

ORAL ARGUMENTS NOT YET SCHEDULED

No. 03-1392

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

KAHANE CHAI, et al.,
Petitioners,

v.

DEPARTMENT OF STATE, et al.,
Respondents.

PETITION FOR REVIEW OF A FINAL ORDER OF THE SECRETARY OF STATE

BRIEF OF PETITIONERS KACH, KAHANE CHAI, AND KAHANE.ORG
CORRECTED

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**Certificate of Counsel for Petitioners Kach, Kahane Chai, and Kahane.org
Under Circuit Rule 28(a)(1) as to Parties, Rulings and Related Cases**

(A) Parties and Amici. Petitioners Kach, Kahane Chai, and Kahane.org are challenging Respondents Secretary of State's and the United State Department of State's designation of them as Foreign Terrorist Organizations ("FTOs"). (Petitioners Kahane Chai and Kach were previously designated separately as FTOs. Respondents later designated Kach as an alias of Kahane Chai. For the first time Respondents designated Kahane.org an FTO as an alias of Kahane Chai.) This Court has original jurisdiction in these matters. Currently the only parties are Petitioners and Respondents. There are no intervenors or amici.

Neither Petitioner Kahane Chai nor Kach is a corporation, association, joint venture, partnership, syndicate or other similar entity.

Concerning Circuit Rule 26.1 disclosure, counsel for Petitioners quotes from and makes as part of the record "CERTIFICATE OF COUNSEL FOR PETITIONERS KAHANE CHAI, KACH, AND KAHANE.ORG PURSUANT TO CIRCUIT RULE 28(a)(1)", filed December 18, 2003 in the present matter:

"Petitioner Kahane.org, a website maintained by people who have no ownership interests, and which has not issued shares or debt securities, was formed to disseminate, through the Internet, teachings and material by and about Rabbi Meir Kahane. Petitioner Kahane.org is closely associated with a non-profit corporation. Without conceding that it is, said non-profit corporation could be viewed as a "parent company". Due to attorney-client confidentiality, and Client's exposure to damaging consequences, counsel is not at liberty to identify said non-profit corporation.

“Yet in as much as counsel believes the purpose [of] Circuit Rule 26.1 is to inform the Court as to any possible conflict of interest, Counsel respectfully submits that he can follow the spirit of Rule 26.1 by informing the Court that the name of the “parent company” is extremely similar to that of Kahane Chai or one of the Petitioner’s alleged aliases, as listed in Respondents’ October 2, 2003 FTO designations. Below is the list of ‘aliases’ of Kahane Chai as they appear in the Federal Register of October 2, 2003 (See Exhibit 1 for original):

Kahane Chai

Also known as Kach

Also known as Kahane Lives

Also known as Kfar Tapuah Fund

Also known as The Judean Voice

Also known as The Judean Legion

Also known as The Way of the Torah

Also known as The Yeshiva of the Jewish Idea

Also known as the Repression of Traitors

Also known as Dikuy Bogdim

Also known as DOV

Also known as the State of Judea

Also known as the Committee for the Safety of the Roads

Also known as the Sword of David

Also known as Judea Police

Also known as Forefront of the Idea

Also known as The Qomemiyut Movement

Also known as KOACH

Also known as New Kach Movement

Also known as newkach.org

Also known as Kahane

Also known as Yeshivat HaRav Meir

Also known as the International Kahane Movement

Also known as Kahane.org

Also known as Kahane.net

Also known as Kahanetzadak.com

Also known as Kahane Tzadak

Also known as the Hatikva Jewish Identity Center

Also known as the Rabbi Meir David Kahane Memorial Fund

Also known as Friends of the Jewish Idea Yeshiva

Also known as Judean Congress

Also known as Jewish Legion

Also known as The Voice of Judea

Also known as No'ar Meir

Also known as Meir's Youth

Also known as American Friends of Yeshivat Rav Meir

Also known as American Friends of the United Yeshiva Movement

Also known as The Committee Against Racism and Discrimination (CARD)"

(B) Rulings Under Review. The first ruling at issue is the Secretary of State's redesignation of Petitioners Kahane Chai and Kach, and initial designation of Petitioner Kahane.org as FTO's, by Public Notice 4501, Federal Register of October 2, 2003 (Vol. 68, No. 191, page 56860).

The other rulings at issue are the amended alias designation of Kahane.org pursuant to Executive Order 13224 by Public Notice 4512 and the amended alias designation of Kach and Kahane.org pursuant to Executive Order 12947 by Public Notice 4511, Federal Register of Oct. 10, 2003 (Vol. 68, No. 197, page 58738).

Kahane Chai, Kach, and Kahane.org ask this court to review and set aside the FTO designations.

(C) Related cases. This case has not previously been before this Court or any other court.

Counsel for Petitioners

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GLOSSARY

PA Palestinian Authority

FTO Foreign Terrorist Organization

AEDPA Antiterrorism and Effective Death Penalty Act

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JURISDICTIONAL STATEMENT

(A) Agency subject-matter jurisdiction. The Anti-Terrorist Effective Death Penalty Act of 1996 (the “AEDPA”), 8 U.S.C. §1189, as amended (the “Act”), empowers the Secretary of State to designate or redesignate organizations as “foreign terrorist organizations” (FTO). By notice in the Federal Register of Oct. 2, 2003, the Secretary of State redesignated Kahane Chai, redesignated Kach by way of alias, and, for the first time, designated Kahane.org by way of alias. By notice in the Federal Register of Oct. 10, 2003, the Secretary of State designated Kahane Chai and Kahane.org by amended alias

designations pursuant to Section (l)(b) of Executive Order 13224, as amended by Executive Order 13286 and Executive Order 13284.

(B) Jurisdiction of the Court of Appeals. 8 U.S.C. §1189(b)(1) provides this court original jurisdiction for review of the designation upon petition filed not later than 30 days after the publication of the designation in the federal register. Kahane Chai, Kach and Kahane.org filed their petition October 31, 2003, which was within 30 days of the initial October 2, 2003 designation notice.

(C) Timeliness of Petition. By filing their petition for review on October 31, 2003 which was within 30 days of the initial designation notice published on October 2, 2003, Kach, Kahane Chai, and Kahane.org timely filed their petition for review.

(D) Review of Final Order. The petition of review of Kach, Kahane Chai and Kahane.org of the final order of the Secretary seeks to dispose of all the claims of Kach, Kahane Chai and Kahane.org regarding their designations.

ISSUES PRESENTED FOR REVIEW

1. Does the Secretary's redesignation of Kahane Chai and Kach, and designation of Kahane.org as foreign terrorist organizations lack substantial support in the administrative record?

2. Are Kach, Kahane Chai, and Kahane.org entitled to constitutional due process and First Amendment rights in connection with their designations by virtue of their substantial presence in the United States and the threat to their liberty and property interests as presented by sanctions of the Act?

3. Did the State Department deprive Kach, Kahane Chai, and Kahane.org of Fifth Amendment due process rights by failing to provide Kach, Kahane Chai, and Kahane.org

the unclassified administrative record and an opportunity to respond before redesignating Kach and Kahane Chai and designating Kahane.org as FTOs?

4. Does the Act deprive Kach, Kahane Chai, and Kahane.org of their due process rights by allowing the Secretary to redesignate Kach, Kahane Chai, and designate Kahane.org on classified evidence to which the parties are not privy and to which the parties are deprived the right of analysis, cross-examination, and investigation of the classified evidence?

5. Did the Secretary engage in religious discrimination by designating only Jewish websites, including Kahane.org's via alias designation, despite the fact that other organizations designated also have websites?

6. Is designation of Kahane.org a violation of the First Amendment right to free speech and to advocate when Kahane.org is a website, does not advocate terrorism, and provides an open forum allowing all views concerning the political situation in Israel?

STATUTES AND REGULATIONS

The pertinent statute at issue is the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Sec. 301(b), 110 Stat. 1247, 8 U.S.C. Section 1189, as amended (the Act), reproduced in Addendum A.

STATEMENT OF CASE

By notice in the federal register of October 2, 2003 (vol. 68 , no. 191 at 56860), the secretary of state redesignated Kahane Chai, redesignated Kach as an alias of Kahane Chai, and for the first time, designated kahane.org, as an alias. By notice in the federal register of October 10, 2003 (Vol. 68, No. 197 at 58738), the Secretary of State designated Kahane Chai and Kahane.org by amended alias designations pursuant to

section (1)(B) of executive order 13224, as amended by executive order 13286 and executive order 13284.¹

In addition in 2003, twenty other organizations, including four websites, were designated for the first time as aliases of Kahane Chai bringing the total number of organizations designated as aliases of Kahane Chai to thirty seven. This was the first time websites were designated as FTOs. No other FTOs on the State Department's FTO list had websites designated.

Pursuant to 8 U.S.C. §1189 (Act), representatives and certain members of a designated organization may be denied visas to enter the United States, 8 U.S.C. §1182; financial institutions holding funds of designated organizations must freeze those funds, 18 U.S.C. §2339B(a)(2); providing financial support to a designated organization is considered a felony, 18 U.S.C. §2339B(a)(1); defendants cannot challenge the designation in a criminal trial, 8 U.S.C. §1189(a)(8).

Under the Act the Secretary compiles an administrative record as the basis of the designation. To be designated as an FTO the Secretary must find that an organization is 1) foreign; 2) engages in acts of terror; and 3) that it threatens the national security of the United States, 8 U.S.C. §1189(a)(1). The designation can be based on classified material to which the designated organization has no access, although the court may receive the classified information ex parte and in camera, *Id.* §1189(b)(2). The statute itself has no provision for notifying organizations of their impending designation.

¹ In 1995 Kahane Chai and Kach were designated separate terrorist entities for the first time. In 1997 Kahane Chai and Kach were designated separately as "foreign terrorist organizations". In 1999 they were redesignated separately as foreign terrorist organizations. In 2001 Kahane Chai was redesignated as an FTO and for the first time Kach was designated as an alias of Kahane Chai. In addition sixteen other organizations were designated as aliases of Kahane Chai. In 2003 Kahane Chai was redesignated as an FTO, Kach was redesignated as an alias, and for the first time Kahane.org was designated as an FTO, as an alias of Kahane Chai.

