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
COLIN L. POWELL, Secretary of State

Respondents.

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

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PETITION FOR PANEL REHEARING

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PETITION FOR PANEL REHEARING [1]

We are filing this petition for panel rehearing to request only a very limited, but important, change in one aspect of the Court's opinion in this case. As described below, we urge the Court to modify its opinion to make clear that, when the Secretary of State first designates a new foreign terrorist organization, due process does not in this category of cases require advance notice and an opportunity for a pre-designation

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), we have substituted the name of the current Secretary of State, Colin L. Powell, as respondent in place of the previous Secretary, Madeleine K. Albright.

hearing for such an entity because otherwise targeted entities will have warning and can defeat much of the purpose of the designation. In such circumstances involving new designations, the type of post-designation hearing described in the Court's opinion is all that is constitutionally required.

This modification in the Court's opinion is warranted because in this category of cases there are no circumstances in which proper balancing under the Due Process Clause necessitates advance warning to an organization that the Secretary of State intends to designate it, and that its assets in this country will thus shortly be frozen, and that it will soon be subject to the other restrictions Congress has imposed on designated entities. If prior notice is given, the entity at issue will be able to move assets it has in the United States out of the country or to conceal them, and take other actions thwarting the purpose of a statutory scheme designed to make the United States inhospitable for foreign terrorist organizations.

The Court's opinion as currently written states that the Secretary may determine not to give advance notice of a new designation for appropriate reasons. We do not understand the opinion to foreclose the Secretary from determining in connection with each new designation that advance warning is not required because it would defeat a central purpose of the designation by giving targeted entities the ability to move their funds out of the United States before a designation takes effect.

Because requiring advance warning to groups that the Secretary believes meet the statutory criteria for designation would be so clearly contrary to the national interests of the United States, the opinion should be modified to make clear that the Secretary need not give advance notice in the category of cases involving new designations. Such a decision finds firm support in the Supreme Court decisions making clear in a variety of analogous contexts that due process does not require advance notice when the items at issue are easily moved or transferred, as is true here with funds.

REASONS FOR MODIFYING THE COURT'S OPINION

1. This case involves challenges by petitioners People's Mojahedin of Iran ("People's Mojahedin") and the National Council of Resistance of Iran ("NCRI") to designations by the Secretary of State under the Antiterrorism and Effective Death Penalty Act of 1996 ("Antiterrorism Act" or "AEDPA") (Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (1996)). In 1999, the Secretary redesignated the People's Mojahedin as a foreign terrorist organization under the statutory scheme, and designated the NCRI for the first time as an alias of the People's Mojahedin. 64 Fed. Reg. 55,112 (1999).

Petitioners contended before this Court that the Secretary's designations were factually and legally unfounded, and that the Secretary had no authority to list the NCRI as an alias of the People's Mojahedin. They also contended that the

designations violated the Due Process Clause because petitioners were entitled to an administrative hearing prior to designation. Further, petitioners claimed entitlement to full access to the classified information on which the Secretary premised the designations.

Based on this Court's prior decision in *People's Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000), we responded that petitioners were not constitutionally present in the United States and thus not entitled to claim the protections of the Due Process Clause. Alternatively, we contended that, even if petitioners were present in this country in some sense, they were not protected by the United States Constitution since foreign states are not so protected, and foreign political organizations such as the People's Mojahedin and the NCRI have a similar constitutional status. We also pointed out that petitioners have no right of access to classified information, and that there was ample information in the record to demonstrate the reasonableness of the Secretary's designations.

2. In response to these arguments, this Court first reaffirmed the limited nature of its judicial review function under the Antiterrorism Act. (The Court's opinion is now published at 251 F.3d 192.) The Court then held that the Secretary's designation of the NCRI as an alias of the People's Mojahedin has substantial support in the record, and that the designation is neither arbitrary, capricious, nor contrary to law. 251 F.3d at 199. Next, the Court agreed with our position that the Secretary is

authorized under the statute to designate aliases for foreign terrorist organizations. *Id*. at 200.

The Court then agreed that the People's Mojahedin does not, under its own name, have a presence in the United States. The Court nevertheless found that the record, including its classified portions, reveals that the NCRI "can rightly lay claim to having come within the territory of the United States and developed substantial connections with this country." 251 F.3d at 202. Accordingly, the Court concluded that petitioners are covered by the United States Constitution. *Id*. at 203. In addition, the Court found that petitioners had made a colorable allegation that they have an interest in a bank account in the United States, and that they therefore had a property interest protected by the Due Process Clause that would be impaired by the designation and its statutory consequences. *Id.* at 204.

