

[Derek P. Jinks, Case Report: People’s Mojahedin Organization of Iran v. United States Department of State, 94 AJIL 396 (2000), © The American Society of International Law.]

*Foreign terrorist organizations—rights under U.S. Constitution—scope of judicial review of Secretary of State’s designation*

PEOPLE’S MOJAHEDIN ORGANIZATION OF IRAN V. UNITED STATES DEPARTMENT OF STATE. 182 F.3d 17.  
U.S. Court of Appeals, D.C. Circuit, June 25, 1999.

In the first case of its kind, two groups formally designated as “foreign terrorist organizations” by the United States Secretary of State petitioned for judicial review of the designation.<sup>1</sup> Section 302 of the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>2</sup> authorizes the Secretary of State<sup>3</sup> to designate groups as “foreign terrorist organizations.”<sup>4</sup> The designation is intended to prevent domestic fund-raising by any such organization.<sup>5</sup> Pursuant to this authority, Secretary of State Albright designated the People’s Mojahedin Organization of Iran<sup>6</sup> (PMO) and the Liberation Tigers of Tamil Eelam (LTTE)<sup>7</sup> as

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<sup>1</sup> People’s Mojahedin Organization of Iran v. United States Department of State, 182 F.3d 17 (D.C. Cir. 1999). The two groups filed separate petitions. Because they raised similar claims under the same statute, the court addressed both petitions in one opinion. *See id.* at 19 n.1.

<sup>2</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 28, 40 & 42 U.S.C.).

<sup>3</sup> The term “Secretary,” which is used throughout section 302, “means the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General.” 8 U.S.C. §1189(c)(4).

<sup>4</sup> *Id.* §1189(1).

<sup>5</sup> In particular, section 302 (“Designation of Foreign Terrorist Organizations,” codified at 8 U.S.C. §1189) enables the Secretary of State to make the legal determinations required to trigger section 303 (“Prohibition of Terrorist Fundraising,” codified at 18 U.S.C. §2339B). Congress enacted these provisions of AEDPA to “strictly prohibit terrorist fundraising in the United States.” H.R. Rep. No. 104-383, at 43 (1995). Finding that many terrorist “organizations operate under the cloak of a humanitarian or charitable exercise,” Congress concluded that “[t]here is no other mechanism, other than an outright prohibition on contributions, to effectively prevent such [terrorist] organizations from using funds raised in the United States to further their terrorist activities abroad.” *Id.* at 43, 45. *See also* Humanitarian Law Project v. Reno, 9 F.Supp.2d 1176, 1193 (C.D. Cal. 1998) (discussing the purposes of these provisions).

<sup>6</sup> The PMO is an anti-Western Iranian dissident group with Marxist and Islamic ideological leanings. According to the information provided to the court by the

“foreign terrorist organizations” by order effective October 8, 1997.<sup>8</sup> In separate petitions filed for judicial review of their designations, the groups challenged both the merits of the Secretary’s findings and the constitutionality of the administrative procedures.<sup>9</sup> The D.C. Circuit denied the petitions, holding that (1) foreign groups have no due process rights infringed by section 302 of AEDPA,<sup>10</sup> (2) the court has authority to review only the Secretary’s findings that the organizations in question are “foreign” and engage in “terrorist activities,”<sup>11</sup> and (3) the administrative record provides “substantial support” for the Secretary’s determination that the two groups are “foreign” and engaged in “terrorist activities.”<sup>12</sup>

As the court acknowledges, the controlling statute in this case is extraordinary.<sup>13</sup> AEDPA proscribes all material support to designated foreign terrorist organizations<sup>14</sup> and

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Secretary, its “primary goal is the overthrow of the Iranian Government, after which it would seek to establish a nontheocratic republic.” *People’s Mojahedin Org.*, 182 F.3d at 20. The group has been linked to several acts of political violence, including multiple bombings of public areas and corporate offices. The Secretary also provided reports linking the group to the assassination of American citizens and the takeover of the U.S. embassy in Tehran. *Id.*

<sup>7</sup> Since its founding in 1976, the LTTE has sought self-determination for the Tamil people of “Tamil Eelam” in the northern and eastern provinces of Sri Lanka. The Tamils constitute an ethnic group that, according to the LTTE, has for decades has been subjected to extensive human rights abuses and discriminatory treatment by the majority Sinhalese, who have governed Sri Lanka since the nation gained its independence from Great Britain in 1948. The LTTE has been linked with several assassinations and other violent tactics, including public bombings. *People’s Mojahedin Org.*, 182 F.3d at 19–20.