However subsequent to the decision of National Council of Resistance of Iran v Department of State, 251 F.3d 192 (D.C. Cir. 2001), the State Department must provide the designated organization with a minimal of Fifth Amendment Due Process protections. Specifically, the State Department must provide notice of an impending designation and an opportunity for the designated party to obtain and challenge the unclassified portion of the administrative record.

Kach, originally a political party in Israel, was in existence for two decades before the original 1995 designation. Kahane Chai was formed in Israel a few years before the 1995 designation. Both organizations, advocate groups, promoted the ideas of Rabbi Meir Kahane among which were expulsion of Arabs from Israel who supported terrorism. Activity under the names Kach and Kahane Chai ceased in Israel approximately in 1994. Advocacy then continued in the United States by U.S. citizens. Petitioner Kahane.org is a website based in the United States and operated by United States citizens. Kahane.org advocates the ideals of Rabbi Meir Kahane. None of the Petitioners engage in nor advocate terrorism.

On Oct. 2, 2003, the Secretary of State redesignated Kach and Kahane Chai and designated Kahane.org. On October 31, 2003 attorney Kenneth Klein filed a petition for review with this court on behalf Kach, Kahane Chai and Kahane.org. On January 16, 2004 the State Department provided the unclassified Administrative Record to attorney Kenneth Klein.

On February 19 and 24, 2005 attorney Kenneth Klein sent responses to the administrative record on behalf of Kach, Kahane Chai and Kahane.org. On June 25, 2004 attorney Kenneth Klein sent additional responses on behalf of Kach, Kahane Chai and

Kahane.org. On December 23, 2004 the State Department filed the unclassified Administrative Record. On March 3, 2005 the State Department filed a corrected version of the unclassified Administrative Record. The March 3, 2005 record revealed that in reaction to the responses from Kach, Kahane Chai and Kahane.org, the Secretary revoked one of the alleged Kahane Chai aliases, a website, in the December 23, 2004 record. On March 16, 2005 attorney Kenneth Klein motioned to withdraw and stay the proceedings. The motion was granted on May 11, 2005. On January 30, 2006 attorney Kenneth Klein motioned to reinstate his appearance. This motion was granted on February 6, 2006.

STATEMENT OF FACTS

Rabbi Meir Kahane formed the Kach political party, and first ran for office in 1976, and was elected to the Knesset in 1984. (KAH03-02 at 401). Rabbi Kahane was murdered in New York City in 1990. (KAH03-30 at 501). Soon after his death, his son Binyamin Ze'ev Kahane founded Kahane Chai. (Id.) Kach continued to exist as a separate organization.

Both organizations, advocacy groups, promoted the ideas of Rabbi Meir Kahane (KAH03-02 at 401). Kahane.org is a website which also promotes Rabbi Kahane's ideas (KAH03-08 at 419), including expulsion of Arabs from Israel who support terrorism. (KAH03-07 at 412). Kahane.org is a website based in the United States and operated by United States citizens. (KAH03-08 at 420). Kahane Chai, Kach and Kahane.org do not engage in nor advocate terrorism. (KAH03-36 at 612).

The ruling of National Council of Resistance of Iran v. Department of State, 251 F.3d 192, (D.C.Cir. 2001) stated that groups designated by the Secretary of State as

Foreign Terrorist Organizations are entitled to receive and comment on the administrative record before being redesignated. Subject to this ruling, six people domiciled in the United States who the State Department considered representatives of Kahane Chai, Kach or its alleged aliases, received notice letters from the State Department offering them the opportunity to obtain the administrative record. (KAH03-35 at 547). A counsel for a representative of Kach, Mr. Kenneth Klein, and another counsel for a member of Kahane Chai, Kach or one of its alleged aliases, Mr. Samuel Abady, requested copies of the administrative record. (KAH03-36 at 569-71). Counsels did not receive copies of the administrative record before the designations occurred on Oct. 5, 2003. (KAH03-35 at 554-558). On January 24, 2004 the State Department provided the administrative record to the counsels and pledged to do a *de novo* review of the designations. (Id.) Counsel for the representative for Kach provided responses to the administrative record in February 2004 and June 2004. (KAH03-36 at 585-654). Among issues counsel raised in his responses was lack of sufficiency of evidence, failure of due process and religious discrimination. (Id.).

SUMMARY OF ARGUMENT

The administrative record lacks substantial support for the findings that Kach, Kahane Chai, or Kahane.org engage in terrorist activities or that they are aliases of each other or the thirty-five other alleged aliases. The State Department documents conflict each other, are vague, present mere suspicions only and thus fail to substantially support the record that Kach, Kahane Chai, or Kahane.org engage in terror. Similarly, the documents fail to support the proposition they are aliases of one another as the requisite showing of control and domination is not present.

The record establishes Kach, Kahane Chai, and Kahane.org's constitutional presence within the United States through the substantial connections of Kach, Kahane Chai, and Kahane.org and their representatives. Thus Kach, Kahane Chai, and Kahane.org are entitled to due process. The designations have caused constitutional harm through assets seizure and criminal prosecutions.

The State Department failed to comport with its constitutionally mandated notice procedures. Kach, Kahane Chai, and Kahane.org suffered harm as its members continued to be prosecuted and assets continued to be held as Kach, Kahane Chai, and Kahane.org waited more than a year to seek redress.

The use of classified material deprives Kach, Kahane Chai, and Kahane.org of their due process rights as the organizations have no access to review, investigate, and analyze prejudicial material. The due process violation is not harmless as the unclassified record fails to substantiate the allegations of terror. Thus the future state of Kach, Kahane Chai, and Kahane.org's designation status depends on information over which Kach, Kahane Chai, and Kahane.org have no control and no ability to counter.

The State Department discriminated against Kach, Kahane Chai, and Kahane.org, the only Jewish FTOs, on the basis of religion by only designating their alleged websites as FTOs and no other FTO websites.

The State Department violated Kahane.org's First Amendment rights by designating it as an FTO, when it is a website that engages in free speech.

ARGUMENT

I. The Record Lacks Substantial Support for Kahane Chai's Redesignation

Standard of Review: Under 8 U.S.C. §1189(b)(3)(D): “lacking substantial support in the administrative record taken as a whole or in the classified information submitted to the court [*ex parte* and *in camera*]”

Upon the *de novo* review of the 2003 administrative record for redesignation (KAH03-35 at 562-563), the Secretary must find substantial support in the administrative record that Kahane Chai engages in terrorist activity as defined in the statute; and that Kahane Chai, Kach, and Kahane.org are aliases of one another. In fact, the record fails to substantiate these elements.

In attempting to demonstrate that Kahane Chai, Kach, and Kahane.org engaged in terrorist activities, the State Department proffered approximately twenty documents (the remainder were classified records not provided, or were the designation notices themselves) (see Certified Index of the Administrative Record). Kahane Chai, Kach and Kahane.org will use these same documents to show that the State Department's material is contradictory, inaccurate, and vague as to each of the alleged acts of terror discussed below, as well as to the proposition that Kahane Chai, Kach, and Kahane.org are aliases of each other and other organizations.

The State Department's material refers to six acts of terror that are repeated throughout the administrative record and that form the basis for the designations:

A. Terrorist activity

(1) The record fails to show that Kahane Chai, Kach, and Kahane.org were involved in any way with the February 1994 massacre at the Tomb of the Patriarchs in Hebron.

Throughout the administrative record, the State Department documents refer to the February 1994 massacre at the Tomb of the Patriarchs in Hebron (for example see documents KAH03-02 at 401; KAH03-05 at 408; KAH03-08 at 420; and KAH03-33 at 531.) The Israeli government conducted a thorough investigation of the massacre. The government appointed an investigative body, known as the “Shamgar Commission” (KAH03-36 Exhibit 1 at 613-616). Serving as chairman of the commission was the President of the Israeli Supreme Court, Justice Meir Shamgar; the commission also included a professor, a lieutenant general, and two more judges (*Id.* at 614). The Commission heard evidence from 106 witnesses in 31 sessions (*Id.*).

The Commission placed full and sole responsibility for the killings on the gunman Dr. Baruch Goldstein: “Dr. Baruch Goldstein bears direct responsibility for the massacre because the evidence unequivocally indicates that he carried it out.” (*Id.* at 615). The commission found that no one else was involved: “We were not presented with credible proof that he was helped, while carrying out the killing or prior to that time, by another individual acting as an accomplice, nor was it proven to us that he had secret partners.” (*Id.* at 615-616). Furthermore, the commission concluded that Baruch Goldstein acted alone and that no one else had knowledge of his plans: “The complete secrecy and the decisiveness of his **independent** act also matched the character and behavior of this assailant....” (*Id.* at 616-bolding added). It is clear Kahane Chai, Kach and Kahane.org

were not involved, yet the State Department fails to include any mention of the Shamgar Commission.

(2) Kahane Chai, Kach, and Kahane.org had no involvement with the April 2002 attempted bombing of a girls school and hospital in Jerusalem.

The State Department tries to connect Kahane Chai, Kach, and Kahane.org to an alleged, attempted planting of a bomb in 2002 near a girls school and hospital, on the basis of the arrest of a person, Noam Federman two weeks after the incident (KAH03-9 at 422; KAH03-12 at 436; KAH03-13 at 438-439). Yet the government documents conflict as to whether Noam Federman was a member of Kach at the time of the incident.

