SCHEDULED FOR ORAL ARGUMENT NOVEMBER 15, 2000

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

Nos. 99-1438, 99-1439

NATIONAL COUNCIL OF RESISTANCE OF IRAN, *et al.*

Petitioners,

v.

DEPARTMENT OF STATE and
MADELEINE K. ALBRIGHT, Secretary of State,

Respondents.

On Petition for Review of a Final Order of the Secretary of State

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REPLY BRIEF FOR PETITIONERS NATIONAL COUNCIL OF RESISTANCE OF IRAN and NATIONAL COUNCIL OF RESISTANCE OF IRAN, U.S. REPRESENTATIVE OFFICE

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August 25, 2000

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AEDPA or the Act	Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (1996)
CRS	Congressional Research Service
NCRI or NCR	National Council of Resistance of Iran
NCRIUS	National Council of Resistance of Iran, United States Representative Office
PMOI	People's Mojahedin Organization of Iran
1997 SAR	1997 Administrative Record (Public Version), incorporated by reference into the 1999 SAR
1999 SAR	1999 Administrative Record (Public Version)

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INTRODUCTION AND SUMMARY OF ARGUMENT

The government concedes that NCRIUS was not designated as a foreign terrorist organization. (Govt. Br. at 28.) NCRIUS requests that this Court, in disposing of NCRIUS' petition, memorialize that concession to clarify that NCRIUS is not subject to sanctions under the 1999 designation. NCRI separately responds to the government's arguments below.

The designation of NCRI may not stand given the government's implicit recognition that the record contains *no* evidence that NCRI engages in terrorist activities. The AEDPA does not authorize the government's approach – designation of a separate organization as an "alias" of a designated terrorist, without a finding that the separate organization engages in

terrorist activities. Here, the record does not even show that NCRI knew or approved of PMOI's alleged use of its name, but suggests at most that PMOI, at an unspecified time and place through unknown actors, unilaterally borrowed NCRI's name for its own fundraising efforts. That does not make NCRI a terrorist organization.

The government's answers to NCRI's constitutional challenges lack merit. Its attempt to bypass constitutional protection altogether is based on a false comparison of NCRI to a foreign government. Applying the correct standard – whether NCRI is present in the United States – the government fails to explain why conducting operations out of an American office, using American channels of commerce to advocate its position, maintaining asset accounts in this country, and boasting a membership containing American citizens and residents do not suffice, as such factors have in other cases. The government's contention that NCRI may not assert injuries suffered by its members is wrong and is premised on the disturbing notion that American residents may be denied *any* judicial redress for constitutional injury. NCRI and its members have suffered constitutional injury and have not received due process.

I. THE RECORD LACKS SUBSTANTIAL SUPPORT FOR THE NCRI DESIGNATION

The government identifies three items in attempting to pinpoint "substantial support" in the record: (1) the Rolince affidavit; (2) a Congressional Research Service (CRS) report; (3) classified material redacted from the brief provided to petitioners. (Govt. Br. at 30-31.) Because this Court deferred ruling on Petitioners' motion for production of the entire record, NCRI cannot here confront whatever allegations are contained in the redacted paragraphs.[1]

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[1] Due to the government's reliance on the classified record in its brief, NCRI renews its request for production of such classified information, under procedures based on the Classified

The allegations from the CRS report on which the government now relies are the same as those in a previous CRS report contained in the 1997 SAR. *Compare* MEK 99-3 at CRS-1 with MEK 97-3 at CRS-1. The State Department has publicly acknowledged that the 1997 record was not sufficient to designate NCRI, *see* Exh. H to NCRI's Motion to File Evidence, and does not contend that it could prevail if only the information in the 1997 record were considered. *See* Govt. Br. at 33. Indeed, the CRS report provides no support for the designation. It states only that PMOI has a "dominant influence" in NCRI and that "U.S. analysts" consider PMOI and NCRI to be "virtually synonymous." Neither the report nor the government asserts that PMOI has induced (or has the power to induce) NCRI to engage in any terrorist activities or raise money for PMOI. The AEDPA contains *no* basis for designation simply because an organization is "influenced" by terrorists.

