of *Freedman v. Maryland*, 380 U.S. 51 (1965), providing for adequate judicial review without hampering the effectiveness of the designation scheme itself. Finally, since § 1189 is a content-neutral regulation, it falls under the

lesser review standard of *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002). The statute meets the requirements of *Thomas* because it contains standards to guide the Secretary's discretion, is content-neutral, is narrowly tailored to combat terrorism against U.S. interests, and leaves open alternative avenues for communication.

ARGUMENT

I. THE GOVERNMENT MAY PROSECUTE AN INDIVIDUAL UNDER 18 U.S.C. § 2339B FOR DONATING MONEY TO A FOREIGN TERRORIST ORGANIZATION WITHOUT ALLOWING HER TO CHALLENGE THE UNDERLYING DESIGNATION.

This case comes to this Court on the threshold question of whether it is a violation of due process to prevent a defendant from challenging the designation of an organization as an FTO. It is not. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). Due process has traditionally required "that only the most basic procedural safeguards be observed," and Congress has broad authority to tailor laws to the exigencies of a given situation. *Patterson v. New York*, 432 U.S. 197, 210 (1977). In order to address the grave dangers associated with providing material support to designated FTOs, Congress determined that once a designation becomes effective, "a defendant in a criminal action . . . shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing." 8 U.S.C. § 1189(a)(8). This provision is consistent with the basic procedural safeguards of due process.

A. There is No Due Process Right to Challenge the Underlying Basis of an Offense.

1. The plain language of 18 U.S.C. § 2339B does not make the validity of the FTO designation an element of the charged offense.

The starting point in any statutory analysis "must be the language of the statute itself."

Lewis v. United States, 445 U.S. 55, 60 (1980); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Section 2339B(a)(1) makes it illegal to knowingly provide material support or resources to a foreign terrorist organization, and § 2339B(g)(6) defines "the term 'terrorist organization' [as] an organization *designated as a terrorist organization* under section 219 of the Immigration and Nationality Act." 18 U.S.C. § 2339B(g)(6) (2000) (emphasis added). The plain language of this statute thus explicitly states that the validity of the underlying designation is not an element of the offense.

In *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004), the Fourth Circuit determined that "Congress has provided that the fact of an organization's designation as an FTO is an element of § 2339B, but the validity of the designation is not." *Id*. at 331. It would be unreasonable for this Court to conclude that the offense depended on the validity of the designation given that the defendant is precluded from raising "any question concerning the validity of the issuance of such designation . . . at any trial or hearing." 8 U.S.C. § 1189(a)(8).

The "Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged." *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (quoting *Patterson*, 432 U.S. at 210) (emphasis added in *McMillan*). Section 2339B only requires the government prove the defendant had knowledge the MEK was designated as an FTO. The language of the statute makes it clear that the validity of the designation is not a fact necessary to constitute the crime with which Petitioners are charged, *see In Re Winship*, 397 U.S. 358, 364 (1970), and the applicability of the reasonable doubt standard "has always been dependent on how a State defines the offense that is charged in a given case." *Patterson*, 432 U.S. at 211; *see also Dixon v. United States*, 126 S. Ct.

2437, 2442 (2006); *Mont v. Egelhoff*, 518 U.S. 37, 58 (1996). Congress explicitly defined this offense to include only the fact of the designation, and thus Petitioners do not suffer a denial of due process by being precluded from collaterally attacking the validity of that designation.

2. The Government may preclude defendants from challenging underlying designations when national security concerns are present.

Preventing a defendant from challenging an underlying designation in a criminal proceeding does not violate due process. In *United States v. Mandel*, 914 F.2d 1215 (9th Cir. 1990), the Ninth Circuit dealt with a statute and factual situation analogous to the instant case. The Export Administration Act of 1979 [hereinafter EAA] gives the Secretary of Commerce broad authority to determine which commodities require a license to be exported. *Id.* at 1216. The court prevented the defendants from challenging the underlying designation and precluded them from discovering any governmental documents relating to the Secretary's decision to control certain commodities. *Id.* at 1218. The Ninth Circuit held that the defendants could not challenge the legitimacy of the designation because the court lacked the expertise or authority to review the Secretary's decision to place an item on the Commodity Control List. *Id*. at 1223.

In *United States v. Bozarov*, 974 F.2d 1037 (9th Cir. 1992), the Ninth Circuit again determined that a defendant could not challenge the underlying designation upon which his indictment was based. "The fact that the EAA involves matters of foreign policy and national security counsels in favor of upholding the Act's preclusion of judicial review." *Id*. at 1044. The court recognized the inherent impossibility of allowing every defendant to challenge an underlying designation, because "it would be politically disastrous if the Second Circuit permitted the export of computer equipment and the Ninth Circuit concluded that such exports

were not authorized by the EAA." *Id.*[3]

The Secretary of State has been given broad authority by Congress to determine which organizations present a threat to this country and should therefore be classified as an FTO. The validity or accuracy of this designation is not an element of the crime for which Petitioners have been indicted. Accordingly, Petitioners should be prevented from challenging the designation just as other defendants have been consistently prevented from challenging the validity of underlying designations when they do not constitute specific elements of the offenses charged.

3. The Government may even preclude defendants from challenging unconstitutional predicate offenses.

In *Lewis v. United States*, 445 U.S. 55 (1980), this Court held that using an unconstitutional prior conviction as the predicate offense for a subsequent prosecution did not violate due proces. Lewis was convicted under a statute that made it illegal for any person to possess a firearm if he had been previously convicted of a felony, *id.* at 56, and for the purposes of its analysis the Court assumed the underlying conviction was unconstitutional. *Id*. at 58.

The Court concluded that the statute applied to any conviction, whether valid or not, because "[n]o exception . . . is made for a person whose outstanding felony conviction ultimately might turn out to be invalid for any reason. On its face, therefore, § 1201(a)(1) contains nothing by way of restrictive language." *Id.* at 62. This Court further stated that Congress was legitimate in its "concern[] that the receipt and possession of a firearm by a felon constitutes a threat . . . to the continued and effective operation of the Government of the United States," and "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." *Id.* at 66.

[3] *See also United States v. Spawr Optical Research, Inc.*, 864 F.2d 1467, 1473 (9th Cir. 1988), *cert. denied*, 493 U.S. 809 (1989) ("[W]hen the Secretary has issued a license or order, the factfinder is instructed to accept it as law, without considering its advisability.").

Congress made no exception in § 2339B or § 1189(a)(8) to allow a defendant to challenge an invalid designation of an FTO. In fact, the statute explicitly precludes a defendant from raising any challenge to the validity of a designation. If it is rational for Congress to be concerned about the safety of the country while precluding felons from possessing guns, then a fortiori it is rational for Congress to conclude that in the interests of national security a defendant should be precluded from challenging the legitimacy of an FTO designation. A designation must be resubmitted every two years,[4] and it is rational for Congress to attempt to ensure that different jurisdictions, or even courts within the same jurisdiction, do not issue multifarious pronouncements about the legitimacy of an FTO designation.