According to the Center for Defense Information (CDI) (KAH03-02 at 402) and the Foreign Broadcast Information Service (FBIS) (KAHO3-12 at 436) Federman was a former Kach member. In fact, according to the CDI document, not only was Federman not connected with Kach, but he was identified with some other unidentified group: “...but [Federman] was found to have ties with another extremist group **unaffiliated with Kach or Kahane Chai.**” (KAH03-02 at 402, bolding added). Yet other government documents, including the summary of the 2003 Administrative Record (Summary), described Federman as a Kach activist or leader at the time of the incident (KAH03-09 at 422; KAH03-13 at 438; KAH03-33 at 535). Finally, the government even questions whether Federman was involved at all; the Summary states that Federman was arrested for his “alleged involvement” (KAH03-33 at 535).

Besides the contradictory records about Federman’s status or his involvement, the government proffers no other evidence in the Administrative Record linking Kahane Chai, Kach or Kahane.org to the attempted planting of the bomb. In fact, the

government's evidence about other people arrested for the planting of the bomb exculpates Kahane Chai, Kach and Kahane.org. According to a U.S. Consulate Jerusalem cable (KAH03-10 at 425), the Summary (KAH03-33 at 535), and an FBIS report (KAH03-14 at 441), two people were arrested as they actually planted the bomb. They were identified as from the "Bat Ayin terror cell" (KAH03-14 at 441) and confessed (KAH03-33 at 535). The "Bat Ayin terror cell" or "Bat Ayin" is not affiliated with Kahane Chai, Kach or Kahane.org and the State Department does not list the organization as being an alias of Kahane Chai, Kach or Kahane.org (Designation notice to Petitioners, KAH03-35 at 557-558).

In the end, after the Shin Bet indicted a person named Tzuriel Amiur for the alleged planting of the bomb, a year after the incident, the Shin Bet closed the investigation (KAH03-14 at 441-442). None of the government documents allege that Amiur is affiliated with any of the Petitioners Kahane Chai, Kach or Kahane.org.

As the government says in its analysis of materials submitted by Kahane Chai, Kach or Kahane.org,

"It is also true that the record contains conflicting information on Federman's relationship to Kahane Chai/Kach at the time of his arrest, and does not conclusively establish that either he or Kahane Chai participated in the attacks. The validity of the redesignation does not, however, depend on this evidence. Even assuming, arguendo, that Kahane Chai did not participate in this attack, the remaining evidence in the administrative record, portions of which are described above, amply supports redesignation."

(KAH03-37 at 661, bolding added).

(3) Petitioners had no involvement with the March 2002 detonation of a bomb at a boys school and planting of three other bombs.

With virtually no evidence, the State Department attempts to link Kahane Chai to the planting of four more bombs. Solely on the alleged basis that a bombing at a boys school in a Palestinian neighborhood, on March 5, 2002, had similar characteristics to the alleged, April 2002, attempted planting of bomb at a girl's school (see (2) above), the government attempts to connect Kahane Chai, Kach and Kahane.org to this unfortunate event (KAH03-10 at 425). "Police are trying to establish whether the suspects [in the attempted girls school bombing] have any connection to an earlier bomb set by suspected Jewish Terrorists (see reftel) that detonated at a boy's school...." (Id.).

Not only does the government fail to produce any evidence of Kahane Chai, Kach and Kahane.org's culpability, but the same document mentioning the boy's school bombing exculpates Kahane Chai, Kach and Kahane.org: "A presumably Jewish Group calling itself the 'Angels of the Oppressed' claimed responsibility for that [the boy's school] attack." (KAH03-10 at 425). Said organization is unaffiliated with Kahane Chai, Kach or Kahane.org and the government does not allege said organization is an alias of Kahane Chai (KAH03-35 at 557-558). Again, based only on suspicion, the government also attempts to link Petitioners to the planting of three other bombs (Summary, KAH03-33 at 535). The FBIS report, upon which the Summary is based, does not mention Kahane Chai, Kach or Kahane.org as being involved (KAH03-14 at 442).

As the government says in its analysis of materials submitted by Kahane Chai, Kach or Kahane.org, **"even if it is assumed that Kahane Chai did not participate in these [the planting of four bombs] attacks, the remaining evidence in the administrative record is more than sufficient to warrant redesignation."** (KAH03-37 at 661, bolding added).

(4) Kahane Chai, Kach and Kahane.org were not involved with shootings of Palestinians in the West Bank that left seven dead and nineteen injured.

Again, on mere suspicion, the government tries to link Kahane Chai to shootings of Palestinians in the West Bank that left seven dead and nineteen injured (KAH03-10 at 425; KAH03-33 at 535). The government's evidence: "Police are also interested in knowing whether the two [arrested for allegedly planting the bomb near the hospital] might be linked to a series of West Bank shooting attacks **thought to have been perpetrated by Jewish Extremists....**" (KAH03-10 at 425, bolding added). Thus not only does the government fail to provide any proof that Kach, Kahane Chai or Kahane.org were involved, the government documents cannot even substantiate that Jewish groups were involved. Another government document, an FBIS report, states that eight Palestinians were killed but the blame is placed on "Jewish Terror Cells" (KAH03-14 at 442). The only group implicated in connection with the "Jewish Terror Cells", is the "Bat Ayin cell" (*Id.*), not affiliated with or alleged to be an alias of Kach, Kahane.org or Kahane Chai (KAH03-35 at 557-558). The Shin Bet has found no suspects (KAH03-14 at 442). As the government says in its analysis of materials submitted by Kahane Chai, Kach and Kahane.org, "**even if it is assumed that Kahane Chai did not participate in these [shooting] attacks, the remaining evidence in the administrative record is more than sufficient to warrant redesignation.**" (KAH03-37 at 661, bolding added).

(5) Kahane Chai, Kach and Kahane.org deny several shooting murders of Palestinians in the West Bank in the early 1990's.

In contrast to the other allegations of terror which are repeated throughout the record, see discussion (1) to (4) and (6) below, one allegation is found only in one

sentence, in one government document (KAH03-02 at 401), besides the Summary. The accusation, found in a Center for Defense Information (CDI) document is that, “In 1993, the groups claimed responsibility for several attacks in the West Bank, in which four Palestinians were killed and two wounded.” (KAH03-02 at 401). In the Summary the accusation is repeated, but the Summary states that “Kach activists” claimed responsibility. (KAH03-33 at 531).

First of all, to the extent this allegation concerns Kach, Kahane Chai, or Kahane.org, this allegation should not even be considered. The State Department stated that the *de novo* review for Kach, Kahane Chai and Kahane.org is strictly based on materials to support the 2003 redesignation expressly excluding materials for the 1997 designation, and the 1999 and 2001 redesignations. (KAH03-35 at 559). In the May 2004 letter to Kenneth Klein, Esquire, Ambassador Cofer Black on behalf of the State Department said,

The Secretary is prepared to undertake a *de novo* review of the 2003 redesignation of Kahane Chai based solely on the new materials contained in the 2003 administrative record for redesignation, as supplemented by submissions received from representatives of Kahane Chai. That is, the review would not encompass materials from earlier, now expired, designation and redesignation actions concerning Kahane Chai.

(Id.).

Without conceding the above point, Kach, Kahane.org, and Kahane Chai will respond to the allegation to protect this record. First, it is unclear exactly which organizations allegedly assumed responsibility for the West Bank attacks. The CDI document states the “... the groups claimed responsibility...” (KAH03-02 at 401). But immediately before discussing the attacks the CDI report was discussing several groups including “Kach”, “Kahane Chai”, “Eyal (not affiliated with Kahane Chai, Kach or

Kahane.org or alleged to be an alias, KAH03-35 at 557-558), and “a number of smaller groups” (KAH03-02 at 401).

Kahane Chai, Kach and Kahane.org next note that Kach and Kahane Chai were not even considered terrorist organizations in 1993; the first terrorist list appeared in 1995 (KAH03-29 at 493-495). Second, despite being listed as Foreign Terrorist Organizations in 1997 and 1999, they were considered separate groups (KAH03-37 at 663); not until 2001 were they designated as a single organization (Id.). Thus, even arguendo, if Kach activists claimed responsibility (KAH03-33 at 531), their actions cannot be imputed onto Kahane Chai or Kahane.org. Most importantly, each of the Petitioners Kahane Chai, Kach and Kahane.org denies committing these murders. (KAH03-36 at 608; 653).

Finally, the government makes the barest of accusations and provides no information about the nature, setting, or circumstances of the “attacks” or “shootings”. The allegation is contained in one sentence in the CDI document (KAH03-02 at 401) and then repeated in the Summary (KAH03-33 at 531). If these “attacks” did occur, under the circumstances, self defense cannot be excluded. As the government has pointed out, Israeli citizens were constantly under attack from terrorists, for example Binyamin Kahane, Rabbi Meir Kahane’s son being ambushed by Palestinians (KAH03-30 at 512); a baby being murdered in a terrorist attack (KAH03-15 at 446); a general environment of “violence directed at Jewish settlers” (KAH03-12 at 436). In this context, arguendo, if Kach members did attack Palestinians, without further explanation in the record, self defense cannot be ruled out.

(6) Petitioners engaged in demonstrations, door-to-door campaigning, and similar activities protected by the First Amendment. Threat allegations lack substance.

In documents summarizing the State Department's case against Kahane Chai, Kach and Kahane.org, "Patterns of Global Terrorism 2002" (KAHO3-01 at 397-399) and the Summary (KAHO3-33 at 536-539), the government reports that Kahane Chai, Kach and Kahane.org engaged in demonstrations, threats, incitement, and related activities.

But once analyzed, the supporting documents only show that Petitioners were engaged in free speech activities; the documents fail to substantiate that Kahane Chai engaged in threats, or that any threats were made at all.

Document KAH03-17, an FBIS document of May 28, 2003, reports that "a group of extreme right-wing activists has decided to launch a 'personal incitement campaign' against Prime Minister Sharon." (*Id.* at 457). FBIS quotes reporter Uri Yablonka as saying the activities of the campaign include: "Among other things, they decided to hoist placards bearing the inscription 'Sharon is a Traitor' and hand out pictures of Sharon clad in a keffiyeh." (*Id.* at 457-458). The FBIS document states that "The Yesha Settlement Council (not alleged to be an alias-KAH03-35 at 557) plans a 'mass demonstration' in Jerusalem on 4 June, and intends to send people door to door to convince Israelis of the rightness of the settlers' cause." (*Id.* at 457).