The next part of the Court's opinion contains the only aspect for which we seek rehearing. The Court explained that due process is a highly flexible concept, and it reiterated its ruling in *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988), that no hearing was required before the Secretary of State could direct the closing of a Washington, D.C. office that the Secretary deemed a mission of a non-governmental foreign entity. However, the Court found that we had not yet shown how affording whatever process is due before designating an entity as a foreign terrorist organization "would interfere with the Secretary's duty to carry out foreign policy." 251 F.3d at 208. The Court further explained that it was not immediately

apparent how providing advance notice of a possible coming designation as a foreign terrorist organization would impair foreign policy goals. *Ibid*.

The Court noted that giving advance notice to groups not previously designated "might work harm to this country's foreign policy goals" in ways that the Court would not immediately perceive, and that it therefore did not mean to "foreclose the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made." *Ibid*. The Court found that no such showing had yet been made in this specific case. The Court concluded: "We therefore hold that the Secretary must afford the limited due process available to the putative foreign terrorist organization prior to the deprivation worked by designating that entity as such with its attendant consequences, unless he can make a showing of particularized need." *Ibid.*

The Court then ruled that foreign groups constitutionally present in the United States and facing deprivation of protected property interests are entitled to notice of a possible impending designation, disclosure of the unclassified portions of the administrative record, and an opportunity to present in writing evidence to rebut the proposition that they are foreign terrorist organizations. *Id*. at 208-09. The Court reiterated that "[u]pon an adequate showing to the court, the Secretary may provide this notice after the designation where earlier notification would impinge upon the security and other foreign policy goals of the United States." *Id.* at 208.

In addition to ordering that petitioners here receive a post-designation opportunity to file responses to the non-classified information in the record and to

support their claim that they are not terrorist organizations, the Court stated that "[w]hile not within our current order, we expect that the Secretary will afford due process rights to these and other similarly situated entities in the course of future designations." *Id.* at 209.

3. Limited rehearing to modify the Court's opinion is warranted because, given the significant national security interests at stake and the consequences of advance warning, due process should not require the Executive to give prior notice that an entity is being considered for a new designation as a foreign terrorist organization. Thus, rather than requiring the Secretary to make a finding in each individual case involving a designation, the Court should recognize that advance warning of an impending new designation should never be mandated.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court "has recognized, on many occasions, that where [the Government] must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert* v. *Homar*, 520 U.S. 924, 930 (1997); accord *FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988).

The Supreme Court has thus held that the Government can seize a yacht believed to be subject to civil forfeiture without prior notice or a hearing, because the yacht was the "sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." *Calero-*

Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974). And, the Court ruled that no pre-seizure hearing is required when United States customs officials seize an automobile at the border. *United States v. Von Neumann*, 474 U.S. 242, 251 (1986). See also *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (allowing seizure without a prior hearing of food believed to be adulterated).

Further, the Supreme Court has upheld warrantless searches and seizures of automobiles against Fourth Amendment challenges because "of the need to seize readily movable contraband before it is spirited away * * *." *Florida v. White*, 526 U.S. 559, 565 (1999). The Court has focused on "the special considerations recognized in the context of movable items * * *." *Ibid.* Accord *Pennsylvania v. Labron*, 518 U.S. 938 (1996).

The court distinguished these various cases when it held that advance notice is required before real property can be seized in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). The Court made clear that its earlier rulings were different because of the easy mobility of the items at issue. *Id*. at 53-61.

As we discuss below, the concerns motivating the Court in the cases finding no requirement of advance notice are obviously present here too. In the financial services world of today, funds can be moved easily and quickly by an entity acting speedily to frustrate a looming government order freezing assets.

4. As the Court is aware, in the Antiterrorism Act, Congress sought to "strictly prohibit terrorist fundraising in the United States," and to make clear that this country

is not to "be used as a staging ground" for terrorist activities. H.R. Rep. No. 104-383 (1995), at 43; see also Antiterrorism Act, § 301(a)(7), 110 Stat. 1247.

Accordingly, once the Secretary, pursuant to statutory standards, designates an entity as a "foreign terrorist organization," Congress imposed three legal consequences that flow automatically: (a) blocking of the organization's funds in the United States (18 U.S.C. § 2339B(a)(2)); (b) exclusion of its representatives and certain members from this country (8 U.S.C. § 1182); and (c) a prohibition on the "knowing" provision by persons within the United States or subject to its jurisdiction of "material support or resources" to the organization (18 U.S.C. § 2339B(a)(1)).