In *Lewis*, this Court distinguished three prior cases that had prevented an unconstitutional prior conviction from being used against a defendant at a subsequent prosecution,[5] because each case "depended on the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction." *Lewis*, 445 U.S. at 67. Similarly, the language of § 2339B indicates that Congress intended this law to focus on the mere existence of an FTO designation, not the reliability of that designation, and as such *Lewis*, rather than *Loper*, *Tucker*, or *Burgett*, applies.

Furthermore, Petitioners reliance on *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), is misplaced because it can be easily differentiated for two essential reasons: 1) there was no review at all in any judicial forum regarding the underlying offense; and 2) the defendants suffered a direct violation of their own rights at the prior proceeding.

One reason for allowing a collateral attack in *Mendoza-Lopez* and not in *Lewis* was

[4] The designation procedures are discussed in detail *infra* Part IV.

[5] In *Loper v. Beto*, 405 U.S. 473 (1972), the Court held that prior unconstitutional convictions could not be used for impeachment. In *United States v. Tucker*, 404 U.S. 443 (1972), the Court held that a judge could not consider unconstitutional convictions when imposing a sentence. In *Burgett v. Texas*, 389 U.S. 109 (1967), the Court determined that prior uncounseled convictions could not be introduced in order to enhance a sentence.

because of "the unavailability of effective judicial review of the administrative determination at issue." *Id.* at 841. This violated due process because "[p]ersons charged with a crime are entitled to have the factual and legal determinations upon which convictions are based subjected to the scrutiny of an impartial judicial officer." *Id.* Petitioners' prosecution is not based on any facts or legal determinations not subjected to the scrutiny of a judicial officer. As discussed *supra* Subsection I.A.1, the Government only needs to prove Petitioners had knowledge the MEK had been designated an FTO, and thus the same relief from *Mendoza-Lopez* is not warranted.

Additionally, the violation in *Mendoza-Lopez* was a direct violation of the defendants' rights. *Id.* at 840. If any violation of due process occurred in this case, it was a violation of the MEK's rights. *Mendoza-Lopez* does not apply "where, as here, the prior administrative proceeding does not involve the defendant's individual rights and is not an element of the criminal proceeding in the pending case." *Mandel*, 914 F.2d at 1221. In *Mandel*, the Ninth Circuit further differentiated *Mendoza-Lopez* because "administrative decisions under the EAA implicate national security concerns and foreign policy considerations that are not part of the decision-making process in a deportation or classification hearing." *Mandel*, 914 F.2d at 1222. Petitioners' individual rights were not violated at the earlier proceeding, the validity of the designation is not an element of the offense, and the designation of an FTO presents national security concerns at least as great as those addressed by the EAA. The fundamental principle from *Lewis* "that a criminal proceeding may go forward, even if the predicate was in some way unconstitutional," *Afshari*, 426 F.3d at 1157, should guide this Court's decision in this case.

B. *McKinney* is Inapposite to the Instant Case.

Petitioners' reliance on *McKinney v. Alabama*, 424 U.S. 669 (1976), is erroneous. The glaring differences between *McKinney* and this case lead to the conclusion that the principles

from *McKinney* simply cannot be transferred to the present situation.

1. *McKinney* relies on the fact that a jury is capable of determining when materials are obscene.

In *McKinney*, this Court held that the defendant's "conviction must be vacated so that he may be afforded the opportunity to litigate in some forum the issue of the obscenity of New Directions before he may be convicted of selling obscene material." *Id.* at 677. The Court's decision thus depended on the fact that it was possible to remand the case to a jury to consider whether or not the magazines were actually obscene. The dissent from the denial for rehearing en banc argued that *McKinney* "stands for the proposition that a criminal defendant has an individual right to challenge the exclusion of what would otherwise be protected speech," *United States v. Afshari*, 446 F.3d 915, 920 (9th Cir. 2006) (Kozinski, J., dissenting), but this argument ignores the issue of whether a jury, or even a district judge, is capable of determining whether an organization was properly designated by the Secretary of State as an FTO. The reasoning in *McKinney* can only be properly applied when dealing with a speech issue that can be submitted to a trier of fact for consideration, and this is not such a situation.

2. A jury is not capable of determining whether an organization is an FTO.

This Court has consistently held that certain types of political questions cannot be reviewed by courts. "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports ought not to be published to the world." *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). It would be impossible for a defendant to challenge a designation during a trial because many of the facts relied upon in designating an FTO are necessarily classified.

> Even if a court could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government,

> Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or peril.

Id. The President is directly responsible for the safety of the citizens of this country, and it would be incongruent with that responsibility to allow a jury or single judge to second guess the decisions of the Executive Branch regarding this issue of national security.

In *Baker v. Carr*, 369 U.S. 186 (1962), this Court set forth elements that might signal a political question, including "an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217. Both of these elements lead to the conclusion that the designation of an organization as an FTO is a political question. "The political question doctrine *excludes from judicial review* those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (emphasis added).[6] The President, through the Secretary of State, is responsible for determining what foreign organizations present a threat to the United States. While it was appropriate and possible for this Court to remand *McKinney* to allow a jury to consider the issue of obscenity, it would create a threat to national security to allow a jury, or an individual judge, to examine the FTO designation for its accuracy. Such an outcome could open up this country to new attacks based on nothing more than the opinions of twelve untrained people or the persuasive abilities of a particular defense attorney.

[6] *See also Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (matters related "to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

3. The FTO designation is judicially reviewed in other proceedings and does not need to be challenged again at Petitioners' trial.

The interests of an FTO are similar enough to the interests of those providing material support to it that any possible First Amendment rights are adequately protected. In *McKinney*, this Court rejected the contention that the earlier challenge precluded a new challenge at the defendant's trial because it disagreed with the "assumption that the named parties' interests [we]re sufficiently identical to those of petitioner that they [would] adequately protect his First Amendment rights." *McKinney*, 424 U.S. at 675. This is true in an obscenity case because "individual exhibitors as well as distributors may be unwilling, for various reasons, to oppose a state claim of obscenity regarding certain material." *Id.* at 675-76. A distributor and a publisher might not share the same interests or have any relationship other than a simple contract. Providing material support to an FTO, however, creates a relationship between the parties that much more closely aligns their interests. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court held that the NAACP could assert a challenge on behalf of its members and protect their First Amendment rights because "its nexus with them is sufficient to permit it to act as their representative before this Court." *Id.* at 458-59. The relationship between an FTO and its material supporters is much more analogous to the relationship between the NAACP and its members than that between a publisher and an independent unaffiliated distributor.

Furthermore, prohibiting a distributor from challenging the obscenity designation would have led to a permanent restriction on that speech. *McKinney*, 424 U.S. at 674. A finding of obscenity by the censorship authority with no procedures in place to allow for the reconsideration of the materials would have left those materials designated obscene indefinitely. The designation of an FTO, however, must be resubmitted every two years, so an erroneous decision, or a failure to adequately challenge the designation by the FTO, will only lead to a

temporary, rather than a permanent, denial of rights.

