

No. 02-50355

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff/Appellant,

v.

HOSSEIN AFSHARI, ET AL.,  
Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

OPPOSITION TO PETITION FOR REHEARING  
AND REHEARING EN BANC

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**INTRODUCTION**

Pursuant to this Court's order of August 8, 2005, the plaintiff/appellant United States files this opposition to the petition for rehearing and rehearing en banc filed by defendants/appellees Hossein Afshari, *et al.*<sup>1/</sup> Defendants seek rehearing because a panel of this Court has unanimously reinstated the indictment against them.

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<sup>1/</sup> The other defendants/appellees in this action have joined the petition for rehearing filed by defendant Roya Rahmani. Thus, this opposition applies as well to the other defendants.

Defendants Rahmani, *et al.*, have not filed a serious rehearing petition. The petition meets none of the criteria for rehearing or rehearing *en banc*; the opinion delivered by the panel reveals that the decision here is fully consistent with prior precedent of this Court and its sister Circuits, and that the panel fully considered and dealt with the relevant Supreme Court rulings.

Indeed, as we discuss below, through their petition, defendants are actually asking this Court to create a conflict with the D.C. and Fourth Circuits. Moreover, counsel for defendants have inexcusably failed to tell this Court about a D.C. Circuit ruling that undermines one of their primary claims for rehearing. Under these circumstances, a second reconsideration by the panel is not needed, and this case plainly does not warrant the unusual commitment of judicial resources for *en banc* consideration.

Defendants' argument can be easily summarized: they claim a First Amendment right to give large amounts of money to the People's Mojahedin Organization of Iran (also known as the "MEK"), a foreign entity formally designated as a terrorist organization by the Secretary of State. Defendants assert that the Constitution guarantees them a right to make these substantial donations of funds unless the district court in this case itself holds that the People's Mojahedin engages in terrorism. This constitutional claim is seriously flawed, and defendants provide no

precedent from the Supreme Court, this Court, or any other Circuit to show that there is such a right. Defendants' entire argument consistently fails to take into account the foreign relations/national security aspect of the issues involved. This context brings into play critical factors that the defendants simply ignore.

Further, defendants' argument here is quite puzzling on a very practical level. They claim that they must have the opportunity to challenge before the district court the terrorist designation of the People's Mojahedin, even though that entity has itself unequivocally announced to the D.C. Circuit in its filings in that court that, using bombs and mortars, it attacked and assassinated high-level Iranian officials on various occasions. For example, the People's Mojahedin has publicly proclaimed that it killed, among others, the Iranian Minister of Prisons (and his bodyguards), as well as the Deputy Chief of the Iranian Joint Staff Command. See Brief of Petitioner in *People's Mojahedin Organization of Iran v. Department of State*, No. 01-1465 (D.C. Cir.), at 32-34. The organization additionally informed the D.C. Circuit that it had attempted to assassinate the Iranian Supreme Leader, shelling his office with mortar rounds (*id.* at 35-38). See *People's Mojahedin Organization of Iran v. Department of State*, 327 F.3d 1238, 1243 (D.C. Cir. 2003) (noting that, as to the issue of whether the People's Mojahedin engages in terrorist activities, this group "has effectively

admitted not only to the adequacy of the unclassified record, but the truth of the allegation”).

In light of these statements, the defendants here are in a very peculiar position in arguing that the district court must have the opportunity to overrule the Secretary of State – whose determination was affirmed by the D.C. Circuit – and declare that the People’s Mojahedin is not a terrorist organization.

### STATEMENT

1. Defendants Afshari, *et al.*, were indicted under 18 U.S.C. 2339B for sending substantial sums of money over several years to the People’s Mojahedin, a foreign terrorist entity that operated primarily out of Iraq and other foreign countries, attacking Iranian targets and officials.

There should be no confusion about the deadly nature of the People’s Mojahedin, a fact that the organization itself has taken considerable pains to acknowledge and publicize. Thus, as described above, in its filings in the D.C. Circuit, the People’s Mojahedin unequivocally announced that it had attacked and assassinated high-level Iranian officials, and had attempted to kill the head of the Iranian state.