If advance notice of a possible new designation is given, the entity at issue would always be able to move some or all of its funds out of the United States, or to conceal them before the designation actually occurs. They will then be available for terrorist purposes, or to free other funds for terrorism. See AEDPA, §§ 301(a)(6), (7), 110 Stat. 1247; H.R. Rep. No. 104-383, at 45, 81 (noting fungibility of money and how terrorist entities can shift funds from legitimate purposes to terrorist ones). Accord *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir.) ("money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts"), *cert. denied*, 121 S. Ct. 1226 (2000). Yet, preventing access to such assets is precisely one of the cardinal purposes of the Antiterrorism Act, as it imposes an automatic freeze on funds as soon as a designation happens.

Thus, if the Executive is required to give advance notice of a possible new designation, a key goal of the Antiterrorism Act will be thwarted as the group's funds in the United States can be moved or hidden before the freeze is actually imposed. In addition, the entity at issue can take other actions in a speedy way – *e.g.*, moving key personnel into the United States, or quickly collecting pledges of money and material – that will no longer be legal when the designation occurs.

Moreover, there is little the United States Government could do to stop the movement or concealment of assets before the Secretary provides Congress with the statutory seven-day classified notice of an impending designation. In most instances, prior to the notice to Congress, we will have little or no information about assets such as bank accounts held by the target organizations in the United States; the Government has no power or mechanism to poll all of the financial institutions in this country, searching for assets of entities that might later be designated as terrorist. Rather, it is only when the Secretary of State gives notice to Congress of a planned designation, that the Secretary of the Treasury is authorized to 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 * * *." 8 U.S.C. § 1189(a)(2)(C).

Thus, the Government often cannot even attempt to take steps to prevent the removal of assets by terrorist organizations in advance of this time because we normally do not know what and where such assets are in this country.

5. At the same time, the strength of the Government's interest at stake here should be decisive with regard to the due process balancing. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964)). Moreover, "the government has a legitimate interest in preventing the spread of international terrorism, and there is no doubt that interest is substantial." *Humanitarian Law Project*, 205 F.3d at 1135.

Here, where Congress has specifically authorized the Executive Branch to act in an area of foreign policy, the Government's authority is greatest and its interest is paramount. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 674 (1981), cited in *Palestine Information Office*, 853 F.2d at 934. As the panel here recognized, this Court earlier concluded in *Palestine Information Office*, 853 F.2d at 942-43, that a post-deprivation remedy was constitutionally adequate when the Government ordered the closure of a Washington, D.C. office believed to constitute a foreign mission of the Palestine Liberation Organization, in order to coerce the PLO into changing its terrorist policies: "a post-deprivation opportunity to challenge th[e] deprivation may be all the process that is due. * * * The Supreme Court has long recognized and deferred to the need of the executive branch to act speedily and authoritatively in the realm of foreign affairs." *Ibid.*

In sum, advance notice to an entity believed by the Secretary to be a foreign terrorist organization will undermine the national security interests of the United States and its foreign policy goals, as the entity will then have the warning necessary

to take steps to remove or hide assets, or to take other actions that will shortly be forbidden once a designation becomes effective. The problem posed is a substantial and categorical one, and applies whenever new designations are being made.

Accordingly, while the Secretary could, because of this serious problem, justify in each new designation a decision not to provide advance warning to the targeted organization, the universality of this concern and the national security issues at stake should mean that the Constitution would never mandate that the Secretary provide such prior notice. The opinion here should therefore be modified to make clear that, just as the Government need not give prior notice before seizing mobile items such as cars and yachts, it need not tell entities in advance that their funds in the United States might shortly be subject to blocking, that their representatives will be barred from the United States, and that they will be prohibited from gathering material support from U.S. persons.

We emphasize that our concerns ordinarily would not apply to organizations subject to redesignation. Any funds of such organizations in the United States are already frozen, material support to them is already prohibited, and their representatives are already barred from entering the country. Consequently, we do not seek any modification of the Court's opinion with regard to redesignations.

But with respect to any new designation, the Court should modify its opinion to make clear that in that category of cases the United States need not give advance notice. Rather, it is consistent with due process in all such situations for the United States to provide an opportunity for a prompt post-designation hearing and access to

the unclassified material in the administrative record for entities that are similarly situated to the People's Mojahedin (*i.e.*, are constitutionally present in the United States and are facing deprivation of protected property interests). At the very least, the Court should modify its opinion so as not to rule out that categorical option.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing and modify its opinion, as described above.

Respectfully submitted,

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July 23, 2001

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2001, I served two copies of the foregoing "Petition for Panel Rehearing" upon the following named counsel, by first class, United States mail, postage prepaid:

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All of the parties in this case are listed in the certificates contained in the petitioners' opening briefs previously filed in this matter.

B. Rulings Under Review. References to the ruling at issue appear in the petitioners' opening briefs previously filed in this matter. This Court's decision in this case is printed at *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001).

C. Related Cases. There are no related cases currently pending. The relevant prior case is *People's Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000).