C. The D.C. Circuit's Review of the FTO Designation Did Not Deprive Petitioners of Due Process.

1. Remand without vacatur is a well accepted procedure throughout the federal circuits.

The D.C. Circuit's decision to remand the 1999 FTO designation without vacatur was within that court's authority and is an accepted procedure in analogous circumstances. The MEK's designation has remained continually in place since Secretary Albright first submitted the designation in 1997, and Petitioners can be prosecuted under § 2339B from that date forward.

Since the 1970s "courts have increasingly opted for . . . remanding the challenged regulation to the promulgating agency to give the agency additional opportunity to justify its action legally without vacating the regulation." Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 Seton Hall L. Rev. 108, 109 (2001).[7] Courts choose to issue remands without vacatur "to prevent an unduly disruptive interruption in a regulatory scheme." Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 299 (2003). Even though there are no Supreme Court cases specifically endorsing remand without vacatur, "this order has long been regarded as well within the remedial discretion of the federal courts." Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 Ariz. St. L.J. 599, 611 (2004).

[7] While this remedy has been utilized most frequently in the D.C. Circuit, it has been adopted in other federal circuits as well. *See, e.g.*, *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1380-81 (Fed. Cir. 2001); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001); *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 702 (5th Cir. 2000); *United Distrib. Comm'n. v. FERC*, 88 F.3d 1105, 1191 (D.C. Cir. 1996); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995); *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1275 (D.C. Cir. 1994); *Checkosky v. SEC*, 23 F.3d 452, 454 (D.C. Cir. 1994); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993); *Int'l Union United Mine Workers of Am. v. Fed. Mine Safety and Health Admin.*, 924 F.2d 340 (D.C. Cir. 1991); *Int'l Union United Mine Workers of Am. v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990); *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1171-72 (D.C. Cir. 1987); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 814 (9th Cir. 1980); *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 824 (D.C. Cir. 1975).

In *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), the court found "significant procedural error on the Secretary's part," *id.* at 1405, yet it refused to vacate the determination of the United States Fish and Wildlife Service that the Springs Snail was an endangered species. While "[o]rdinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid . . . when equity demands, the regulation can be left in place while the agency follows the necessary procedures." *Id.* The court determined that the possible substantial harm to the Springs Snail that could result from vacatur was significant enough to leave the designation in place notwithstanding the procedural errors. *Id.*

The equity concerns during the MEK's challenge tilted even more heavily in favor of remand without vacatur. If the *Idaho Farms* court vacated the determination, it could have led to the extinction of a single species of snail; if the *PMOI II* court had vacated the designation, it could have potentially invalidated every FTO designation that had been previously challenged. This could have opened the floodgates of material support to organizations the Executive Branch determined to be threats to national security. While the protection of animal species is unquestionably compelling, "no governmental interest is more compelling than the security of the nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). It is well established throughout the federal circuits that remand without vacatur is the appropriate remedy in limited situations, and the D.C. Circuit confronted one such situation when it remanded the Secretary's designation of the MEK.

2. Any due process violations to the MEK or Petitioners were harmless.

The MEK did not suffer any harm from the initial procedural errors the D.C. Circuit discovered in the designation process. Once the Secretary of State afforded the MEK all the due process protections required, the MEK "effectively admitted not only the adequacy of the unclassified record, but the truth of the allegation." *PMOI III*, 327 F.3d at 1243. The D.C. Circuit

reviewed the entire record and determined that "the Secretary did not deprive Petitioner of any process to which it was constitutionally entitled. Even if the record supported a finding of violation of due process, such violation would be harmless as the unaffected portion of the record is ample to support the determination made." *Id.* at 1244. This holding further strengthens the argument that Petitioners should not be permitted to challenge the designation at their own trial. The MEK "effectively admitted" that it was a terrorist organization, both the "designation and redesignation . . . afforded all the process that the organization was due," *id.* at 1245, and the designation has been continuously in place since 1997.

3. The Government does not need to wait until an FTO designation has passed judicial review to prosecute an individual under § 2339B because an FTO designation takes effect immediately upon submission by the Secretary of State.

The designation of the MEK as a terrorist organization took effect immediately upon submission by the Secretary of State on October 8, 1997. 62 Fed. Reg. 52,650 (1997). The argument championed in the dissent from the denial for rehearing en banc that permitting a prosecution to occur prior to judicial determination of the merits of the designation creates an ex post facto prior restraint is incorrect and erroneous. *See United States v. Afshari*, 446 F.3d 915, 920 (9th Cir. 2006) (Kozinski, J., dissenting).

This Court has consistently held that agency determinations may take effect immediately without violating due process even if there has not been an evidentiary hearing. "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *FDIC v. Mallen*, 486 U.S. 230, 240 (1988); *see also Barry v. Barchi*, 443 U.S. 55, 64-66 (1979); *Dixon v. Love*, 431 U.S. 105, 112-15 (1977); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 314-21 (1908).

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court held that disability benefits could be terminated without a pre-termination hearing. *Id.* at 340. This Court specified three factors to be considered when determining how much process is due: the private interest affected; the risk of an erroneous deprivation; and the Government interest in postponing the hearing. *Id.* at 335. The Court recognized that a person could incorrectly go without benefits for longer than one year, *id.* at 342, and that "the hardship imposed upon the erroneously terminated disability recipient may be significant," *id.*, yet this Court still held that terminating legitimate benefits for more than one year did not violate due process. This conclusion was based in large part on the fact that there would be significant societal costs associated with requiring a pretermination hearing before every termination of disability benefits. *Id.* at 347.

Each of the three factors leads to the conclusion that the designation of an FTO must take effect immediately. First, the private interest affected is merely the right to provide material resources to a designated FTO solely during the time before the D.C. Circuit can consider the FTO's challenge. Second, there is little chance for an erroneous deprivation because the Secretary must go through significant procedural hurdles to designate an FTO. Third, the government has a compelling interest in prohibiting the provision of material support and resources to a designated FTO while waiting for the D.C. Circuit to consider the challenge.

"[W]here a state must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of Due Process." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). There is perhaps no greater situation in which it would be more impractical to require a predeprivation hearing than when dealing with providing material support to terrorist organizations. It would be impractical to allow Americans to continue providing material support to organizations the Secretary of State has determined

present a threat to national security while waiting up to a year and a half for a ruling from the D.C. Circuit. The interest in protecting the right to provide support to quasi-political organizations is certainly strong, but it pales in comparison to the tremendous societal costs associated with allowing material support to continue unabated.