Because of its activities, the People’s Mojahedin was designated in 1997 and 1999, by the Secretary of State as a Foreign Terrorist Organization (“FTO”) pursuant

to the Secretary's authority under the Antiterrorism and Effective Death Penalty Act of 1996. In that statute, in order to protect the foreign relations and national security interests of the United States, Congress made knowing provision of material support to an FTO designated by the Secretary a felony. See 18 U.S.C. 2339B. The basic purpose of this statute is to stop funding of international terrorism by persons within the United States. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136-37 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

2. Defendants challenged their indictment, arguing that the Antiterrorism Act is unconstitutional because it does not allow them in these criminal proceedings to attack the validity of the Secretary's designation of the People's Mojahedin as an FTO. The statute provides that entities designated by the Secretary can obtain review of their designations within a specified period in the D.C. Circuit, but it precludes collateral challenges to a designation by a defendant in a criminal matter. See 8 U.S.C. 1189(a)(8) and (b)(1). In other words, when the Secretary designates groups such as the People's Mojahedin or the Tamil Tigers or al-Qaeda as FTOs, those entities themselves can challenge the designations in the D.C. Circuit (as both the People's Mojahedin and the Tamil Tigers have done). However, the ability to challenge the designations is given to the organizations themselves, and not to third parties such as the defendants here.

3. A panel of this Court unanimously reversed the district court's order dismissing the indictment (see 392 F.3d 1031). This Court first held that defendants could challenge the constitutionality of the statutory scheme, but it overturned the district court's conclusion that the Antiterrorism Act violates due process insofar as it limits review of the Secretary's designation determinations to actions brought in the D.C. Circuit by FTOs themselves. Second, this Court rejected defendants' contention that they have a First Amendment right to donate money to designated foreign organizations like the People's Mojahedin, unless the judge or jury in their criminal case agrees with the Secretary's FTO designation. The Court specifically addressed and rejected the defendants' argument that, under the Supreme Court's decision in *McKinney v. Alabama*, 424 U.S. 669 (1976), each defendant in a criminal case must be allowed to collaterally attack the Secretary's designation of FTOs.

Defendants sought reconsideration, and the panel issued a new decision (see 412 F.3d 1071), which expanded on some of the discussion of the issues, but did not change the substance of the Court's rulings.

### **REASONS FOR DENYING REHEARING**

A. Defendants' plea for rehearing is premised principally on a flawed constitutional claim. Defendants argue that they have a First Amendment right to give money to foreign entities unless those entities are actually engaged in terrorist

activities threatening the United States, and that the determination of that fact is made by the district court here rather than by the Secretary of State under a statutory scheme created by Congress. Defendants accordingly assert that they must be able to collaterally attack the Secretary's determination that the People's Mojahedin indeed carried out terrorism. To press this argument, defendants rely on various cases, such as *Buckley v. Valeo*, 424 U.S. 1 (1976), involving political fundraising and donations of money in a purely domestic context.

Defendants' argument is mistaken. This case involves the distinct issue of whether Congress can prohibit donations of funds to foreign entities, not whether it can restrict fundraising within the United States. The Supreme Court and other federal courts have determined that in the foreign affairs realm Congress and the Executive can restrict dealings with foreign entities in the face of constitutional challenges, and the courts have refused to second-guess the foreign policy/national security determinations made by the Executive in imposing such sanctions.

For example, the Executive imposed a broad embargo on dealings with Cuba, including travel-related transactions. Individuals challenged this embargo, arguing that it violated their substantive due process rights. The Supreme Court rejected this claim, deferring to the Executive determination that Cuba must be denied hard

currency, in part because of its perceived support for terrorism. *Regan v. Wald*, 468 U.S. 222, 240-44 (1984).

Most significantly for our purposes today, the Supreme Court in *Regan*, 468 U.S. at 243, rejected the plaintiffs' contention that the Executive had provided insufficient reasons to justify the Cuban embargo. The Court explained that the conduct of foreign relations is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." 468 U.S. at 242.

Defendants' argument here cannot be squared with the Supreme Court's approach in *Regan*. There, the Supreme Court upheld the Executive's ban on certain types of association with Cuba, and refused to engage in its own decision making as to whether that ban was warranted.

This approach has been adopted by lower court decisions as well, including, most significantly, the relevant part of this Court's opinion in *Humanitarian Law Project*, 205 F.3d at 1136-37, which has been adopted by this Court *en banc*. *Humanitarian Law Project v. Department of Justice*, 393 F.3d 902 (9th Cir. 2004).