The only new information in the 1999 record is contained in the Rolince affidavit. But that affidavit, considered alone or with the CRS report, does not constitute substantial support for the designation. As a legal matter, facts offered to prove that NCRI is controlled by

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Information Procedures Act, Title 18, App. 3, § 6, and further seeks permission to respond to these allegations in a supplemental brief. The AEDPA does not prohibit adoption of these procedures by analogy; sharing classified information with those who have security clearances is not an "unauthorized disclosure." 8 U.S.C. § 1189(c)(1), CIPA § 1(a). (Lead counsel for NCRI received a top secret national security clearance in connection with his work on *Griffin v. U.S.*, C.A. 80-3227 (D.D.C.) –settled in June 2000. *See* Ex. A.) The government has argued that CIPA only applies to criminal proceedings, and urges the Court to follow tort or FOIA cases where access to classified information was denied. *See, e.g., Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983); *Salisbury v. United States*, 690 F.2d 966 (D.C. Cir. 1982); *Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982). The stakes in this matter (seizure of assets, immigration consequences and criminal prosecution for providing material support) are far more analogous to the criminal proceedings for which CIPA was designed, than to the civil cases on which the government relies. *See Najjar v. Reno*, 97 F. Supp. 2d 1329, 1358-59 (S.D. Fla. 2000) (encouraging procedures like CIPA's in immigration case). Should the Court not grant production, we urge that it not consider any facts submitted *ex parte*. To do so would violate due process. *Infra* at 11-12.

or raises funds for PMOI are irrelevant absent a finding that NCRI engages in terrorist activities. 8 U.S.C. § 1189(a)(1). In any event, the Rolince affidavit provides insufficient support for the government's flawed legal theory of control. It lacks specific examples of the alleged improper fundraising activity and does not even attribute the fundraising to NCRI. The affidavit, if true, asserts only that PMOI unilaterally borrowed NCRI's name to raise funds. It does not explain how the PMOI supposedly "controls" the NCR, and does not tie the concept of "control" with any specific directions to NCRI to engage in terrorism or fund PMOI. Finally, it provides no information regarding the basis of the "human source's" knowledge and makes no attempt to vouch for the reliability of the source of the informant's information. For all anyone knows, the "human source" was reporting a rumor heard from another or read in Iran's propaganda.

The lack of substantial support is evident under either the minimal standard of review articulated by this Court in *People's Mojahedin Org. of Iran v. Dept. of State*, 182 F.3d 17, 25 (D.C. Cir. 1999), *cert. denied* 120 S.Ct. 1846 (2000), or the heightened obligation dictated by Article III. The record citations that the *PMOI* Court relied upon – hearsay assertions of supposed bombings and attacks on government and military targets – at least identified locations and times of the alleged events and specified the source of that information. *Id.* at 20. That record is a far cry from the Rolince affidavit. If the *PMOI* record had recited only that "a human source, who has provided other reliable information, reported that PMOI engaged in terrorist activities, including bombings and assassinations," this Court could not have applied its recited standard of review to uphold the PMOI designation.

Moreover, the government makes no attempt to counter or distinguish the Supreme Court's "rubber-stamping" jurisprudence, which would preclude this Court's endorsement of the Rolince affidavit without making an independent assessment of the

specificity or reliability of the information it contains. (NCRI Br. at 7-8.) Instead, the government argues that this Court may not consider the Article III implications of the standard of review solely because *PMOI* "is the binding precedent of this Circuit." (Govt. Br. at 30.) But the *PMOI* Court was not presented with and did not address arguments based on Article III. Nothing prevents NCRI from arguing to this Court that the statutory standard of review must be interpreted and applied consistently with the limited constitutional authority of this Court. *See O'Brien v. Dubois*, 145 F.3d 16, 21, 26 (1st Cir. 1998) (construing AEDPA habeas corpus review standard to prevent undue deference to state court decisions to avoid Article III rubber-stamping problems).