Concerning the future evacuation of settlements, Uri Yablonka reported that a 'Radical right-wing activist' stated that he could not rule out the use of firearms but that it was an unlikely event: 'I'm not saying that weapons will be aimed against soldiers and policemen, but I do no longer rule out such a possibility.' (*Id.* at 457).

Even members of the Knesset and the Likud planned on protesting Prime Minister Sharon's Policies (Id. at 458). Yablonka further states that when Sharon attended a support rally for a Likud, "demonstrators put up posters with such inscriptions as 'The Road Map Leads to Hell', 'We Are All Settlers', and 'Haifa With Yesha.' One activist wore a T-shirt with the inscription 'Ari'el Sharon Is Destroying the Country.'" (Id.).

In another State Department document, a radio newscast from July 2003, concerning different Israeli and Palestinian security matters, the correspondent reported that the Shin Bet Director "claimed" that there was a threat to the life of Prime Minister Sharon from "Kahanist extremists" (KAH03-22 at 473). The report does not name a specific organization to which these "Kahanist extremists" belonged, if any. According to the government evidence, Rabbi Kahane had many followers throughout the world: "After his [Rabbi Meir Kahane's] death, Kahane's teachings gained him [Rabbi Meir Kahane] acolytes in Israel and around the world." (KAH03-02 at 401); "...[Rabbi Meir] Kahan[e] and his admirers." (KAH03-26 at 484). Furthermore, the government's evidence shows that not every person that followed Rabbi Kahane's views was a member of Kahane Chai, Kach, or Kahane.org, or any organization at all. Professor Ehud Sprinzak, an experienced terror organization researcher (KAH03-26 at 484), stated that "...the [Kach] movement's **members** and **sympathizers** have not engaged in any act of terror since the movement was outlawed..." (Id., bolding added). Thus alleged threats from "Kahanist extremists" did not necessarily come from members of Kahane Chai, Kach, or Kahane.org, or any organization at all.

Furthermore, the newscast document containing the alleged threats against Prime Minister Sharon casts doubt upon the allegation that threats were actually made. In the

two page document, which concerned Israeli security matters, every sentence but one begins with words such as “said”, “revealed”, or “stressed” (KAH03-22 at 472-473), as in “Dichter also said that today’s mortar fire from the Gaza Strip is the PA’s first test.” (Id. at 472). Yet concerning the alleged threat from “Kahanist extremists”, the correspondent only said that the security director “claimed” that there was a threat (Id. at 473). Nowhere else in the two page report is the word “claimed” or a similar word used (Id. at 472-473). Accordingly, the document does not mention that anyone was questioned, arrested, indicted, or convicted for the alleged threats.

As to other allegations of threats, the Jerusalem police unit “investigating the Jewish terrorist squad case” received death threats (KAH03-21 at 470). The police detained five people (Id.). The document neither identifies the parties who allegedly made the threats, nor the detained people (Id.). No mention is made of Kahane Chai, Kach or Kahane.org. (Id.).

An FBIS report dated July 18, 2002 (KAH03-04 at 406), concerns a Kach summer camp investigated for allegedly inciting the murder of Foreign Minister Shim’on Peres. According to the report the activities included visiting the grave of Barukh Goldstein and conducting a “mock trial of Peres for his part in the Oslo Accords.” (Id.). A second FBIS report dated June 11, 2002 (KAH03-05 at 408) also concerns the same information but adds that Arab Knesset member Ahmad al-Tibi was also a defendant in the mock trial. The Summary says that Kach members were soliciting the campers to become terrorists (KAH03-33 at 538). Yet, no evidence of the solicitation allegation exists in either of the FBIS reports upon which the Summary is based. As well, no information is provided about the results of the investigation. Most importantly, rather

than breeding terrorists, the mock trial exercise, if it in fact occurred, exposed the campers to the democratic way of voicing discontent -- through a trial, not violence.

Another FBIS document, (KAH03-06 at 410), dated April 29, 2002, supports the view that the campers were being instilled with democratic ideals. As referenced above, Knesset member Ahmad al-Tibi was allegedly also on “mock trial” at the summer camp. During the spring session of the Knesset a confrontation occurred between Al-Tibi and other members of the Knesset resulting in the Deputy Knesset speaker and other Knesset members “scream[ing] at Al-Tibi and call[ing] him a traitor and a collaborator with terrorists.” (KAH03-06 at 410). The mock trial was a logical extension of the confrontation that occurred in the Knesset.

A Nov. 3, 2002 FBIS document reports that Kach activists had been demonstrating near a Shin Bet officer’s home. The protest was a response to the detention conditions of Bat Ayin members (not alleged to be an alias of Kahane Chai, (KAH03-35 at 557-558)) who were arrested for attempting to blow up a school. (KAHO3-20 at 467). Members of the families of the Bat Ayin detainees distributed a letter with “harsh accusations against the senior officer.” (Id.). The wife of the Shin Bet Officer wrote that her family felt threatened and harassed (Id.). The Shin Bet officer’s wife’s reaction was that “she had enough of the demonstrations...” (Id.). Comporting with an open debate, the wife “consequently published an open letter in which she share[d] her feelings with her neighbors.” (Id.). An alleged Kach spokesman said he empathized with the wife but the protests were continuing (Id. at 468).

An FBIS report dated May 20, 2003, states that two web-sites, www.kahane.org and www.newkach.org “...are vehemently anti-Muslim and anti-Arab.” (KAH03-08 at

419). Petitioner Kahane.org cannot speak for www.newkach.org. Petitioner Kahane.org denies the characterization of itself as stated. In fact, the State Department's own evidence refutes the fact that Kahane.org is anti-Arab or Muslim. On the first page of document KAH03-07, printed material from the Kahane.org website, Kahane.org puts forth its own plan for protecting Israel (Id. at 412). It does not involve separating Jews from Arabs with a fence. It does not involve creating a separate Palestinian state. It involves expelling Arab terrorists from Israel: "Support Kahane.org the only organization that has a program that could save Israel... Only one answer, and it is not fences or Oslo. All hostile Arabs who wish to destroy Israel must be removed from Israel." (Id.).

Accordingly, Kahane.org espouses the view that anyone is free to live in Israel, enjoying full rights as a citizen, as long as he or she abides by the law. According to "Kahane.org-Principles and Philosophy" as found on the Kahane.org web-site, principle Number 6 states: "Israel is the exclusive homeland of the Jews. Non-Jews can only live in the Jewish state if they fully accept Jewish so[vereignty and the] basic Torah conditions of 'Ger Toshah' – a resident stranger, with full social, economic, and civil rights, but without na[tional rights or the] ability to change the Jewish character of the state and its citizens. This is why the hostile Arabs must go!" (KAHO3-36 at 619)². Yet removing violent people from a community is hardly unique. Every time a community jails a violent person it is removing a violent person from the midst.

In support of the allegation that Kahane.org is "vehemently anti-Muslim and anti-Arab", the FBIS report of May 20, 2003, states that in December 2001, Kahane.org

² Language from the record printed page on 619 is truncated. The complete text of the quote was found on a web page <http://www.kahane.org/philosophy.htm> printed from the website on June 19, 2002.

“rhetorically” asked through an on-line poll “whether Israel should ‘only kill Arafat’s henchmen’ or ‘Arafat himself.’ ” (KAH03-08 at 419). At the present time, Kahane.org cannot answer whether in 2001 it conducted such a poll. But if Kahane.org did present such a poll, it certainly was an exercise in free speech. From the language cited, it is evident Kahane.org was suggesting that the **government of Israel** kill Arafat. Rather than evidencing a hatred of Arabs or Muslims, the poll presented a valid policy debate in Israel that existed until Arafat died. As many non-violent, non-hating, rational people in the United States called for the Administration to kill Saddam Hussein, many rational, non-violent, non-hating Israelis called upon their government to kill Arafat. People living in a democratic country have the right to state their opinion that their government should kill someone like Arafat.

Thus pursuant to 8 U.S.C. §1189(b)(3)(D), the government has failed to show by substantial support in the administrative record that Petitioners engage in terrorist activity.

B. Aliases. The record fails to show that Kach, Kahane Chai or Kahane.org are aliases of each other or any of the other organizations listed as aliases of Kach, Kahane Chai or Kahane.org.

As this Court noted, basic agency principles apply to analyzing whether one Foreign Terrorist Organization is an alias of a second one. National Council of Resistance of Iran v. Department of State, 373 F.3d 152, 158 (D.C.Cir. 2004). If a principal Foreign Terrorist Organization “so dominates and controls another that the latter can no longer be considered meaningfully independent from the former” then the

latter is not merely an agent, but an alias of the former. (Id.) The record fails to establish by substantial support this requisite level of control and domination.

In fact, from the differences in origin, leadership, domicile, and philosophy among Kach, Kahane Chai, and Kahane.org, the State Department's records make clear that there is no domination and control among the groups. According to the Summary, Rabbi Meir Kahane founded Kach in 1974 (KAH03-33 at 531). After Rabbi Kahane was murdered in 1990, the Summary states that Kach then split into two groups (Id.). The Summary specifically states that Rabbi Kahane's son, Binyamin Ze'ev Kahane "created" Kahane Chai on December 22, 1990 (Id.). But if Kahane Chai is an alias of Kach, then there would have been no reason for Kach as "Kahane Chai" to found itself again sixteen years later. After all Kach was still in existence.