In holding that Congress could constitutionally predicate criminal liability under Section 2339B on the provision of material support to designated foreign entities, this Court specifically rejected freedom of association claims by would-be

donors, based on the alleged inadequacy of the underlying designation process. See 205 F.3d at 1137 (statutory designation standard sufficiently precise to satisfy constitutional concerns, given the foreign affairs context; moreover, judicial deference to Secretary's designation decision is a necessary concomitant of the foreign affairs power). Accord *Farrakhan v. Reagan*, 669 F. Supp. 506, 512 (D.D.C. 1987), *affd. without opin.*, 851 F.2d 1500 (D.C. Cir. 1988) (“[T]he court has little choice but to defer to the judgment of the President that all economic intercourse with Libya should cease”). Accord *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996) (Court refuses to review the validity of the Executive's reasons for imposing an embargo regarding Cuba).

These various decisions make clear that, in the foreign relations realm, the federal courts should and do respect the determinations made by the Executive to restrict or bar dealings with foreign entities, even in the face of constitutional claims. This principle means that, in the case at bar, defendants are simply mistaken in arguing that the Constitution demands that the district court in this case determine whether or not it believes that the People's Mojahedin is a terrorist entity.

Defendants' argument that they can donate money to foreign organizations unless the individual district court in their particular case agrees that the organization at issue engages in terrorism would have immense consequences, because it calls into

question the validity of various other important statutory provisions. For example, under 18 U.S.C. 2332d, Congress has imposed criminal punishment on those who knowingly engage in financial transactions with foreign governments listed by the Secretary of State as supporters of terrorism (see 50 U.S.C. App. 2405). Under defendants' theory, no such criminal prosecution could proceed unless the district court in a specific case itself determined that the foreign state at issue actually engages in support of terrorism. Otherwise, as defendants' argument runs, they have a First Amendment right to donate money to foreign entities.

Defendants thus say that the Constitution compels a hearing at which a district court would be required to attempt to determine whether, for instance, the government of Syria actually supports terrorism. Not surprisingly, defendants do not suggest precisely how an individual district judge would intelligently make such a finding (for example, would each judge hear *in camera/ex parte* testimony from the Secretary of State, the Director of Central Intelligence, and the President's National Security Advisor?).

Similarly, under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*), the President promulgates Executive Orders prohibiting financial dealings with various foreign governments or entities – such as Libya, the Taliban, or Hamas – because he believes that they are acting contrary to the interests of the

United States, and he wishes to sanction them. See, e.g., Executive Order No. 12947 (60 Fed. Reg. 5079 (1995)). Violations of such embargoes are criminally punishable. See, e.g., *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093-95 (4th Cir. 1993).

Again, under defendants' theory, despite the President's decision, individuals could be prosecuted for violating these Executive Order prohibitions only if the presiding district court in each criminal prosecution under the statute reassesses and redetermines that Libya, the Taliban, or Hamas actually is a threat to the United States. In short, courts would be required repeatedly and potentially inconsistently to address quintessentially political questions, under some standard that defendants do not define.

In a footnote (at 13 n.6), defendants appear to concede that their argument might not apply to the context of dealings with foreign governments, as opposed to other foreign entities. Defendants give no explanation as to why Congress and the Executive would have more power in regulating financial dealings with foreign states than with other foreign entities, and it is difficult to see why such a rule would be constitutionally compelled.

Moreover, we note that there are often no clear lines between foreign states and entities within those states. For example, the United States Government never recognized the Taliban regime as the legitimate government of Afghanistan. In

defendants' view, this would mean that the President could not bar donations to the Taliban unless a district court in a particular case determined that the Taliban engaged in terrorism. Similarly, the LTTE is not a recognized foreign state, although it exercises power over a large section of Sri Lanka; where does such an entity stand in defendants' conception of the constitutional foreign affairs power?

In sum, the central premise of defendants' argument is wrong: none of them has a constitutionally protected right to associate by providing money to foreign entities with whom the Executive has barred dealings. In the foreign policy arena, the political branches determine whether to allow transactions with foreign entities, and those determinations are not vulnerable to constitutional attack in the various district courts.

**B.** Defendants nevertheless argue that their position is compelled by *McKinney v. Alabama*, 424 U.S. 669 (1976), and that rehearing is warranted because this Court's decision here conflicts with *McKinney*. This argument is mistaken because it again disregards the critical foreign affairs context of this case and the precedent by the Supreme Court and this Court governing this special area.

In *McKinney*, the Supreme Court determined that a prior labeling of material as obscene by an administrative body in one part of Alabama could not bind a defendant in a later criminal prosecution elsewhere in the state when he argued that

the prosecution violated his First Amendment free speech rights. The Court ruled that the defendant must have an opportunity in some forum to litigate the nature of the material at stake before he could be convicted of selling obscene publications. *Id.* at 676-77.