II. DESIGNATION OF AN ALIAS ORGANIZATION IS UNLAWFUL WITHOUT THE REQUIRED STATUTORY FINDINGS

Contrary to the government's argument, NCRI has never claimed the Secretary is "precluded from listing in a single designation the various names and acronyms used by a foreign terrorist organization" and therefore has no power to sanction terrorists that attempt to circumvent a designation by adopting a new name. (Govt. Br. at 32.) Indeed, NCRI specifically acknowledges the Secretary's right to list all assumed names that a foreign terrorist organization uses at any time, *see* NCRI Br. at 13-14, and nowhere disputes the government's ability to sanction a properly designated terrorist organization acting through an alias. What the government cannot do, however, is to apply sanctions against a *separate* organization simply because terrorists have used its name.

Thus, if Hezbollah used the name "OPEC," the Secretary could list "OPEC" as an alias to alert government enforcers and would-be financial supporters that Hezbollah might attempt to disguise itself as a different entity. If the government learned that Hezbollah opened a domestic bank account using the name "OPEC," it could seize assets held under the assumed

name. And, if supporters knowingly provided "material support" to Hezbollah with a nudge and a wink by writing the check to "OPEC," they could be prosecuted under 18 U.S.C. § 2339A. However, the Secretary could not designate and sanction OPEC (the oil cartel) as a terrorist organization without finding that OPEC was a foreign organization engaging in terrorist activity harmful to national security interests.

The Secretary's bald assertions of PMOI "control," "domination," or "interchangeability" with NCRI likewise do not suffice to support designation. The government admits that NCRI started as a "bona fide coalition" and does not dispute that it includes voting components that are not part of PMOI. *See* NCRI Br. at 14-15. It is uncontested that PMOI and NCRI are not one and the same organization, and NCRI, if given the opportunity, could prove that PMOI does not control its decisionmaking. *See* Affidavits submitted with Motion to File. The cases cited by the government involved foreign entities that were one and the same. *First Nat'l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 630-31 (1983) (dissolved Cuban banking instrumentality indistinguishable from successor Cuban agency); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 94 (1961) (organizations "establishe[d]" by foreign government in other countries to carry out its objectives). Without a showing that a terrorist and its supposed "alias" are the same entity, the government may not be absolved of the showing that each designated organization is a "foreign terrorist organization" under the statute.

III. NCRI IS ENTITLED TO CONSTITUTIONAL PROTECTION

The government maintains that NCRI is like a foreign government that may not assert rights under the constitution. (Govt. Br. at 34-37.) But it admits, as it must, that even foreign nations enjoy constitutional protections when haled into domestic courts where they face a potential judgment depriving them of property, much as the administrative proceeding by the

State Department stands to deprive NCRI of its property. (Govt. Br. at 36.) Given this admission, it is unsurprising that none of the cases cited by the government supports the notion that a foreign government can *never* claim protection under the Constitution.

In any event, NCRI is not, and does not claim to be, a "foreign government." NCRI – unlike Monaco, Cuba and Iran in the government's cited cases and unlike the PLO – has not received the privileges and immunities that make those entities immune from suit and their officials diplomatically immune for any crimes. *Compare Palestine Information Office v. Shultz*, 853 F.2d 932, 935 (D.C. Cir. 1988) (finding that PLO "has received privileges and immunities under American law by virtue of its status as an observer at the United Nations"). As explained by the court in *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1481 (S.D.N.Y. 1988), foreign governments lie "outside the structure of the Union," because they do not undertake "to abide by United States law." NCRI, insofar as it is present here, is not immune from liability for transgressions of U.S. law, and ought be treated like any other membership organization.

The government cites three Executive Orders to buttress its claim of executive power to "act swiftly and on the basis of classified or confidential information, without providing the panoply of due process protections." (Govt. Br. at 38.) Those Executive Orders are based on declarations of national emergencies by the President under relevant national emergency statutes. Justice Jackson, in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952), put these "national emergency" Presidential powers in proper context:

> In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon a proclamation of a national emergency.