Only approximately one and a half years passed from the time the MEK was first designated as an FTO in 1997 and the issuance of the D.C. Circuit opinion validating that designation in 1999. *See* 62 Fed. Reg. 52,650 (1997); *PMOI I*, 182 F.3d at 17. This is not substantially longer than the delay in *Matthews* that "exceed[ed] one year." *Mathews*, 424 U.S. at 342. Therefore, an analysis of the factors specified in *Mathews*, along with the relatively short length of any deprivation, leads to the conclusion that the designation takes effect immediately upon submission by the Secretary of State.[8]

II. THE EXECUTIVE HAS A COMPELLING INTEREST IN PREVENTING THE USE OF TERRORISM TO TARGET AMERICAN NATIONALS AND HARM NATIONAL SECURITY AND THE JUDICIARY SHOULD DEFER TO THE EXECUTIVE'S POWER IN THIS AREA.

A. The Government has a Compelling Interest in Preventing Terrorist Attacks Against American Citizens and in Contravention of U.S. National Security Interests.

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Agee*, 453 U.S. at 307 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). As brought into sharp relief by the events of September 11, 2001, the

[8] The 1997 designation was valid from October 8, 1997 until it expired October 7, 1999. Judge Kozinski contends in the dissent from the denial for rehearing en banc that the 1997 designation was unconstitutional because "[t]he process by which the organization was designated had not changed from 1997 to 1999, so if one was unconstitutional the other was as well." *United States v. Afshari*, 446 F.3d 915, 920 n.5 (9th Cir. 2006). This argument is flawed, however, because the D.C. Circuit explicitly concluded that there were significant differences between the 1997 and 1999 designations. *PMOI II*, 251 F.3d at 201 ("We accepted, and continue to accept, the government's proposition in support of the 1999 designation that the record is not the same and the decision is not the same as in 1997."). Therefore, even if this Court concludes that Petitioners' prosecution cannot be based on the 1999 designation, it can still be based on material support Petitioners provided to the MEK from October 8, 1997 until October 7, 1999.

Government's interest is surely compelling where the Secretary of State acts to attempt to curb terrorist activities by FTOs directed against the citizens and national security interests of the United States. The Court of Appeals correctly noted that the government enjoys such latitude with regard to foreign affairs that these sorts of centrally political decisions are "largely immune from judicial inquiry or interference." *Afshari*, 426 F.3d at 1150, 1161 n.69 (quoting *Regan v. Wald*, 468 U.S. 222, 242 (1984)).

Congress enacted 8 U.S.C. § 1189 as part of a comprehensive scheme to minimize the harm caused by international terrorism by limiting the supply of weapons, finances, and other materials to designated FTOs. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Congress found that the new designation scheme of § 1189 was necessary to effectively hamper the ongoing activities of a small, specific group of FTOs who "raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations." AEDPA, 110 Stat. at 1247. Section 1189 was specifically designed to fill in for the inadequacies of the existing material support statute, *see* 18 U.S.C. § 2339A (2000), and allow the federal government to rapidly and aggressively target the channels of support flowing through the United States. Any action to limit the scope § 1189 must recognize that while the Executive cannot act outside the bounds of the Constitution, this Court has held that the Constitution is not a "suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

B. The Court of Appeals Correctly Found that the Judiciary Should Defer to the Expertise and Constitutional Obligation of the Executive Branch in its Attempt to Effectively Regulate Material Support to FTOs.

It is the primary responsibility of the Executive Branch to ensure the national security of the United States. The President alone carries the constitutional obligation to act as Commander-

in-Chief. U.S. Const. art. II, § 2. He is also the "sole organ" of the federal government in its interactions with foreign entities. *Dames Moore v. Regan*, 453 U.S. 654, 660-61 (1981) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). Additionally, deference to the Executive's action is particularly compelling in the case of § 1189, which restricts the decision of the Executive to designate an organization as an FTO to specifically enumerated legislative standards. The President's authority under § 1189 is thus "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown Sheet & Tube, Co. v. Sawyer*, 343 U.S. 579, 636-37 (1952) (Jackson, J., concurring).

Designation under § 1189 is similar to the designation of a terrorist organization under the International Emergency Economic Powers Act [hereinafter IEEPA]. IEEPA grants additional discretion to the Executive, allowing the President, in a time of national emergency, to unilaterally designate a list of "Specifically Designated Global Terrorist" organizations, freezing the assets of and prohibiting interactions with those organizations. *See, e.g., Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002). The constitutionality of the IEEPA process has been consistently upheld. *Cf. Curtiss-Wright*, 299 U.S. at 304.

Finally, the D.C. Court of Appeals correctly held in *PMOI I*, 182 F.3d at 23, that the determination by the Secretary of State that an organization's terrorism threatens the United States is wholly beyond the purview of judicial review. Given the "changeable and explosive nature of contemporary international relations," *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), the Executive alone is positioned to act swiftly to evaluate and protect the nation's security. A determination of whether or not an organization's terrorist acts impinge on the national security of the United States is quintessentially of this type.

III. SECTION 1189 AND § 2339B FORM A NARROWLY TAILORED REMEDY THAT EFFECTIVELY REGULATES THE PROVISION OF MATERIAL SUPPORT TO TERRORISTS WITHOUT IMPINGING ON THE SPEECH RIGHTS OF INDIVIDUALS OR GROUPS.

A. The Court of Appeals Correctly Found that the FTO Designation and Prosecution Schemes Regulate Conduct in a Manner Consistent with the First Amendment.

The designation and prosecution schemes outlined in 8 U.S.C. § 1189 and 18 U.S.C. § 2339B regulate and criminalize the provision of materials to organizations engaged in terrorist activity in contravention of the national security interests of the United States. Both the individuals and the organizations covered by these statutes are subject to regulation, consistent with the requirements of the First Amendment, on the basis of their actions.

Providing material support to designated FTOs is "not . . . engage[ment] in speech." *Afshari*, 426 F.3d at 1150; *see also Hammoud*, 381 F.3d at 329 (finding that § 2339B regulates conduct, not speech). While pure advocacy receives some First Amendment protection, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), any speech-related activity that is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," is clearly regulable. *Id.* The fact that some contributions may not actually be used to finance terrorism by designated FTOs is an insufficient reason to invalidate the material support provisions on First Amendment grounds. Congress specifically found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA, 110 Stat. at 1247. Thus, any financial support flowing from Petitioners to a designated FTO presumptively facilitates acts of terrorism in contravention of U.S. national security interests.

Even if Petitioners could show, notwithstanding MEK's own administrative submissions,

that MEK does not engage in terrorist conduct, the Court of Appeals correctly noted that financial contributions to political organizations receive only intermediate scrutiny under the First Amendment. *Afshari*, 426 F.3d at 1161-62. Contribution limits are subject to lower scrutiny since "the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). Regardless of whether or not an FTO is correctly designated, the fact that indicted defendants are merely facilitating the speech of others militates against applying strict scrutiny to the statute.