More importantly the government's own evidence shows that the groups did not control each other. The FBI affidavit states that the reason Kahane Chai was formed was because a leader of Kach and Kahane Chai in the United States and "...other Jewish extremists... believed Kach was not taking a strong enough stand against the Arabs." (KAH03-30 at 501-502). In other words at least one person affiliated with both groups, and other people as well, felt Kahane Chai could not control Kach. Furthermore, the affidavit states that the organizations differed in leadership and locale of its members. An Israeli citizen, Baruch Marzel, lead Kach; its members mainly lived in Qiryat Arba', Kefar Tapuach, and Ma'ale Levone, areas and settlements in Israel (Id. at 501). Kahane Chai, on the other hand, was lead by Binyamin Ze'ev Kahane, Rabbi Meir Kahane's son (Id.). Those who supported the creation of Kahane Chai lived in the United States, Israel, and other parts of the world (Id. at 502). Thus the government has not shown by

substantial support that Kach, Kahane Chai, or Kahane.org so dominated and controlled one another that they were no longer meaningfully independent from one another, but in fact one and the same, thus aliases of one another.

The State Department argues that alleged similarities between two of the four originally designated web-sites³ show that the web-sites are aliases of one another and Kach and Kahane Chai, and all of the other designated aliases. An FBIS memorandum describes Kahane.org and newkach.org as sharing similar ideologies and having some of the same links (KAH03-08 at 419-420). Kahane.org cannot address the unaffiliated newkach.org, but Kahane.org notes the common situation that many organizations that have similar ideologies and interests have common links and sometimes have similar layouts in their web pages. For instance, the same document that the government cites to support its proposition that web-links demonstrate aliases, also shows that Kahane.org is linked to HinduUnity.com, Israelfaxx.com, Jpost and Haaretz, among others (KAH03-07 413). Though linked, Kahane.org is not the JPost.

Other information on the FBIS web page document shows ownership and operational differences between Kahane.org and newkach.org. Newkach.org solicits volunteer web services, while Kahane.org seeks donations and sells various merchandise (Id.). Newkach.org is registered to NKM in Montreal and lists Efraim HersHKovits as the contact (Id.). Kahane.org is registered to Yeshivat HaRav Meir, in Brooklyn, and lists Michael Guzofsky as the billing contact (Id.). The government evidence lacks substantial support to show that Newkach.org and Kahane.org are aliases of one another or of Kach or Kahane Chai or one of the many alleged aliases.

³ The government revoked the designation one of the websites, Kahane.net, acting upon the Petitioners' responses of June 25, 2004 to the administrative record demonstrating that Kahane.net was not alias.

The procedural history of the designations supports the view that Kach and Kahane Chai are not aliases. The Administration treated Kach and Kahane Chai as separate terrorist entities in 1995 (KAH03-29 at 495). The State Department treated Kach and Kahane Chai as separate Foreign Terrorist Organizations in 1997 and 1999 (KAH03-33 at 531). Not until 2001 did the State Department list Kach and Kahane Chai as aliases (Id. at 531-532). As the federal government had developed records on each organization since at least 1995, it defies common sense to think that the government required six years to realize that the organizations were allegedly one and the same. Furthermore, the government maintains that Kahane.org was in existence since at least the year 2000. Yet the government did not even designate Kahane.org until 2003, when it and nineteen other groups were designated (as aliases of Kahane Chai) (KAH03-33 at 532).

Thus the government maintains that after the year 2001 twenty new organizations were formed as aliases. The government has presented no articles of incorporation, business plans, company structures, business entities, membership lists, business licenses, trademark, copyright, or any other business information to even document that most of these organizations exist, much less that they are alleged aliases of Kahane Chai, Kach, or Kahane.org. Neither does the government present this information for Kahane Chai, or Kach, and only minimally for Kahane.org to substantially support that Kahane Chai, Kach, and Kahane.org are aliases of one another. Rather than have acted on fact, or with substantial support in the record, the State Department's actions seem arbitrary and capricious in designating thirty-eight groups, including Kach, Kahane.org and Kahane Chai as aliases of one another.

C. The FBI classified declaration of July 31, 2003 fails to substantiate the record in that it is an overview of the documents submitted.

The State Department presents the affidavit (KAHO3-30 at 497-520) of Kenneth Piernick (KAH03-37 at 662), the Acting Section Chief of the Counterterrorism Division's International Terrorism Operations Section II, whose responsibilities include oversight of terrorism investigations and analysis of collected intelligence information (KAH03-30 498).

Mr. Piernick's affidavit states that Rabbi Kahane formed Kach "to facilitate the expulsion or eradication of all Arabs from greater Israel" (Id. at 501). This view is completely unsupported in the material provided: in fact, one of the State Department's own documents refutes that Rabbi Kahane sought the "expulsion...of all Arabs" or that he called for or promoted the "eradication" of any Arabs. Kahane.org "espouse[s] the same views of Rabbi Meir Kahane....", according to the State Department, (KAH03-08 at 419). Yet, Kahane.org does not stand for the "eradication" of Arabs (KAH03-07 at 412). In fact, Kahane.org does not seek the expulsion of all Arabs. Instead, Kahane.org only calls for the expulsion of Arabs who engage in terror. Kahane.org's philosophy is put forth in State Department document KAH03-07: "All hostile Arabs who wish to destroy Israel must be removed from Israel." (Id. at 412).

Actually, Kahane.org believes that any law abiding person is allowed to live in Israel. As stated in their "Principles and Philosophy", "Non-Jews can only live in the Jewish state if they fully accept Jewish so[vereignty and the] basic Torah conditions of 'Ger Toshae' – a resident stranger, with full social, economic, and civil rights, but without na[tional rights or the] ability to change the Jewish character of the state and its

citizens. This is why the hostile Arabs must go!” (KAHO3-36 at 619)⁴. Expelling violent people is not unique. Communities expel violent people by imprisoning them.

The affidavit states that Kahane Chai advocates violence to stop any political remedy to the Israeli-Arab conflict that excludes ridding all Arabs from Israel (KAH03-30 at 502). Yet, Kahane.org does not believe in excluding all Arabs from Israel (KAH03-07 at 412). In fact, Kahane.org believes any person who is law abiding can live in Israel (KAHO3-36 at 619). Thus Kahane Chai would not be advocating violent resistance to any government policy short of ridding all Arabs from Israel, because, Kahane.org as an alleged alias of Kahane Chai, does not believe in the premise of ridding all Israel of Arabs.

Next, the affidavit alleges Kahane Chai and Kach leaders have made public statements supporting the use of violence against those who promote “land in exchange for peace” in Israel (KAH03-30 at 502). In support, Mr. Piernick cites a New York Times article supposedly quoting Binyamin Ze’ev Kahane concerning the recent murder of his father, Rabbi Meir Kahane (Id.). In the article, Binyamin Ze’ev Kahane allegedly says his father’s murderer deserves death (Id.). The State Department’s use of a grieving son’s reaction can hardly be used for the greater proposition that Kahane Chai engages in violence to derail political processes.

Similarly, Mr. Piernick uses statements made in grief by other alleged members of Kahane Chai to show that Kahane Chai stands for violence against Arabs. Mr. Piernick presents the statements of two people supposedly vowing revenge for the murder of Binyamin Ze’ev Kahane, founder of Kahane Chai (Id. at 502), by Palestinians in the

⁴ Language from the record printed page on 619 is truncated. The complete text of the quote was found on a web page <http://www.kahane.org/philosophy.htm> printed from the website on June 19, 2002.

West Bank (Id. at 512). Binyamin Kahane's wife was also murdered in the ambush (KAH03-02 at 402). One statement was made on the very day that Binyamin and his wife were murdered (KAH03-30 at 512). Again, statements by those who have just experienced loss through a terrorist attack cannot fairly be said to represent a philosophy of violence by a group.

In the following paragraphs of the affidavit, Mr. Piernick again uses the events surrounding the emotional time of death to allegedly show the violent nature of Kahane Chai. At a funeral procession a riot ensued and some Palestinian property was damaged. Allegedly, Kach members carrying a Kach banner were present. There is no evidence Kach instigated or participated in the riot, or was responsible for the damage. (Id. 512-513).

On the date of September 11, 2001, Michael Guzofsky allegedly issued a statement through Kahane.org calling "for 'a free hand to Israel once and for all to uproot this savage evil [Arabs] from the core.'" (Id. at 513). This alleged press release raises several concerns. First, once again Mr. Piernick uses statements made in an emotional state immediately following a violent terror attack, to allegedly show the violent nature of an organization. Next, if this truly represents a person's own statement, a press release no less, then there would be no use for brackets. Either the person making the quote used the term "Arab" or did not (Id.). Finally, as this alleged statement was made on the day that about 3,000 innocent people were murdered, there is no indication the alleged quote was not referring to rooting out Muslim terror.

The affidavit states that Baruch Marzel, the alleged leader of Kach, was arrested during a clash in a settlement (Id.). He was charged with assaulting a police officer (Id.). No indication is given in the affidavit as to the outcome of the arrest (Id.).

Concerning the attempted bombing of the girls school and hospital, the affidavit says “several members of KACH, including well-known KACH activist, Noam Federman...” were arrested (Id.). Other government documents soundly refute almost all the information in this simple statement from the affidavit. First, none of the other government documents concerning the attempted school state that “several” Kach members were arrested (KAH03-09 at 422; KAH03-33 at 535; KAH03-2 at 402; KAH03-12 at 436; KAH03-13 at 438-439). Other government documents stated Federman was a former member at the time of the incident (KAH03-02 at 402; KAH03-12 at 436). One document essentially exonerates Kahane Chai (KAH03-14 at 441). Even the government has seemed to abandon the idea of Kahane Chai’s culpability. In “Summary and Analysis of Materials Submitted by Counsel to Kahane Chai, Kach, and Kahane.org”, the government writes: “It is also true that the record contains conflicting information on Federman’s relationship to Kahane Chai/Kach at the time of his arrest, and does not conclusively establish that either he or Kahane Chai participated in the attacks. The validity of the redesignation does not, however, depend on this evidence.” (KAH03-37 at 661).

As to allegations of threats (KAH03-30 at 514), the government documents did not substantiate that threats were made or that Kahane Chai was responsible. Kahane Chai adopts and incorporates A (6), above.