<sup>8</sup> *See* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (1997). The designation also covers twenty-eight other organizations. *See id.*

<sup>9</sup> *See* 8 U.S.C. §1189(b)(1).

<sup>10</sup> *People’s Mojahedin Org.*, 182 F.3d at 22–23.

<sup>11</sup> *Id.* at 23–24. The court also concluded that the Secretary’s finding that the organizations’ activities threatened national security is nonjusticiable. *Id.* at 23; *see also* Haig v. Agee, 453 U.S. 280 (1981); *Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

<sup>12</sup> 182 F.3d at 24–25.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> Section 301 expresses Congress’s specific finding 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.” 18 U.S.C. §2339B note. Section 303

authorizes the Secretary of the Treasury to freeze all domestic assets of such groups.<sup>15</sup> In order for a group to be designated as a “foreign terrorist organization,” the Secretary of State must find under section 302 that “(A) the organization is a foreign organization; (B) the organization engages in terrorist activity . . . ; and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.”<sup>16</sup> Prior to designating an organization as a foreign terrorist organization, the Secretary must notify specified members of Congress.<sup>17</sup> The designation becomes effective upon publication seven days thereafter.<sup>18</sup>

Section 302 provides that any group designated as a “foreign terrorist organization” may seek judicial review of the Secretary’s designation in the United States Court of Appeals for the District of Columbia.<sup>19</sup> Judicial review “shall be based solely

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provides: “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.” 18 U.S.C. §2339B(a). Section 323 defines the term “material support or resources” as “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” 18 U.S.C. §2339A(b).

<sup>15</sup> 8 U.S.C. §1189(a)(2)(C).

<sup>16</sup> *Id.* §1189(a)(1).

<sup>17</sup> *See id.* §1189(a)(2)(A).

<sup>18</sup> *See id.* §1189(a)(2)(B).

<sup>19</sup> *Id.* §1189(b)(1). The action must be filed within thirty days of the published designation. *Id.* Note that the designation may be challenged only by the groups themselves—and not by other organizations or individuals whose interests may be directly implicated by the designation. Section 1189(a)(8) provides that a defendant in a criminal action is not 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.” *Id.* §1189(a)(8). In this case, the court was careful to avoid deciding whether section 1189’s judicial review provisions would violate the rights of U.S. citizens prosecuted for transferring resources to designated terrorist groups. *See People’s Mojahedin Org.*, 182 F.3d at 22 n.6 (“Because the issue is not before us, we do not decide whether section 1189 deprives those in the United States of some constitutional right if they are members of, or wish to donate money to, an organization designated by the Secretary.”). It is unfortunate that the court was so unconcerned about this question and the deeply problematic implications of their position under established U.S. constitutional law. *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944).

upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation.”<sup>20</sup> Section 302 also establishes the grounds upon which the Court of Appeals may set aside the Secretary’s designation.<sup>21</sup>

The PMO and the LTTE filed petitions for review arguing that (1) the Secretary’s fact-finding procedures deprived them of due process of law and (2) the evidence does not provide substantial support for the Secretary’s finding that the groups are foreign organizations engaged in terrorist activities that threaten national security.<sup>22</sup> The court rejected both claims. In support of the first claim, petitioners argued that the U.S. Constitution’s Fifth Amendment Due Process Clause prohibits the government from condemning organizations without giving them notice and an opportunity to be heard.<sup>23</sup> The court recognized that the “administrative record”<sup>24</sup> required under section 302 to support the Secretary’s finding was unusual. “Unlike the run-of-the-mill administrative proceeding, here there is no adversary hearing, no presentation of what courts and agencies think of as evidence, no advance notice to the entity affected by the Secretary’s internal deliberations.”<sup>25</sup> Nevertheless, despite the superficial appeal of the groups’ due

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<sup>20</sup> 8 U.S.C. §1189(b)(2).

<sup>21</sup> “The Court shall hold unlawful and set aside a designation 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), or (E) not in accord with the procedures required by law.” *Id.* §1189(b)(3). In addition to having its designations set aside by the Court of Appeals, a group may cease to be designated as a foreign terrorist organization if: (1) the Secretary fails to renew the designation after two years (*id.* §1189(a)(4)(B)); (2) Congress blocks or revokes a designation (*id.* §1189(a)(5)); or (3) the Secretary revokes the designation based on a finding that changed circumstances or national security warrants such a revocation (*id.* §1189(a)(6)(A)).