*McKinney* does not control here because it had nothing to do with foreign relations and national security. Consequently, the precedents discussed above had no relevance – there was no Executive determination compelling deference. To the contrary, the question at issue in *McKinney* was a quintessentially judicial one that the Supreme Court had held must be made by the courts in the many varying circumstances in which it arises.

The situation in *McKinney* starkly contrasts to the question of whether the People's Mojahedin is a terrorist entity threatening the national security of the United States, considering its activities in Iraq, Iran, and elsewhere around the globe. That determination involves intelligence information (often classified), and sensitive political, foreign relations, and national security issues. This judgment must be made by the political branches as part of a unified national antiterrorism and foreign policy, which differs sharply from the determination about whether particular material is obscene, requiring a judicial inquiry based often on the specific nature of the material and uniquely localized considerations (as *McKinney* argued in his defense, the

definition of obscenity varies “according to contemporary community standards” (*id.* at 673)).

In contrast to obscenity determinations, there are compelling reasons for Congress to have centralized review over FTO designations in the D.C. Circuit, and to have restricted the timing and scope of that review. Major problems for enforcement of the Antiterrorism Act’s goal of limiting terrorist fundraising in the United States would arise if each district court in which a prosecution is brought were free to override the decision of the Secretary of State, especially if that decision has already been reviewed and upheld by the D.C. Circuit, and enforced in prior terrorism financing prosecutions.

Further, for foreign relations purposes, there is an obvious interest in finality once FTOs designations are made. See *United States v. Bozarov*, 974 F.2d 1037, 1044 (9th Cir. 1992) (“the need for uniformity in the realm of foreign policy is particularly acute; 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 [statute]”), *cert. denied*, 507 U.S. 917 (1993). Yet, under defendants’ argument, district courts around the United States would at different times make potentially conflicting decisions about whether a terrorist organization designation is valid or not. Not surprisingly, the full Fourth Circuit recently rejected

the same argument made by the defendants here that the district court in a criminal case must make its own determination about the validity of an FTO designation. See *United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc).<sup>2/</sup>

C. Defendants also argue that rehearing should be granted because the prosecution here cannot proceed since the D.C. Circuit erred in declining to vacate the 1999 designation of the People's Mojahedin when that court remanded the matter to the Secretary of State for further administrative proceedings (the D.C. Circuit left the designation in place pending the outcome of the remand to the Secretary). See *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 209 (D.C. Cir. 2001). Thus, defendants urge this Court to override the D.C. Circuit's ruling on this point.

We note first that defendants do not mention in their petition that the D.C. Circuit considered the 1999 People's Mojahedin designation after the remand, and upheld its validity. See *People's Mojahedin Organization*, 327 F.3d at 1242-44 (procedures on remand satisfied due process and the administrative record supported

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<sup>2/</sup> The judgment in *Hammoud* was vacated by the Supreme Court with regard to sentencing issues. See 125 S. Ct. 1051 (2005). The aspects of the decision not involving sentencing were subsequently reinstated by the Fourth Circuit *en banc*. See 405 F.3d 1034 (2005).

the designation because the People's Mojahedin effectively admitted that it is a foreign organization engaged in terrorist activity).

Second, defendants' argument is wrong as a statutory matter because the elements of the criminal case before the district court included only the fact of the designation. See 18 U.S.C. 2339B(a) & (g)(6); *Hammoud*, 381 F.3d at 331. Because the D.C. Circuit did not set aside the designation, this element was not affected.

Third, Congress entrusted designation appeals exclusively to the D.C. Circuit, and did not intend for each district court handling Section 2339B prosecutions across the country to second-guess the D.C. Circuit and opine – possibly inconsistently – on whether that court had erred in its designation rulings. See *Humanitarian Law Project*, 205 F.3d at 1137 (challenge to the judicial review scheme must be raised before the D.C. Circuit).

In this instance, the D.C. Circuit exercised its discretion, in the interests of national security and foreign relations, to leave the 1999 designation in place as the Secretary conducted further proceedings on remand. *National Council of Resistance*, 251 F.3d at 209. That decision was fully within the D.C. Circuit's authority, and this Court should reject defendants' suggestion that it should override the D.C. Circuit's order. See *Hecht Co. v. Bowles*, 321 U.S. 321, 328 (1944) (rejecting statutory construction argument similar to defendants' contention here).