Concerning an alleged statement made in 1995 by Michael Guzofsky about using weapons against “Arab murderers” (KAH03-30 at 506), the statement should not be considered as it pertains to a record concerning a previous designation not at issue. The State Department stated that the *de novo* review for Kach, Kahane Chai and Kahane.org is strictly based on materials to support the 2003 redesignation expressly excluding materials for the 1997 designation, and the 1999 and 2001 redesignations. (KAH03-35 at 559).

Without conceding the above point, Kach, Kahane.org, and Kahane Chai will respond to the allegation to protect this record. First, Mr. Guzofsky has generally denied making violent statements of any nature, but has been advised by counsel not to make further statements. Second, from the context, it cannot be ruled out that the statement concerns self defense.

In whole, the FBI affidavit significantly conflicts with other parts of the government record and fails to substantiate terror allegations.

D. Kach, Kahane Chai, and Kahane.org do not commit terror or violence but espouse political ideology.

The State Department presents the views of the late Professor Ehud Sprinzak, “dean of the Lauder School of Government, Diplomacy, and Strategy” (KAH03-26 at 483) and an expert on terrorism (KAH03-14). The document is dated January 3, 2003(KAH03-26 at 483):

“To the best of my knowledge, the movement’s members and sympathizers have not engaged in any act of terror since the movement was outlawed and certainly have not done so within the last five years.” (*Id.* at 484).

“The outlawing of the movement has tarnished Israel’s democracy, testifying to its arbitrary rule and its conservative reluctance to re-examine itself and its determinations.” (Id.).

“I should like to add my support to the move to abolish classifying the Kach movement as a terrorist organization and to make it into an ideological political movement permitted to operate in accordance with Israeli custom.” (Id. at 483).

II. Kach, Kahane Chai, and Kahane.org have a Constitutional Presence within the United States.

The State Department record establishes that Kach, Kahane Chai and Kahane.org have established substantial connections to the United States, are entitled to due process and have suffered the loss of liberty and property resulting from the designations.

A. As the administrative record shows, Kach, Kahane Chai and Kahane.org have substantial presence in the United States.

The FBI affidavit states that Kahane Chai was formed with encouragement by a “dual US/Israeli citizen and US leader of Kahane Chai/Kach, and other Jewish extremists in the US, Israel, and elsewhere....” (KAH03-30 at 501-502). The State Department maintains that both newkach.org and new Kach Movement are aliases of Kahane Chai (KAH03-35 at 557). An FBIS record states that “US-based new kach chapters and websites are located in Philadelphia, Milwaukee, New York, Chicago, and Teaneck, New Jersey.” (KAH03-08 at 420). The State Department sent notice to six people it believed were representatives of Kach, Kahane Chai, or Kahane.org or one of the thirty-five, alleged aliases; all six people had addresses in the United States (KAH03-35 at 547-548).

B. Kach, Kahane Chai and Kahane.org’s presence entitles it to due process.

According to the government Kach, Kahane Chai, and Kahane.org have substantial connections within the United States and thus have developed constitutional presence. United States v. Verdugo-Urquidez, 494 U.S. 259,271 (1990). Thus Kach, Kahane Chai, and Kahane.org are entitled to the basic elements of due process. ACLU Foundation v. Barr, 952 F.2d 457 (D.C.Cir. 1991).

C. The Secretary's Designation Has Deprived Kach, Kahane Chai and Kahane.org of Property and Liberty.

The Secretary's designation deprives Kach, Kahane Chai and Kahane.org of life, liberty or property. The FBI has seized assets from alleged members of Kach, Kahane Chai or Kahane.org and their alleged aliases in the United States (KAH03-08 at 419; KAH-30 at 507). A mother of three, resident of New York, who identifies with the views of Rabbi Kahane, and who the government alleges is a representative of Kahane Chai (KAH03-35 at 547-548), is being prosecuted in New York for providing material support to a foreign terrorist organization; the woman allegedly bought a magazine of political commentary sold by an alleged alias of Kahane Chai (Declaration of Samuel Abady, at p.7). Other followers of Rabbi Kahane are also being prosecuted for purchasing political items from alleged aliases of Kahane Chai. (Id.).

III. The State Department deprived Kach, Kahane Chai and Kahane.org their due process rights by disregarding designation notice procedure.

Standard of Review: 8 U.S.C. §1189(b)(3)(B): "contrary to constitutional right, power, privilege or immunity"

The State Department failed to follow its own constitutionally mandated procedures and in doing so deprived Kach, Kahane Chai and Kahane.org of fundamental

due process rights, to each of the organizations detriment.

A. The Secretary failed to follow the constitutional mandate of National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C.Cir. 2001) and in doing so deprived Kach, Kahane Chai and Kahane.org of Fifth Amendment Due Process rights.

The Secretary of State designates a group as a Foreign Terrorist Organization pursuant to 8 U.S.C. §1189 and the constitutionally mandated notice principles set forth in National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C.Cir. 2001). The holding of National Council of Resistance of Iran provides that **before** the Secretary makes a designation, the Secretary must notify the groups he seeks to designate, or redesignate, that the groups have an opportunity to obtain and challenge the unclassified portion of the administrative record (Id.).

William P. Pope, State Department Acting Coordinator for Counterterrorism, in a letter dated Sept. 3, 2003, provided such notice to six people the Secretary thought were representatives of Kahane Chai, or its alleged aliases. (KAH03-35 at 547-548). Mr. Pope instructed the six addressees of the letter that they could obtain the unclassified version of the administrative record by sending a written request to him within 10 days of the date of receipt of the September 3, 2003 letter (Id. at 548). The letter further stated that the Secretary sought to designate Kahane Chai and its alleged aliases by October 5, 2003 (Id.).

Fern Sidman, an addressee of the September 3, 2003 notice letter, received the notice letter on Sept. 12, 2003 (KAH03-35 at 552-553; KAH03-36 at 569-570). On September 16, 2003, an attorney, Mr. Samuel A. Abady, acting on behalf of Fern

Sidman, an alleged representative of Kahane Chai and Kach and its alleged aliases, requested the administrative record (KAH03-36 at 569-570). On October 1, 2003 attorney Mr. Kenneth Klein also made a request for the administrative record on behalf of a representative of Kach (Id. at 571).

On Oct. 22, 2003, Mr. Abady wrote again to Mr. Pope requesting the administrative record (Id. at 572-575). By that date, neither Mr. Abady nor Mr. Klein had received any communications from the State Department concerning the unclassified record.

On December 18, 2003, Mr. Klein motioned for summary review to set aside the designations of Kach, Kahane Chai, and Kahane.org, based in part on the State Department's failure to comport with the mandate of National Council of Resistance of Iran.

On December 18, 2003 the government sought an extension for filing the certified indices to the records because the indices were not yet prepared due to work burdens. ("Motion For Extension Of Time To File Certified Indices To Records", at 2-3). Thus the government could not have comported with the notice requirements set forth in National Council of Resistance of Iran providing for Kahane Chai to receive and comment on the administrative record before the October 5, 2003 designation date.

On January 20, 2004, in its Response to Kahane Chai's motion for summary review, the government stated that the Secretary had designated Kahane Chai on October 2, 2003 (Response to Petitioners' Motion for Summary Review to Set Aside Designations, 2). In the same motion the government explained that it had not comported with the requests by Mr. Abady and Mr. Klein for the administrative record because each

of their requests were defective (Id., 4-5). According to the government, Mr. Klein's letter was outside the required congressional prenotification period and Mr. Abady's did not state that he was requesting the administrative record as an attorney to a representative of Kahane Chai or its alleged aliases. (Id.). Yet, the government stated it had decided to send each Mr. Abady and Mr. Klein the administrative record to "simplify the issues before this Court..." and conduct a *de novo* review of the designations (Id. at 5-6).

The government maintains that that Mr. Abady's request for the record was defective in that he "did not indicate that [he was] requesting the record as a representative of Kahane Chai or one of its aliases...." (KAH03-35 at 555). In fact, the government's own evidence is to the contrary. As both Mr. Klein and Mr. Abady pointed out in future communications to the government, it is clear that the September 3, 2003 letter considered Ms. Sidman a representative of Kahane Chai:

We believe that you might represent Kahane Chai (also known as Kach and other aliases) in the United States. Accordingly, the Secretary is notifying Kahane Chai (also known as Kach and other aliases) through you of his intent to consider those organizations and their aliases mentioned above, for redesignation as foreign terrorist organizations, on or before October 5, 2003, pursuant to applicable law.

If you or another representative of Kahane Chai (also known as Kach and other aliases) would like to participate in the process prescribed by the United States Circuit of Appeals for the District of Columbia NCRI v. Department of State, you or such other representative(s) must notify the Secretary of State in writing, within ten (10) days of the day you receive this letter."

(KAH03-35 at 548).

Further, Mr. Abady's initial request letter of Sept. 16, 2003 letter makes it eminently clear that he represented Fern Sidman: "I am counsel to Fern Sidman...."

(KAH03-36 at 569). It's also evident he made a request for the administrative record on behalf of his client: "Pursuant to *National Council of Resistance of Iran*, 251 F.3d 192 (D.C. Cir. 2001), demand is hereby made that the Secretary of State disclose any and all material which he claims support the intended designation of the Jewish activist organizations in your letter as 'foreign terrorist organizations.'" (*Id.* at 570).

On January 24, 2004 Mr. Klein received the unclassified record. An accompanying letter, dated January 16, 2004, stated, as did the January 20, 2004 government response motion (Response to Petitioners' Motion for Summary Review to Set Aside Designations) that the Secretary had already redesignated Kahane Chai and designated or redesignated its alleged aliases on October 2, 2003 (KAH03-35 at 557-558). Mr. Abady also received the record and a similar letter. (*Id.* at 554-556).

But in the January 20, 2004 motion, the government maintained that only Mr. Klein had made a late request for the administrative record (Response to Petitioners' Motion for Summary Review to Set Aside Designations, 4). In the letter dated January 16, 2004 accompanying the administrative record, the State Department maintains that both Mr. Klein's and Mr. Abady's requests for the administrative record were beyond "the required 7-day Congressional prenotification period..." (KAH03-35 at 555, 558).