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court applied intermediate scrutiny to reaffirm the constitutionality of limits on contributions by individuals to political parties. It did so partly because those limitations "leave the contributor free to become a member of any political association and to assist personally . . . on behalf of candidates." Similarly, Petitioners are charged only with providing funds in the form of "solicitations, wire transfers and monetary donations" to facilitate violence by the MEK. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1047 (2002). They are free to advocate an ideological message identical to that of the MEK, and even express support for the MEK's violent activities right up to the *Brandenburg* line. Petitioners can even claim direct affiliation with the MEK, so long as that affiliation is not so actively facilitative of the organization's activities that it constitutes material support of "personnel." 18 U.S.C. § 2339A(b)(1) (2000).

Under *McConnell*, even a "significant interference" with First Amendment rights is permissible so long as it is "closely drawn" to match a "sufficiently important interest." *McConnell*, 540 U.S. at 136 (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)). Applying that test, the *McConnell* Court upheld several restrictions on the contribution and use of funds to political candidates and parties because prevention of both actual corruption and the appearance

thereof constitute "sufficiently important interest[s]" to justify contribution limits. *Id.* at 143. These restrictions were upheld despite their significant effects on American political discourse and the fact that they impose criminal sanctions for violations. *Id.* at 161. The prevention of terrorist attacks is at least as much of a sufficiently important interest, and regulating basic political participation under *McConnell* raises much more egregious First Amendment concerns than limiting violent attacks by FTOs. Cases limiting financial contributions adhere to the "basic premise" that "the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association." *Beaumont*, 539 U.S. 146, 161 (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986)).[9]

Petitioners' First Amendment attack on the designation scheme itself is similarly flawed for several reasons. First, the designation process regulates organizations on the basis of their actions, not their advocacy. The Secretary assembled an administrative record that provided ample evidence of the MEK's engagement in terrorist activities. This was clear from a review of the non-classified portions of the administrative record alone. *See PMOI I*, 183 F.3d at 113-14; *PMOI II*, 327 F.3d at 1243. The findings are particularly robust in this case, since in its evidentiary submissions to the Secretary in 2001, the MEK itself conceded that it had engaged in a panoply of mortar attacks and assassinations against government officials and facilities in Iran. *Id.* These actions are not "expressive conduct" subject to intermediate scrutiny, *United States v. O'Brien*, 391 U.S. 367 (1968), but rather unprotected conduct that is proscribable under the First Amendment. Just as cross-burning is a "particularly virulent form of intimidation" that is regulable under the First Amendment, *Virginia v. Black*, 538 U.S. 343, 363 (2003), the Government may also regulate the activities of FTOs that threaten American national security

[9] *See also Humanitarian Law Project v. Reno*, 205 F.3d 1130 (2000) (noting that in the case of "contributions . . . made to candidates for political office . . . Money, and the things money can buy, do indeed serve as a proxy for speech and demonstrate one's association with the organization.").

interests because such activities "are most likely to inspire fear of bodily harm." *Id.*

Second, even if the heinous acts necessary for an organization to be designated as an FTO by the Secretary qualify for some level of protection under the First Amendment, the standard for review is merely the intermediate scrutiny of *United States v. O'Brien*. *O'Brien* allows the regulation of expressive conduct if such action is within "the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. Both circuits to consider the question have found that the prosecution scheme satisfies the *O'Brien* test. *See Humanitarian Law Project,* 205 F.3d at 1135; *Hammoud,* 381 F.3d at 329. The relations between American citizens and foreign organizations can be constitutionally regulated by the government, *see Wald*, 468 U.S. at 244, and the Government has more than an "important or substantial interest" in combating terrorism against U.S. national security interests. *Supra* at Section II.A. Both schemes are facially directed at acts of terrorism, not political advocacy by groups with particular viewpoints, and thus not directed at the suppression of free expression. Finally, the impact the scheme has on the First Amendment rights of defendants or designated FTOs is limited in its scope. *See infra* Section *III.B.*

B. Neither § 1189 or § 2339B are Unconstitutionally Overbroad.

Courts may facially invalidate regulatory regimes that are so poorly tailored that they inadvertently sweep up a significant amount of protected First Amendment activity. However, the "strong medicine" of facial invalidation for overbreadth is "employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The standard for invalidation is high – the statute's "application to protected speech [must] be 'substantial,' not

only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003). Given the difficulty of meeting this test, both circuits to consider the question have found, unsurprisingly, that the designation and prosecution schemes are not unconstitutionally overbroad. *See Humanitarian Law Project*, 205 at 1136-37; *Hammoud*, 381 F.3d at 381.

Petitioners have failed to show that either §1189 or §2339B operate to chill a substantial amount of First Amendment activity either in absolute terms or as a percentage of their legitimate usages. First, these statutes do not regulate speech per se, but are focused instead on acts of terrorism and the provision of material support to designated FTOs. In *Hicks*, this Court refused to invalidate a policy barring trespassing on the streets of a quasi-privatized low-income housing development in part because the challenged policy was directed at the defendant's "non-expressive conduct" of physically entering the neighborhood. Because the doctrine's concern with chilling speech "attenuates as the otherwise unprotected behavior that forbids the State to sanction moves from 'pure speech' toward conduct," *Broadrick*, 413 U.S. at 615, "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to conduct necessarily associated with speech (such as picketing or demonstrating)." *Hicks*, 539 U.S. at 124.

Second, Petitioners have not demonstrated the level of discretion within either statute necessary to provide even the potential for unconstitutional overbreadth. There is a wide range of material support to FTOs under § 2339B that would fall short of implicating the First Amendment under *Brandenburg v. Ohio*, and the requirements of the FTO designation process require a finding that FTOs have engaged in acts of terrorism. Thus, the majority of conduct under both provisions falls beyond the ambit of the First Amendment, making it difficult for

Petitioners to demonstrate substantial overbreadth as a function of all potential government action under the designation and prosecution schemes.

This designation scheme is quite different from that found in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). There the Court invalidated an ordinance requiring a fee and permit before authorizing public speaking, parades or assemblies because it lacked "articulated standards," *id*. at 132, and granted "unfettered discretion" to the Secretary to limit expressive activity specifically protected by the First Amendment. Section 1189 carries neither of these deficiencies. Section 2339B enumerates specific prohibited actions, the majority of which – including the furnishing of lodging, training, safehouses, false documentation, communications equipment, facilities, weapons, lethal substances, and explosives – occasion no claim to protection under the First Amendment. 18 U.S.C. § 2339A(b)(1) (2000). The definition also specifically excludes the provision of "religious materials" from the material assistance ban, *id.*, further ensuring that actions covered by the statute fall beyond constitutional protection.