Finally, even if there were some flaw with a prosecution based on the 1999 designation, that fact would not require dismissal of the indictment in its entirety; the indictment is also based on the 1997 designation of the People's Mojahedin. The D.C. Circuit fully upheld that designation, with which there were no due process problems. See *People's Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17, 18-25 (D.C. Cir. 1999).

**D.** Finally, defendants chastise the panel (at 18-19) for failing to address their argument that the process by which FTO designations are made must provide sufficient procedural protections. Defendants cite *Freedman v. Maryland*, 380 U.S. 51 (1965), for this uncontroversial proposition. That case involved a criminal conviction for a theater owner who showed a film without first submitting it to a state censorship board; the film actually met state statutory standards, and the censorship process did not adequately protect constitutionally protected free expression rights.

It is easy to see why the panel here apparently did not view *Freedman* as relevant to this case, which involves prosecution of individuals who provided substantial funds to a foreign terrorist organization for which material support was barred because of its designation by the Secretary of State.

Moreover, foreign countries such as Syria, Iran, and North Korea have no due process rights, and the political branches can of course sanction them for perceived

misbehavior, such as supporting terrorists or engaging in weapons proliferation, without affording them a hearing or other process. See *People's Mojahedin Organization of Iran*, 182 F.3d at 22 (“No one would suppose that a foreign nation had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a change in policy”).

Similarly, the United States can sanction many other dangerous foreign entities without affording them a hearing or other process, and in fact the overwhelming majority of designated FTOs clearly lack any constitutional due process rights. But the upshot of defendants' argument is that, while Iraq or Libya or al-Qaeda do not have any due process rights, the United States cannot enforce sanctions against U.S. persons who violate embargoes on dealings with these entities unless either the entities or their material supporters and suppliers in the United States receive notice of the proposed sanction, an opportunity to be heard, and meaningful judicial review. In other words, according to defendants, the United States could not prosecute or punish U.S. persons for supplying funds to al-Qaeda in violation of sanctions imposed on that group for the attacks of September 11, 2001, unless the Government provided notice and a hearing to al-Qaeda or its later supporters in the United States on whether al-Qaeda was really responsible for the attacks, together with meaningful judicial review.

The absurdity of this proposition hardly needs discussion; simply put, there are no such constraints on the ability of the United States to conduct foreign policy and take effective measures against foreign entities it perceives as hostile. See, e.g., *Regan*, 468 U.S. at 243 (upholding against constitutional attack restrictions on travel to Cuba by American citizens because “[i]n the opinion of the State Department,” Cuba had provided widespread support for violence and terrorism) (emphasis added).

Even assuming, contrary to fact, that under some circumstances the People’s Mojahedin’s U.S. supporters could be entitled to due process safeguards in the designation process on the issue of whether the People’s Mojahedin actually engages in violence, no one has a constitutional right to a hearing before the Secretary on whether an avowedly violent foreign group should be considered a liberation movement rather than a terrorist organization, or whether its violence damages or advances U.S. national security. This sort of issue is clearly a non-justiciable political question. See *People’s Mojahedin*, 182 F.3d at 23.

We further note that defendants’ argument is at clear odds with this Court’s decision in *Humanitarian Law Project*, which specifically rejected the claims of would-be material supporters to a designated group that the designation process did not adequately protect their First Amendment rights. See 205 F.3d at 1136-37.

In sum, there is a process for designation of FTOs, and those entities are statutorily authorized to challenge their designations if they choose to do so, as the People's Mojahedin did unsuccessfully in the D.C. Circuit on three separate occasions. Once the People's Mojahedin was designated, defendants could no longer provide money to it, and this Court has already *en banc* in *Humanitarian Law Project* upheld the constitutionality of that statutory prohibition.

### CONCLUSION

For the foregoing reasons, the petition for rehearing should be denied.

Respectfully submitted,

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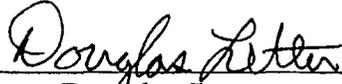
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August 24, 2005

## CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4) and 41, I certify that the foregoing opposition is proportionally spaced, has a type face of 14 points, and contains 4,185 words, according to the word processing system used to prepare this brief. In addition, the brief does not have an average of more than 280 words per page, including footnotes and quotations.

  
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Douglas Letter

## CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August 2005, I served the foregoing Opposition to Petition for Rehearing and Rehearing En Banc upon the Clerk of this Court by Federal Express overnight service, and by first class mail to each counsel below, unless otherwise noted:

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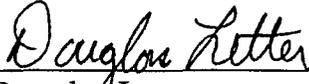
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