<sup>22</sup> The LTTE also argued that it is a government rather than being a “foreign organization” within the meaning of section 302. The court rejected this claim on the grounds that the recognition or nonrecognition of foreign governments is “solely entrusted to the political branches.” *People’s Mojahedin Org.*, 182 F.3d at 24. *See also* *Jones v. United States*, 137 U.S. 202, 212–13 (1890).

<sup>23</sup> *See* *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (plurality opinion) (setting aside the Attorney General’s designation of several organizations as “Communist” without providing them notice and opportunity to be heard).

<sup>24</sup> 8 U.S.C. §1189(a)(3)(B).

<sup>25</sup> 182 F.3d at 19.

process claim,<sup>26</sup> the court held that absent substantial connections to the United States, the PMO and the LTTE enjoy no such protections under the U.S. Constitution;<sup>27</sup> since neither group challenged the Secretary's finding that they are "foreign" organizations, the court concluded that the Due Process Clause does not apply to their case.<sup>28</sup> With regard to the second claim, the court refused to review the Secretary's determination that PMO and LTTE activities threatened national security within the meaning of the statute.<sup>29</sup> Relying on *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,<sup>30</sup> the court held that "it is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch."<sup>31</sup>

The only remaining question was whether the administrative record provided "substantial support" for the Secretary's findings that the groups engaged in "terrorist activities" as defined under AEDPA.<sup>32</sup> The PMO and the LTTE argued that the evidence in the administrative record fell well below this standard. Although it acknowledged that the record contained nothing more than news reports and other hearsay that had not been subjected to any adversarial examination, the court rejected the groups' suggestion that it should embrace a robust interpretation of the "substantial support" standard.<sup>33</sup>

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<sup>26</sup> *Id.* at 22.

<sup>27</sup> *Id.* ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."); *see also* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

<sup>28</sup> The court did point out, however, that cases involving the seizure of domestic assets might require a different approach. 182 F.3d at 22.

<sup>29</sup> "National security" is defined as "the national defense, foreign relations, or economic interests of the United States." 8 U.S.C. §1189(c)(2).

<sup>30</sup> 333 U.S. 103 (1948).

<sup>31</sup> 182 F.3d at 23. The court rejected, however, the suggestion that the nonjusticiability rationale applies equally to the Secretary's designations. The court concluded that meaningful judicial review of the Secretary's other requisite findings is necessary to give effect to the statute's judicial review provision. *Id.* at 23–24.

<sup>32</sup> 8 U.S.C. §1189(a)(1)(B); *see* 8 U.S.C. §1182(a)(3)(B)(ii) (defining "terrorist activity").

<sup>33</sup> Specifically, the court refused to review the Secretary's findings under something akin to the "substantial evidence" standard of the Administrative Procedure Act. 182 F.3d at 24 n.8 ("Section 1189(b)(3), although generally parroting the language of the Administrative Procedure Act, modified the 'substantial evidence' standard of 5 U.S.C. §706(2)(E) to say instead 'substantial support.' Perhaps this was in recognition of the decision of this court that whenever a statute requires the agency action to be supported

Assuming a highly deferential posture, the court held that section 302 imposes no constraints on the Secretary's fact-finding process and that the "record, as the Secretary has compiled it, not surprisingly contains 'substantial support' for her findings."<sup>34</sup>

Accordingly, the court denied the petitions for review.

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Although the immediate question presented by *People's Mojahedin Organization* is the scope of judicial review under section 302 of AEDPA, the larger issue raised by the case is the scope of discretion to be accorded the executive branch in taking action against suspected foreign terrorist organizations.

From the outset of its substantive consideration of the cases before it, the court's frustration with the administrative record supporting the Secretary's action was apparent:

At this point in a judicial opinion, appellate courts often lay out the "facts." We will not, cannot, do so in these cases. What follows in the next two subsections may or may not be facts. The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.<sup>35</sup>

Indeed, as the court's analysis progressed, it occasionally even used quotation marks in referring to the "administrative record" and "evidence." In view of section 302's requirement that the record provide "substantial support" for the Secretary's factual findings,<sup>36</sup> the question presented was straightforward: did an administrative record that was so thin nevertheless satisfy the statutory requirement? In deciding this question, the court would be determining, in turn, its judicial role in relation to section 302. If it set aside the Secretary's findings and remanded for legally sufficient fact-finding, it would be doing nothing more and nothing less than it does in reviewing the interpretation and application of other statutes. Alternatively, if the court denied the petitions for review, it would thereby be bypassing any meaningful judicial scrutiny of either the administrative record or the Secretary's actions under section 302.