To permit the government to rely upon the President's "considerably expanded" "emergency" powers as a benchmark for due process constraints on Executive Branch conduct in a non-emergency context is to permit the tail to wag the dog, with potentially devastating consequences of "unlimited executive power." *See Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (quoting *Youngstown*, 343 U.S. at 641 (Jackson, J., concurring)). Absent a finding that NCRI has obtained diplomatic immunities or that the President has invoked his extraordinary powers to declare a national emergency, the relevant inquiry in determining whether NCRI may assert constitutional claims is the one asked by this Court in *PMOI* – whether NCRI has "property or presence" in this country sufficient to support "constitutional rights under the due process clause or otherwise." 182 F.2d at 22.

The government claims, without citation or reasoning, that opening an office and conducting business here are not enough to establish a substantial presence in this country. But NCRI's operations in the United States are by any measure substantial. It "present[s] and disseminate[s] information about socioeconomic, political and human rights conditions in Iran" (NCRI Br. at 5) and, continuously for the past 6 years, has used U.S. instruments of commerce, including printing companies, the mail and telecommunications systems, as well as public speaking fora, to spread its message to Americans and government officials. The government's claim that NCRI's bank account does not establish constitutional presence is also wrong. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931), makes clear that a foreign organization that "acquir[es] or hold[s]" property in this country may invoke the protections of the Constitution when the property is placed in jeopardy by the United States government. Finally, the government fails to address NCRI's claim of presence through its members residing here and cites no case holding that organizations with members here are not constitutionally

present. It obscures the point by claiming that NCRI has no standing to raise the rights of its members – a claim that addresses only whether NCRI may challenge others' injuries, but does not answer whether it is sufficiently present to challenge its own.

IV. NCRI'S CONSTITUTIONAL CLAIMS HAVE MERIT

The government admits that the Supreme Court recognizes a deprivation of constitutional liberty when a claimant asserts a "significant alteration of legal status together with injury resulting from defamation." (Govt. Br. at 43.) It neither cites legal authority nor explains why as a practical matter a deprivation of the ability to use banking services should be treated differently from deprivations of the right to buy liquor, or to drive, or to be considered for government contracts, or to seek private employment, or any of the other status-based freedoms for which due process is guaranteed by the constitution. *See* NCRI Br. at 20-21; *Mosrie v. Barry*, 718 F.2d 1151, 1161 (D.C. Cir. 1983). In the end, its argument collapses into its previous, misguided refrain that NCRI is a foreign government that can assert no liberty interests at all.

NCRI also has the right to rely on the deprivation of constitutional liberties of its American members, who may be convicted for providing material support to NCRI or denied the right to exit and re-enter this country freely based upon the designation of NCRI, *see* 8 U.S.C. § 1182(a), in order to obtain the basic process essential to ensure that the factfinding on which those deprivations are based is reliable. The government responds by misapplying *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 120 S. Ct. 693, 704 (2000) ("an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right"). The government apparently does not dispute that NCRI members have or will imminently suffer injury-in-fact that is fairly traceable to the designation of NCRI as

a terrorist organization. Rather, it relies on a circular argument, which in effect states that (1) review of the accuracy of a terrorist designation is exclusively relegated to the petition process initiated by the organization; (2) members are bound by the facts found in that review proceeding; (3) because members are so bound, they cannot separately obtain due process to test the facts on which the terrorist designation is based when their liberties are curtailed; and (4) because they can't assert the right themselves, their interests cannot be asserted by the membership organization when utilizing the only available avenue of review. The government's position is inconsistent with cases holding that an individual's right to due process may not be limited by prior proceedings that did not adequately protect the individual's interests, and that Congress may not strip such individuals of the right to any constitutional review. *Yakus v. United States*, 321 U.S. 414, 435 (1944); *Webster v. Doe*, 486 U.S. 592, 611 (1988) ("[A] serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").[2] If NCRI's members are bound by the Secretary's determination, their interests *must* be considered in determining what process is due.