Third, Petitioners have not demonstrated actual overbreadth in the application of either § 1189 or § 2339B. "The overbreadth claimant bears the burden of demonstrating 'from the text of [the law] *and* from actual fact,' that substantial overbreadth exists." *Hicks*, 539 U.S. at 122 (quoting *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988)) (emphasis added). From 1997 through September 11, 2001, the Government pursued only four material support prosecutions under § 2339B; two for support to the Lebanese militant group Hezbollah, and two involving support for the MEK. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harv. J. on Legis. 1, 18-19 (2005). The use of the FTO designation process itself under §1189 is similarly limited. The Secretary's list of FTOs, updated every two years, included only 30 organizations worldwide in 1997, Designation of

Foreign Terrorist Organizations, U.S. Dep't of State, October 8, 1997, *available at* http://www.fas.org/irp/threat/fs_terrorist_orgs.html, 27 organizations worldwide in 1999, Foreign Terrorist Designations, Designations by the Secretary of State, U.S. Dep't of State, October 8, 1999, *available at* http://www.state.gov/s/ct/rls/rpt/fto/2682.htm, and 28 organizations worldwide in 2001. 2001 Report on Foreign Terrorist Organizations, U.S. Dep't of State, October 5, 2001.

Fourth, the fact that the statute may incidentally criminalize a small amount of activity whose prevention is not critical to protecting American citizens and national security interests is irrelevant so long as the remedy overall is necessary for such prevention. *See McConnell*, 540 U.S. at 154-55 (limitations on soft money not overbroad even though they apply to soft money funds which don't implicate an interest in preventing corruption in federal elections since the prevalence of such funds makes "all large soft-money contributions to national parties suspect")

Finally, the overbreadth doctrine cannot be used to invalidate a statute if "a limiting construction or partial invalidation so narrows it as to remedy the seeming threat or deterrence to constitutionally protected expression." In the event the Court found that a substantial proportion of § 1189 designations or §2339B prosecutions implicated protected speech activity, the Court could require additional procedural protections to limit administrative discretion, *PMOI II* at 208-09; invalidate vague provisions; *Humanitarian Law Project*, 205 F.3d at 1137-38; or narrow the scope of the statute's applicability. *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382, 402-03 (9th Cir. 2003).

IV. THE MEK RECEIVED SUFFICIENT PROCEDURAL PROTECTION UNDER § 1189 TO PROTECT BOTH ITS LIMITED FIRST AMENDMENT RIGHTS AND THE LIMITED RIGHTS OF THE PETITIONERS.

In order to designate an FTO, the Secretary must compile an administrative record

sufficient to determine that the organization in question is "foreign", "engages in terrorist activity . . . or retains the capability and intent" to do so, and that its terrorist activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189 (a)(1) (2000). Before a designation can take effect, the Secretary must notify congressional leaders of the impending designation and provide access to the "factual basis" for that record. 8 U.S.C. § 1189(a)(2)(A)(i) (2000). Any designation is also revocable by Congress. 8 U.S.C. § 1189(a)(2)(B)(ii) (2000).

A. The Validity of an FTO Designation May Only Be Properly Raised in an Appeal to the D.C. Circuit Court of Appeals, Which Refused to Set Aside the MEK's Designation Three Times.

Section 1189 affords a specific judicial remedy for challenging the validity of an FTO designation. 8 U.S.C. § 1189(b) (2000). This is the proper and exclusive mechanism by which a challenge to a specific designation, or the constitutionality of the scheme, may be brought. *See, e.g., Afshari*¸ 426 F.3d at 1154-55; *Humanitarian Law Project*, 205 F.3d at 1137; *Hammoud*, 381 F.3d at 373. Defendants in criminal material support cases are specifically barred from raising such challenges of their own accord. 8 U.S.C. § 1189(a)(8).

Congress has plenary power to define the jurisdiction of the lower federal courts. U.S. Const. art. III, § 1. "It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *see also Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Beyond this jurisdictional power, Congress also has a strong interest in consolidating all challenges within a single appellate court and a single litigation vehicle to preserve the uniformity of U.S. foreign policy.

B. The Lack of Pre-Designation Notice and Submission of Materials Under § 1189 is Justified By the Government's Interest in Obstructing the Flow of Material Support to Terrorist Organizations.

Section 1189 provides designated FTOs with general notice via publication of the designation in the Federal Register upon its taking effect. 8 U.S.C. 1189(a)(2)(A)(ii). While Fifth Amendment concerns might typically compel an agency to provide notice and an opportunity to be heard prior to such a designation, courts have recognized that, particularly in the context of an FTO designation, "[t]he Due Process Clause requires only that process which is due under the circumstances of the case." *PMOI III*, 327 F.3d at 1242. Designated FTOs can be split into two categories – those who are so "foreign" as to lack constitutional protection, and those that have sufficient contact with the United States to fall under the protection of the Fifth Amendment. While the latter group must be afforded some procedural protection, neither requires pre-designation notice or an opportunity to submit evidence.

The D.C. Circuit correctly held that an FTO that lacks sufficient contacts with the United States is entitled only to that process which it is afforded under statute. *PMOI I*, 182 F.3d at 111. This Court has adhered to the principle that, with regard to non-citizens, "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). The court in *PMOI II* expressly disclaimed any judgment of "how 'substantial' an alien's connections must be to merit the protections of the Due Process Clause." *PMOI II*, 251 F.3d at 141. Whatever level of contact is necessary to trigger those protections under *Verdugo-Urquidez*, that level was not legally present at the time of the first FTO designation in 1997. At that time, the Secretary specifically found that NCRI was not an alias of the MEK, *PMOI II*, 251 F.3d at 199, and the MEK conceded in its original challenge that it was

an entirely foreign entity. *See PMOI I*, 182 F.3d at 22.[10] The subsequent finding by the D.C. Circuit in 1999 that the MEK had sufficient contacts to trigger some procedural protections was predicated on the fact that the 1999 record "is not the same and the decision is not the same as in 1997." *Id.* As such, whatever the test for "substantial" connections is, the D.C. Circuit correctly upheld that designation in *PMOI I*, and Petitioners actions in providing material support to MEK during the period of 1997-1999 are sufficient to find a criminal violation of § 2339B.

The D.C. Circuit correctly identified that potential designee organizations that have sufficient contacts with the United States are entitled to some form of process protection. *PMOI II*, 251 F.3d at 201-03. Potential designees have a private interest in access to their own finances within the jurisdiction of the United States, however, the Government's interest in preventing those funds from being used to attack its citizens and interests certainly outweighs it. While the "[r]isks of error rise when hearings are deferred . . . these risks must be balanced against the potential for loss of life if assets should be put to violent use." *O'Neill*, 415 F.3d at 754.

It is the seizure of an FTO's assets that threatens to trigger due process protections. *See, e.g.*, *PMOI I*, 182 F.3d at 22. While seizure without notice or an opportunity to comment is atypical, it is justified where (i) the action is "directly necessary to secure an important governmental or general public interest," (ii) there is a "special need for prompt action," and (iii) the seizure is initiated by "a government official responsible for determining under the standards of a narrowly drawn statute that it was necessary and justified in the particular instance." *Caldero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974). All three *Caldero* factors are satisfied here. First, the action is necessary to ensure that the Government can freeze the assets of terrorists without alerting them beforehand that such a seizure is imminent.