In fact, it is plain that Mr. Abady's letter had fully complied with the State Department's time frame. The State Department sent notice on September 3, 2003 and instructed recipients to make a written request **within ten days of receipt** of the September 3, 2003 letter. Ms. Sidman received the letter on September 12, 2003 as Mr. Abady indicated in his September 16, 2003 request letter (KAH03-36 at 569) and the government documented by the certified mail return slip (KAH03-35 at 552-553). Mr.

Abady then requested the administrative record in a letter dated September 16, 2003, well within the ten day period required by the government (KAH03-36 at 569-570).

Thus, on the one hand the Secretary stated that he had provided an opportunity for Kahane Chai and its alleged aliases to request the record, receive the record, comment on the record, and have the Secretary make his designation based on the record and Kahane Chai's responses. (KAH03-35 at 554-558). On the other hand the Secretary stated that all these events were to occur before October 5, 2003 when the Secretary intended to make designations. Given that the Secretary mailed the letter dated Sept. 3, 2003 on Sept. 4, 2003 (KAH03-35 at 551), and he gave the alleged representatives ten days to reply, and fifteen days to comment, it seems the State Department was not seriously trying to comport with their constitutional requirements. Furthermore, the letters dated January 16, 2004 each sent to Mr. Klein and Mr. Abady stated that the responses from the alleged representatives had to be received at least seven days prior to Oct. 5, 2003 to comport with the Congressional prenotification requirement (KAH03-35 at 555; 558). It seems virtually impossible for the State Department to have comported with the due notice requirements of National Council of Resistance of Iran.

It is true that in the government's response motion (Response to Petitioners' Motion for Summary Review to Set Aside Designations, 5-6) and in the State Department letter dated January 16, 2004 that both Mr. Klein and Mr. Abady received, the State Department pledged to conduct a de novo review of the designations (KAH03-35 at 555, 558). The State Department provided the unclassified record to Kahane Chai, Kach, and Kahane.org, through Mr. Klein and Mr. Abady, on January 24, 2004 (KH03-35 at 554-556, 557-558); accepted responses from Kahane Chai (KAH03-36 at 585-654);

completed its de novo review of the designations on December 22, 2004 (KAH03-38 at 667); and released it in final form March 3, 2005 (Administrative Record, Volume 2, Unclassified Version-Sealed Material Deleted, Corrected Version, Certificate of Service).

But this proposed remedial action fell and falls far short in comporting with the constitutional requirements of National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001). The Secretary made his de novo designation decision almost ten months after Kach, Kahane Chai and Kahane.org provided their initial responses. More than one year after Kahane Chai was to have participated in the designation process, the Secretary finally made a designation decision. Due to the serious ramifications of the designations, each day that seeking redress was delayed was and is still prejudicial and harmful to those that identify or associate with Kach, Kahane Chai and Kahane.org. People, such as Fern Sidman, continue to be prosecuted and investigated for their beliefs (Declaration of Sam Abady p. 7). Seized assets continue to be held (KAH03-8 at 419). People cannot associate freely or support political causes without facing significant jail time or travel abroad without fear of being barred from returning to the country of their citizenship. By failing to comport with the mandates of National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001), Kahane Chai was denied due process and injured as a result.

IV. 8 U.S.C. § 1189 violates the due process of Kahane Chai, Kach, and Kahane.org by allowing the use of classified information, not subject to disclosure, as the basis for the designation.

Standard of Review: Under 8 U.S.C. §1189(b)(3)(B): “contrary to constitutional right, power, privilege or immunity.”

By allowing the use of untested, classified evidence, unavailable evidence, Kach, Kahane Chai, and Kahane.org have been denied meaningful participation in the designation process resulting in a lack of due process.

A. Kach, Kahane Chai, and Kahane.org incorporate and adopt sections I and II for the argument below.

B. This court and other courts have consistently maintained that

The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions. See In re Application of Eisenberg, 654 F.2d 1107, 1112 (5th Cir. 1981).

Exceptions to the main rule are both few and tightly contained.

Abourezk v. Reagan, 785 F.2d 1043, 1060-1061, (D.C.Cir. 1986), **bolding added.**

In People's Mojahedin Organization of Iran v. Department of State, 327 F.3d 1238 (D.C. Cir. 2003), this Court did not have to rely on classified information in reviewing the FTO designation, as the unclassified record substantiated the case. (Id. at 1243). Thus the Court found that even if there could be a due process violation, the violation would be harmless as the unclassified evidence was overwhelming, "However, even if we err in describing the process due, even had the Petitioner been entitled to have its counsel or itself view the classified information, the breach of that entitlement has caused it no harm" (Id.).

In contrast is the case at bar. The documents supporting the government's unclassified record have been shown to be contradictory, vague, inaccurate, containing mere suspicion and innuendo. As such, in the best light, Kach, Kahane Chai, and Kahane.org respectfully submit that the unclassified portion of the administrative record

lacks substantial support for the FTO designations of Kach, Kahane Chai, Kahane.org or any of the other alleged aliases. Without the responses of Kach, Kahane Chai and Kahane.org, and on a cursory look, it is feasible to be misled by the unclassified portion of the record. Kach, Kahane Chai and Kahane.org are confident that were they to see the classified information they would be able to provide adequate explanation just as they have done for the unclassified portion. As this court stated: “It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment” Abourezk v. Reagan, 785 F.2d 1043 (D.C.Cir. 1986). There is no one in a better position to contest the administrative record than Kach, Kahane Chai and Kahane.org themselves.

The classified information should therefore either be disclosed for review to Kach, Kahane Chai and Kahane.org or in the absence of such disclosure the court should not utilize the classified information in making a determination. Any less will result in irreparable harm to Kach, Kahane Chai and Kahane.org through a violation of their due process rights.

V. The State Department engaged in religious discrimination by designating only Jewish websites, including Kahane.org’s via alleged alias designation, despite the fact that other designated organizations also have websites.

Standard of Review: 8 U.S.C. §1189(b)(3)(B): “contrary to constitutional right, power, privilege or immunity”

The State Department discriminated on the basis of religion, by only designating Jewish websites, despite the fact that other FTOs also have websites.

A. The State Department violated Kahane.org's First Amendment rights by only designating it and other Jewish websites as FTOs despite the fact that many of the other FTOs also have websites. For the first time, with the 2003 designations, websites were designated as FTOs (KAH03-36 at 640-641). Specifically only Jewish websites were designated, all alleged aliases of Kahane Chai: Kahane.org, Kahane.net, newkach.org, Kahanetzadok.com.

“No other website was designated as an FTO. This is important because besides Petitioners and their alleged aliases, there are approximately twenty-five organizations and one hundred fifty-five aliases appearing on the 2003 designation list. Many of the other organizations are Islamic or have an Islamic purpose. Other organizations on the list represent, for example, Kurds, Basque, and Columbians. Some of these organizations have websites. Yet none of their websites were listed. Not even the websites of some of the most notorious organizations were designated as FTOs.” (Id. at 640).

These are FTOs whose sites are not listed: Al Qaeda's site (It showed the severed head of a hostage the group had murdered (Id. at 642-645). Hamas, Hezbollah, Palestine Islamic Jihad (Id. at 640). The National Council of Resistance of Iran has two websites affiliated with it, yet neither are listed (Id.).

By designating only Jewish websites, all alleged aliases of Kahane Chai, when other FTOs have websites, and sometimes use those sites for despicable purposes, evidences that the State Department engaged in religious discrimination violating the First Amendment.

VI. Designating a website, Kahane.org, as a foreign terrorist organization violates the First Amendment.

Standard of Review: 8 U.S.C. §1189(b)(3)(B): “contrary to constitutional right, power, privilege or immunity”

The State Department violated the First Amendment rights of Kahane.org by designating the website a Foreign Terrorist Organization..

A. The State Department violated Kahane.org’s First Amendment rights by designating it as an FTO. Kahane.org is a website, a portal of free speech protected by the First Amendment. In Idaho, a jury acquitted a man of providing material support to a terrorist organization by operating a website (KAH03-36 at 638-639). The website sought to raise funds and warriors for the terrorist group, Hamas (Id.). The website posted admirations for those committing suicide attacks (Id. at 639). Even the man’s attorney admitted his client was no pacifist. But the jury decided that the man was engaging in First Amendment activity and that even if the man were extolling illegal activity, as long as people were not driven to imminent activity, then it was protected free speech.

The case at bar is no different. Kahane.org expresses a viewpoint. But it does not advocate terror. Kahane.org should be fully protected as a medium of free speech. The designation should be reversed on First Amendment grounds.

CONCLUSION

This Court should hold unlawful and set aside the Secretary's designations for Kach, Kahane Chai, and Kahane.org.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused two copies of the Brief of Petitioners to be delivered personally this _____ day of April, 2006, to the following counsel of record:

Douglas Letter, Esquire
Mark S. Davies, Esquire
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Kenneth Klein

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The undersigned counsel of record for Kahane Chai, Kach and Kahane.org hereby certifies, pursuant to F.R.A.P. 32(a)(7)(B)(1) and Circuit Rule 32(a) that based upon the word count reported by the word-processing system used to prepare the brief, the Brief of Petitioners' Kahane Chai, Kach, and Kahane.org, contains 11,372 words and complies with said limitation.

ADDENDA

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ADDENDENDUM A -	Text of Immigration and Naturalization Act, 8 U.S.C. Section 1189
ADDENDUM B -	Declaration of Samuel A. Abady, Esq., Pages 1, 4, 5, 7



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TITLE 8 > CHAPTER 12 > SUBCHAPTER II > Part II > § 1189[Prev](#) | [Next](#)**§ 1189. Designation of foreign terrorist organizations**[How Current is This?](#)**(a) Designation****(1) In general**

The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—

- (A)** the organization is a foreign organization;
- (B)** the organization engages in terrorist activity (as defined in section 1182 (a)(3)(B) of this title or terrorism (as defined in section 2656f (d)(2) of title 22), or retains the capability and intent to engage in terrorist activity or terrorism) ^[1]; and
- (C)** the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

(2) Procedure**(A) Notice**

(i) To congressional leaders Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate, in writing, of the intent to designate an organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor.