In denying the petitions, the court recognized that it was approving a minimalist interpretation of "substantial support"—an interpretation that left little or no room for judicial review.

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by 'substantial evidence'—a term of art in administrative law—there must be 'some sort of adversary, adjudicative-type procedures' before the agency. *Mobil Oil Corp. v. FPC*, 157 U.S. App. D.C., 235, 483 F.2d 1238, 1259 (D.C. Cir. 1973).").

<sup>34</sup> *Id.* at 24. The court also stated that "any one of the incidents attributed to the LTTE and to the [PMO] would have sufficed under the statute." *Id.* at 24–25.

<sup>35</sup> *Id.* at 19.

<sup>36</sup> 8 U.S.C. §1189(b)(3).

*We reach no judgment whatsoever* regarding whether the material before the Secretary is or is not true. . . . [T]he record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. . . . Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received—something we have *no way of judging*.<sup>37</sup>

Despite section 302’s explicit provision for judicial review, the court held that its “only function was to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism.”<sup>38</sup> In leaving the Secretary such broad and unfettered discretion in the fact-finding process,<sup>39</sup> the court effectively isolated the Secretary’s actions under section 302 from judicial scrutiny.

From both national and transnational perspectives, this result is unfortunate. From the national perspective, *People’s Mojahedin Organization* represented—as the first case brought under section 302—a potentially important moment in the development and consolidation of U.S. antiterrorism law. AEDPA is an important and innovative component of U.S. antiterrorism policy. The statute employs a reasonably specific definition of terrorism. Section 302 mandates a formal procedure for executive determinations of whether particular foreign organizations are classified as “terrorist,” and provides for substantive judicial review of such determinations. Contrary to the judicial role (and the legal protections) Congress envisioned under section 302, however, the court’s deference to the Secretary of State effectively gives unbridled discretion to the executive branch in designating foreign terrorist organizations, thereby bringing the enforcement provisions of AEDPA into play against them. It will therefore be political judgments, not legal ones, that determine how and to which groups the statute is applied. Indeed, by rubber-stamping the Secretary’s action, the court has allowed the reputation of the judicial branch to be “borrowed by the political branches to cloak their work in the neutral colors of judicial action.”<sup>40</sup>

From a transnational perspective, AEDPA is the product of a broader U.S. and international commitment to develop a global antiterrorism regime. This regime has been taking shape through the development of both international norms and effective

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<sup>37</sup> 182 F.3d at 25 (emphasis added).

<sup>38</sup> *Id.*

<sup>39</sup> The court posits that Congress’s use of the phrase “substantial support” rather than “substantial evidence” lends support to the court’s interpretation of its role. *Id.* at 24 n.8. This distinction is arguably illusory, however, and, at the very least, the court reads too much into the phrases. Federal courts, including the D.C. Circuit, often use the phrase “substantial support” when reviewing agency action under the “substantial evidence” standard. *See, e.g.,* *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 556 (D.C. Cir. 1999).

<sup>40</sup> *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

transnational enforcement mechanisms,<sup>41</sup> including the multitude of treaties requiring the parties to prosecute or extradite terrorist suspects found within their borders.<sup>42</sup> Nevertheless, building a global antiterrorist regime requires not just treaties, but effective cooperation in implementing them. One of the obstacles to such cooperation is the widespread perception that “terrorism” is an irreducibly political and ideological, rather than legal, concept. The resulting disputes about who is a terrorist and what is a terrorist organization have undercut, and continue to undercut, international cooperation and the application and enforcement of treaties. In this context, section 302’s provisions for judicial review gave the court an opportunity to analyze terrorism from a relatively nonpolitical perspective, and in terms of specific statutory definitions of “terrorist organization” and “terrorist activity.” Such an analysis would have served as an important counterweight to the political and ideological conception of terrorism, and as a first step in surmounting the divisive controversies to which that conception gives rise within the international arena. The opportunity has been squandered.

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<sup>41</sup> See Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT’L L. 559, 561 (1999) (noting that this approach is central to U.S. antiterrorism policy).

<sup>42</sup> See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 UST 1643, 860 UNTS 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 565, 974 UNTS 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 UST 1975, 1035 UNTS 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, *reprinted in* 19 ILM 33; International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 UNTS 85.