[10] *See also PMOI II*, 251 F.3d at 140 ("the [MEK] had not established a constitutional presence in the United States in 1997 under its own name").

Anything else "would allow an enemy to spirit assets out of the United States." *O'Neill,* 415 F.3d at 754. The key distinction between those seizures requiring pre-deprivation protections and those that do not require such protections is "[t]he ease with which an owner could frustrate the Government's interests in the forfeitable property." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 52 (1993). This is precisely the problem in this case. Second, when dealing with organizations that the Secretary has determined present a threat to U.S. national security interests, the need to act quickly to limit their capacity to do further harm is a compelling justification for prompt action. Finally, the designation and seizure decisions are made by the Secretary of State and the Secretary of the Treasury, respectively, *see* 18 U.S.C. § 1189(a)(1) (2000); 8 U.S.C. § 2339B (e)(2) (2000), ensuring sufficient governmental procedural oversight.

C. Section 1189 Suitably Balances the Prior Restraint Concerns of *Freedman v. Maryland* with the Government's Compelling Interest in Combating Terrorism.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that a scheme requiring all movies to be shown within the state of Maryland to be approved by a State Board of Censors lacked the procedural safeguards necessary to permit speech activity protected under the First Amendment. 380 U.S. 51 (1965). The *Freedman* Court required that the regulatory scheme contain three "procedural safeguards" – (i) the government designator must "bear the burden of instituting judicial proceedings," (ii) the effect of any designation "prior to judicial review "can be imposed only briefly in order to preserve the status quo," and a "prompt judicial determination" of the designation's validity. *Id*. at 741 (Douglas, J., concurring). These specific requirements have been limited by subsequent decisions, which, in combination with the government's compelling interest in preventing terrorism against U.S. national security interests,

provide a framework for procedural protection that is more than satisfied by § 1189.

1. **The Government need not bear the burden of proving that a designated FTO does not engage in protected First Amendment advocacy.**

Freedman's requirement that the government bear the burden of instituting judicial proceedings and proving that a regulated act is protected expression does not apply to § 1189. The requirement is premised on the idea that the government cannot be relied upon to be neutral in its initial administrative decision-making because "the censor's business is to censor . . . [which] inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression." *Freedman*, 380 U.S. at 58-59. The case of a dedicated movie censorship board is quite unlike the Secretary of State's actions under § 1189. The Secretary has no institutional interest in suppressing free expression, and makes designation decisions only based on the compilation of an administrative record from government experts regarding the actual terrorist activities of potential designee organizations.

In addition, under *Freedman*, all activities are presumptively invalid unless the Government acts affirmatively to issue a license. In *Freedman*, the state "concede[d] that the [challenged] picture [didn't] violate the statutory standards and would have received a license if properly submitted." *Freedman*, 380 U.S. at 52-53. The § 1189 scheme is a narrow procedure imposed on a small handful of FTOs. Under such circumstances, there is much less reason to place the burden on the government. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990).

Finally, the *Freedman* Court placed the burden of proof on the government since movie distributors and exhibitors lacked a sufficient stake in each individual film to warrant litigation. Where license applications are "key to the applicant's obtaining and maintaining a business," the Court has found that applicants' litigation incentives are sufficiently high to warrant setting aside the government burden-of-proof requirement. *FW/PBS*, 493 U.S. at 229-30. A designated FTO

has "every incentive" to seek judicial review, since that status was designed to dry up material support flowing to such organizations. AEDPA, 110 Stat. at 1247. Indeed, the MEK has challenged its designation in the D.C. Circuit each and every time that it has been designated as an FTO. *See PMOI I*, 182 F.3d at 17; *PMOI II*, 251 F.3d at 192; *PMOI III*, 327 F.3d at 1238.

2. **Judicial review under § 1189 is sufficiently expeditious to prevent erroneous designations from becoming permanent.**

Freedman's requirement that review occur within a reasonable period of time is adequately met by § 1189. With a movie censorship scheme, it is important to impose a timetable on the initial designation process to avoid functionally preventing a movie from ever being shown. Here, organizations can continue to engage in normal activities right up until designation. As a result, there is no constitutional need to limit the initial designation process by time.

Once designated, the process has several elements designed to expedite review. Congress must be notified of the intent to designate an organization seven days prior to its promulgation, allowing for immediate legislative review of the initial decision. 8 U.S.C. § 1189(a)(2)(A)(i) (2000). After a designation is filed, judicial review must be sought within 30 days, ensuring that a disputed initial designation will not languish. 8 U.S.C. § 1189(b)(1) (2000). Additionally, under the scheme as constituted at the time covered by the indictment, all FTO designations would last for only two years before lapsing. 8 U.S.C. § 1189(a)(4)(A) (2000). Any re-designation would require new findings of terrorism directed against the United States, and could not occur sooner than sixty days prior to the termination of the previous designation. These requirements serve as an impetus for courts to quickly review designations, providing a safety valve to "minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Freedman*, 380 U.S. at 739.

It is a legitimate and necessary deviation from *Freedman* for the designation to remain in

place unless and until it is set aside by the D.C. Circuit. 8 U.S.C. § 1189(c)(4) (2000). *Freedman* suggested that the finality of a designation should be withheld until after the adjudicative review process, *Freedman,* 380 U.S. at 741, however, leaving the designation in place is necessary in order to have any chance of effectively hampering the flow of funds and support to and from terrorist organizations through the jurisdiction of the United States. *See supra* IV.B.

3. **Section 1189 provides judicial review adequate to satisfy the requirements of the Fifth Amendment.**

Freedman's requirement for judicial review is adequately satisfied by the designation's review scheme. Under the statute, a designated FTO can challenge a designation by the Secretary in the D.C. Circuit Court of Appeals. 8 U.S.C. § 1189(b). The D.C. Circuit is statutorily authorized to review the legitimacy of the designation based on the administrative record. The Government may also submit for review by the court any additional classified information used in making its decision. *Id.* § 1189(b)(2). The D.C. Circuit is authorized to "hold unlawful and set aside" the designation for several reasons, including if it is found to be arbitrary, capricious, unlawful, or unconstitutional. *Id.* § 1189(b)(3). While these protections are not as comprehensive as those required to prevent the suppression of speech under the film censorship system at issue in *Freedman*, in light of the significantly different circumstances of this case, on balance, they provide designated FTOs with more than adequate procedural protection.

First, according to the *Freedman* Court, the purpose of judicial review of administrative decisions under a prior restraint regime is to "ensure[] the necessary sensitivity to freedom of expression." There is no reason to assume that the Secretary of State, quite apart from a designated film censor, would show any less sensitivity toward the First Amendment than a court. Even so, the D.C. Circuit is specifically authorized to hold unlawful and set aside any designation that is unconstitutional, 8 U.S.C. § 1189(b)(3)(B) (2000), ensuring that the court will

review for violations of the First Amendment. Indeed, even under content-discriminatory regimes that lie at the heart of the First Amendment, *Freedman*'s judicial review requirement can be satisfied by access to normal judicial procedures. *See City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781-82 (2004) (holding that a state's "ordinary judicial review procedures suffice . . . so long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly."). If an adult business licensing scheme receives adequate protection through normal state court adjudication, *id.*, a statutory scheme that provides for centralized, expedited judicial review of an organization's FTO designation more than satisfies *Freedman*'s review requirements.