(ii) Publication in Federal Register The Secretary shall publish the designation in the Federal Register seven days after providing the notification under clause (i).

(B) Effect of designation

(i) For purposes of section 2339B of title 18, a designation under this subsection shall take effect upon publication under subparagraph (A)(ii).

(ii) Any designation under this subsection shall cease to have effect upon an Act of Congress disapproving such designation.

(C) Freezing of assets

Upon notification under paragraph (2)(A)(i), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court.

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(3) Record**(A) In general**

In making a designation under this subsection, the Secretary shall create an administrative record.

(B) Classified information

The Secretary may consider classified information in making a designation under this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c) of this section.

(4) Period of designation**(A) In general**

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

(B) Redesignation

The Secretary may redesignate a foreign organization as a foreign terrorist organization for an additional 2-year period at the end of the 2-year period referred to in subparagraph (A) (but not sooner than 60 days prior to the termination of such period) upon a finding that the relevant circumstances described in paragraph (1) still exist. The Secretary also may redesignate such organization at the end of any 2-year redesignation period (but not sooner than 60 days prior to the termination of such period) for an additional 2-year period upon a finding that the relevant circumstances described in paragraph (1) still exist. Any redesignation shall be effective immediately following the end of the prior 2-year designation or redesignation period unless a different effective date is provided in such redesignation. The procedural requirements of paragraphs (2) and (3) shall apply to a redesignation under this subparagraph.

(5) Revocation by Act of Congress

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

(6) Revocation based on change in circumstances**(A) In general**

The Secretary may revoke a designation made under paragraph (1) or a redesignation made under paragraph (4)(B) if the Secretary finds that—

- (i) the circumstances that were the basis for the designation or redesignation have changed in such a manner as to warrant revocation; or
- (ii) the national security of the United States warrants a revocation.

(B) Procedure

The procedural requirements of paragraphs (2) and (3) shall apply to a revocation under this paragraph. Any revocation shall take effect on the date specified in the revocation or upon publication in the Federal Register if no effective date is specified.

(7) Effect of revocation

The revocation of a designation under paragraph (5) or (6), or the revocation of a

redesignation under paragraph (6), shall not affect any action or proceeding based on conduct committed prior to the effective date of such revocation.

(8) Use of designation in trial or hearing

If a designation under this subsection has become effective under paragraph (2)(B), or if a redesignation under this subsection has become effective under paragraph (4)(B), a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing.

(b) Judicial review of designation

(1) In general

Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit.

(2) Basis of review

Review under this subsection shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation.

(3) Scope of review

The Court shall hold unlawful and set aside a designation 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),^[2] or
- (E)** not in accord with the procedures required by law.

(4) Judicial review invoked

The pendency of an action for judicial review of a designation shall not affect the application of this section, unless the court issues a final order setting aside the designation.

(c) Definitions

As used in this section—

- (1)** the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);
- (2)** the term "national security" means the national defense, foreign relations, or economic interests of the United States;
- (3)** the term "relevant committees" means the Committees on the Judiciary, Intelligence, and Foreign Relations of the Senate and the Committees on the Judiciary, Intelligence, and International Relations of the House of Representatives; and
- (4)** the term "Secretary" means the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General.

[1] So in original. The closing parenthesis probably should follow "section 1182 (a)(3)(B) of this title".

[2] So in original. The comma probably should be a semicolon.

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

-----X

PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN,

Petitioner,

03-1387

- versus -

DEPARTMENT OF STATE, et al.,

Respondents.

-----X

- and -

CONSOLIDATED CASES NUMBERED 03-1388

and 03-1392

-----X

Samuel A. Abady, an attorney duly admitted to the bars of the State of New York, the United States District Courts for the Northern, Southern, Eastern and Western Districts of New York, the United States Court of Appeals for the Second and Fourth Circuits, and the United States Supreme Court, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I represent various Jewish activists who are American citizens and adherents to the political philosophy and religious teachings of the late Rabbi Meir David Kahane, founder of the Jewish Defense League ("JDL"), author of various books on politics and religion, and former member of the Knesset in Israel.
2. Rabbi Kahane was a graduate of New York University and New York Law School where he studied International Law. He founded the JDL in 1968. His first book was entitled *Never Again*. The title became a catch phrase representing militant Jewish resistance to

the owners fully compensated for its monetary value, and the Arab residents then relocated to their own state. Jordan.³

6. Due to his hard line views against Arab terrorism, not surprisingly. Rabbi Kahane was in the cross-hairs of Arab terrorists for many years. In 1990, while giving a speech in New York City, he was murdered by El-Said el-Nossair, a member of the Al-Queda Islamic international terrorist organization. Reflecting the traditional Arab embrace of the "blood feud," *i.e.*, that honor demands revenge be taken not only against one's enemy, but also, his entire family,⁴ in December of 2000, Palestinian terrorists murdered Rabbi Kahane's only son, Benjamin Ze'ev Kahane, along with his wife, Talia.⁵
7. Among my clients is Fern Sidman, a single mother in New York and former member of the Jewish Defense League. Ms. Sidman received a letter dated September 3, 2003, from William Pope, Acting Director of Counter-terrorism at the United States Department of State, providing the notice mandated by this Court's decision in *National Council of*

³ This policy, also embraced by Israel's Moledet Party, is often grounded in the "exchange of populations," argument, *i.e.*, that relocation of the Arab population of the disputed territories is justified by the ethnic cleansing of the 960,000 Jewish refugees from the Arab countries in the period 1948-50. Whereas Israel absorbed all these refugees, whose descendents make up half its population today, the Arab states refused to absorb the Palestinian refugees and grant them citizenship, in order to use them as a sword in the Arab war against Israel. See, David G. Littman, "The Forgotten Refugees - An Exchange of Populations," *National Review*, Dec 3, 2002, published at <http://www.nationalreview.com/i/script/printpage.asp?ref=/comment/comment-littman120302.asp>.

⁴ See, Uri Avinery, "The Ongoing Blood Feud," *Palestine Chronicle*, Jan. 20. 2002. <http://www.palestinechronicle.com/article.php?story=20020120193255152>. Avinery is a well-known Israeli gadfly sympathetic to the Palestinian nationalist cause, and has called for creation of a bi-national Jewish-Arab state in all of Israel and the disputed territories..

⁵ See, Fern Sidman, "Who Really Murdered Binyamin Kahane," Jan. 2, 2001, http://www.jdl.org/israel/b_kahanemurder_shtnil.

Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001) that the Secretary of State intended to designate certain Jewish organizations named after or inspired by Rabbi Kahane as Foreign Terrorist Organizations ("FTO") under 8 U.S.C. § 1189. A copy of that letter is annexed hereto as Exhibit "A."

8. Mr. Pope's letter to Ms. Sidman further advised that she was entitled to disclosure of all non-secret information on which the Secretary of State supposedly justified designating these Jewish organizations as FTO's.
9. The law requires the Secretary of State to designate FTO's every two years. Annexed at Exhibit "B" is a copy of 66 FR 51088-01 dated October 5, 2001. As the Court can see, at that time, the Secretary of State designated Kahane Chai ("chai" is Hebrew for lives, hence, "Kahane Lives") as an FTO, and listed seventeen Jewish activist political groups or Jewish educational institutions as alter egos of Kahane Chai.
10. Annexed at Exhibit "C" is a copy of 68 FR 56860-03 dated October 2, 2003. As the Court can see, this time, the Secretary of State designated Kahane Chai as an FTO, and listed thirty-seven other Jewish activist groups and Jewish educational organizations as alter egos, including the original list of seventeen from 2001,
11. These organizations are listed side-by-side with traditional, international Arab terrorist organizations like Hamas, Islamic Jihad and Al-Queda, but the list conspicuously excludes the Palestine Liberation Organization, historically, the world's leading force of Arab terrorism which was founded in 1964 by Egyptian national and current President, Yasser Arafat.
12. The irony of the Secretary of State's action is that many of the Jewish organizations

17. Specifically, a grand jury has been convened in the Eastern District of New York to initiate prosecution of Ms. Sidman and others under 18 U.S.C. § 2339B which prohibits giving "material support" to an FTO. One of the FTO's listed in 68 FR 56860-03 is the Judean Voice, a magazine of political commentary published in print and on the Internet. It is apparently the Government's contention that, by purchasing a copy of this magazine, the purchaser has violated 18 U.S.C. § 2339B, an offense which carries up to fifteen years in prison.
- 18.. A. U.S. A. Ruth Nordenbrook, a career prosecutor in the Eastern District of New York whom I have known for many years, is presenting the evidence to this grand jury. Ms. Sidman was subpoenaed to testify before the grand jury on October 23, 2003. A copy of that subpoena is annexed hereto as Exhibit "F." A.U.S.A. Nordenbrook advised me that Ms. Sidman was a target of the grand jury.⁶ Accordingly, I advised A.U.S.A. Nordenbrook that, because the Secretary of State in effect has perverted the expression of Jewish activist political beliefs into a predicate for terrorism prosecutions, and constitutionally protected acts such as paying dues to the organizations listed in 68 FR 56860-03, or purchasing literature distributed by such organizations such as the Judean Voice or Rabbi Kahane's books, constitutes providing "material support" for an FTO, I advised Ms. Sidman to invoke her Fifth Amendment rights. In response, A.U.S.A. Nordenbrook withdrew the subpoena.

⁶ In the Second Circuit, persons subpoenaed to testify before a grand jury are entitled to advance notice that they are targets of prosecution. *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert granted*, 431 U.S. 937, 97 S.Ct. 2647, 53 L.Ed.2d 254 (1977), and *cert. dismissed*, 436 U.S. 31, 98 S.Ct. 1873, 56 L.Ed.2d 53 (1978).