Finally, the government is wrong to argue that post-deprivation judicial review in this Court satisfies due process. The Secretary's "careful deliberation" (Govt. Br. at 47) is based on a one-sided, secret record, which this Court has disclaimed any ability to evaluate for reliability. *PMOI*, 182 F.3d at 19, 25. Moreover, the AEDPA precludes the designated entity from adding new evidence to the administrative record upon review. 8 U.S.C. § 1189(b)(2) ("Review . . . shall be based solely upon the administrative record."). Without an opportunity to

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[2] Petitioners adopt section III of PMOI's Reply Brief addressing the First Amendment claims.

confront or refute the allegations before the Secretary (an opportunity that the government nowhere claims would pose an undue administrative burden), the risk of erroneous deprivations is significant, with little to no possibility of later correction.

None of the D.C. Circuit cases on which the government relies for the adequacy of post-deprivation review (Govt. Br. at 49) involved judicial review that constrained the petitioner from introducing its own version of the facts into the record or from obtaining *de novo* review of the facts upon which the agency's action was based.[3] The government relies on *First National Bank & Trust v. Department of the Treasury*, 63 F.3d 894 (9th Cir. 1995) for the proposition that "post-deprivation judicial review can be constitutionally adequate even when the review is not *de novo*." (Govt. Br. at 49.) In that case, the Ninth Circuit only found the judicial review proceeding constitutionally adequate because the bank mounting the challenge "had ample opportunity to express its views" during the Controller's examination of the bank before the adverse administrative judgment. *See First National*, 63 F.3d at 898.

Moreover, in none of the cases cited by the government was the post-deprivation process limited to an administrative record assembled *ex parte*, with no notice to the constitutionally injured party, no opportunity for factual input at the pre- or post-deprivation stage, and no meaningful judicial review of the evidence. Here, the government affirmatively relies upon undisclosed and untested facts to support its finding that NCRI is properly designated. Several courts have found flagrant due process violations when liberty was denied based upon a secret record supposedly establishing that someone was a terrorist or associated with a terrorist organization. *Najjar*, 97 F. Supp. 2d at 1355 (relying on *Abourezk v. Reagan*,

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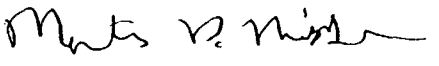
[3] The Court in *Palestine Information Office*, 853 F.2d 932, merely deferred to an agency's legal interpretation of a statute – a practice raising no due process concerns – giving no indication what procedures would apply had a factual dispute existed.

785 F.2d 1043, 1060-61 (D.C. Cir. 1986)); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 411-12 (D.N.J. 1999) (relying on *Rafeedie v. INS*, 880 F.2d 506, 524 (D.C. Cir. 1989). NCRI, "like Joseph K. in [Kafka's] The Trial," *Rafeedie*, 880 F.2d at 516, is in the "untenable position of being forced to prove that [it is] not a terrorist in the face of the Government's confidential information." *Kiareldeen*, 71 F. Supp. 2d at 412.

CONCLUSION

The Secretary's designation of NCRI should be set aside as unlawful and the Court should hold that NCRIUS was not designated under § 1189(a).

Respectfully submitted,



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August 25, 2000

CERTIFICATE OF COMPLIANCE

I hereby certify that, based on the word count reported by undersigned counsel's word-processing system, the Reply Brief of Petitioners National Council of Resistance of Iran and National Council of Resistance of Iran, U.S. Representative Office complies with the type-volume limitation of Rule 32 of the Federal Rules of Appellate Procedure and this Court's Order, dated June 14, 2000, and is 3,497 words.

Martin D. Minsker

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2000, I caused two copies of the Reply Brief of Petitioners National Council of Resistance of Iran and National Council of Resistance of Iran, U.S. Representative Office to be delivered by hand upon the following:

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The above named individual has been granted security approval by the Executive Office of the President and is authorized to have access to classified information through ***TOP SECRET***. This is granted under the standards of Executive Order 12968.

Charles C Easley

CHARLES C. EASLEY
EOP SECURITY OFFICER

CERTIFICATION

I certify that I have been briefed on the procedures for handling, storage and transmission of classified information in accordance with Executive Order 12958, and that I have read and completed a non-disclosure agreement Standard Form-312.

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