Second, while the court does not review the accuracy of the facts underlying the administrative record in the procedures outlined in § 1189(b), that deference to the State Department's expertise and the Executive's constitutional responsibility in safeguarding national security does not undermine the robustness of the judicial review regime. *PMOI II*, 182 F.3d at 114; *see also Mistretta v. United States*, 488 U.S. 361, 407 (1989). While federal appellate courts typically review facts central to constitutional determinations from jury and trial courts de novo, *see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court has deferred to the factual determinations of agencies, even in the case of predicate facts to First Amendment claims. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969), this Court accepted an NLRB determination that specific statements by an employer constituted "unfair labor practice" and thus fell outside the protection of the First Amendment. *Id.* at 617. This Court did not review the veracity of the facts underlying the determination, noting instead that "a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Id.* at 620. Similarly,

the Secretary of State, operating with the knowledge and expertise of the State Department and with access to a broad array of classified intelligence material, is clearly most "competen[t] in the first instance" to make the determination as to whether or not a potential designee organization is "foreign" and "engages in terrorist activity . . . or retains the capability and intent" to do so. 8 U.S.C. § 1189(a)(1); *see also supra* Section I.B.

Third, the D.C. Circuit, in reviewing the MEK's third designation, correctly held that the ability of the Government to present classified evidence to the court *ex parte* and *in camera* to bolster the designation does not render it constitutionally infirm. The power to classify information and control access to it inheres to the President through his Article II, § 2 responsibilities as Commander-in-Chief. *See McElroy*, 387 U.S. at 890. This Court "has recognized the government's 'compelling interest' in withholding national security information from unauthorized persons in the course of Executive Business." *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also Snepp v. United States*, 444 U.S. 507, 509 (1980).

Fourth, the D.C. Circuit retains equitable powers to impose remedies that enforce its determinations regarding the validity of a § 1189 designation. The D.C. Circuit's decision to impose additional procedural requirements on the designation process, notwithstanding the dictates of the statute, is one example of such action. *PMOI II*, 251 F.2d at 208. The D.C. Circuit's refusal to set aside the MEK's 1999 FTO designation is another example of that court's exercise of its equitable powers. Under the judicial review procedure of § 1189(b), the Secretary "does not carry the sole burden" of determining the validity of the designation, but rather, "[t]he courts also have been entrusted with a share of that responsibility." *See Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944). The fact that the D.C. Circuit has chosen to exercise its powers of equity in deference to the Government's compelling interest in blocking the ongoing activity of

terrorist groups does not negate the value of those powers in providing for robust judicial review.

D. FTO Designations Provide Adequate Procedural Protection Under *Thomas v. Chicago Park Dist.* Because they do not Target Messages Espoused by FTOs.

Only prior restraint regimes that represent "subject-matter censorship" are subject to the *Freedman* protections. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002). Regimes that do not authorize a regulator to "pass judgment on the content of speech" instead require a lesser level of procedural protection to guard against undue infringement of an organization's First Amendment rights. The designation statute does not occasion "subject-matter censorship." The Secretary cannot designate an organization because of a disagreement with its advocacy. Instead, the Secretary must find that an organization "engages in terrorist activity . . . or retains the capability and intent to do so." 8 U.S.C. § 1189(a)(1). This inquiry is based only on an analysis of aggressive actions carried out by FTOs, and not the advocacy or ideology of those organizations. As such, § 1189 is similar to the ordinance at issue in *Thomas*, 534 U.S. at 316, which required individuals to procure permits before conducting events in municipal parks. The Court held that the policy was content-neutral, even though the grounds for rejecting a permit request included "use or activity by the applicant [that] would present an unreasonable danger to the health and safety of the applicant, other users of the park … or the public." *Id.* at 319.

In the case of content-neutral schemes, *Thomas* requires only that the regulation adhere to the normal constitutional requirements attendant to time, place and manner restrictions on speech. Namely, those regimes must (i) "contain adequate standards to guide the official's decision and render it subject to effective judicial review," (ii) "not be based on the content of the message," (iii) be "narrowly tailored to serve a significant government interest", and (iv) "leave open ample alternatives for communication. *Thomas*, 534 U.S. at 323.

All four standards are easily met in this case. The statutory scheme contains discrete

standards for designating an organization as an FTO, the adequacy of which are reviewable by the D.C. Circuit. Designation is triggered by acts of terrorism or an intent to commit acts of terrorism, and thus independent of the content of an FTO's message. The designation procedure is as narrow as it can be in order to limit access to classified information and effectively maximize the immobilization of FTO resources, and the comprehensiveness of the administrative designation process produces only a handful of organizations on the FTO list every two years. And finally, there are ample alternatives for communication by the organizations, which can be removed from the list if they no longer pose a threat in the independent judgment of the Congress or the Secretary of State. In any event, each designation lapses after two years, providing another opportunity for FTOs to cease engaging in behavior that triggers FTO classification and thus avoid reclassification. The organization's members also remain free to communicate support for its ideological message, and even for its heinous acts, as is their right under the First Amendment.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm the decision of the Ninth Circuit and hold that a defendant may not collaterally attack the designation of a foreign terrorist organization at her trial, and that the procedural schemes under 8 U.S.C. § 1189 and 18 U.S.C. § 2339B do not violate due process.

Respectfully submitted,

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April 30, 2007

APPENDIX

ADDITIONAL STATUTORY PROVISIONS

8 U.S.C. § 1189 provides in relevant 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) [FN1]; 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

Seven days before making a designation under this subsection, the Secretary shall, by classified communication–

(i) 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, 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 therefore; and

(ii) seven days after such notification, publish the designation in the Federal Register.

(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) 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), 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) of this section.

(4) Period of designation

(A) In general

Subject to paragraphs (5) and (6), a designation under this subsection shall be effective for all purposes for a period of 2 years beginning on the effective date of the designation under paragraph (2)(B).

(B) Redesignation

The Secretary may redesignate a foreign organization as a foreign terrorist organization for an additional 2-year period at the end of the 2-year period referred to in subparagraph (A) (but not sooner than 60 days prior to the termination of such period) upon a finding that the relevant circumstances described in paragraph (1) still exist. The procedural requirements of paragraphs (2) through (4) shall apply to a revocation under this paragraph.

(5) Revocation by Act of Congress

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

. . .

(8) Use of designation in trial or hearing

If a designation under this subsection has become effective under paragraph (1)(B), a defendant in a criminal action shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.

(b) Amendments to a designation

(1) In general

Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation 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.

(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), [FN2] or

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

. . .

. . .