The Foreign Terrorist Organization List

An Effective Tool to Fight Terrorism or an Infringement of Civil Liberties?

Since September 11, 2001, the U.S. government has increasingly relied on watch lists as a linchpin of its counterterrorism strategy. Their use, however, has attracted scrutiny out of concern that they impinge upon civil liberties, that they do not serve as deterrents to the formation of terrorist groups, and that the process for groups to appeal their designation is unclear and excessively burdensome. This paper explains the process for designation as an official Foreign Terrorist Organization (FTO), and the procedures by which groups are removed from the FTO list. It then compares the procedures and factors involved in the designation and removal of three separate groups as FTOs: the DFLP, the PMOI, and the PKK. Finally, this paper sets forth policy recommendations regarding FTO designation and removal, and offers suggestions on how the watch lists can be more effective counterterrorism tools that do not infringe on basic civil liberties.

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Preface

I did not mean to write this paper. Truly, why would any self-respecting undergraduate student focused on studying international communication and the management of student exchange programs, who aspires to one day open a coffee shop, and who is in their final semester of college voluntarily choose to spend countless hours in the law school library plodding her way through legal texts and policy documents, trying to decipher ‘lawyer-speak’? Moreover, why terrorist organizations?

Well, I guess you can never really plan for anything. I meant to write about the media; after all, I am pursuing a communications degree. Then I meant to write about the how the media is used as propaganda by a terrorist organization. That terrorist organization happened to be so fascinating that I meant to do an in-depth study on how they currently operate. As I read more and more about them, however, I became increasingly confused as to why they were deemed to be such a danger as to warrant designation as a Foreign Terrorist Organization (FTO) by the U.S. State Department. After all, no one I spoke with had ever heard of them before. Indeed, my Filipino friend described them as ‘tame.’ Too bad that organization was located halfway around the world; it made field research a little difficult. So then I hit upon it, why is any group classified as an FTO? What differentiates it from any other organized militant group that is not on the list? The college student idealist inside me further wondered—is this process fair?

And so I braced myself for exactly what I’ve told myself for over fifteen years I would never do—pretend to be a law student (sorry, Dad!). That said, in the end, I appreciate this project for what I have been able to take away, which includes a richer understanding of the U.S. legal system, an awareness of the breadth of U.S. foreign policy, and a heightened concern for the rights and liberties of all individuals in a post-9/11 context—not to mention a better idea of what “time management” truly means!

Thank you, first and foremost, to my faculty advisor, Dan Schneider, who fueled new ideas and perspectives on my topic, and encouraged me to go beyond the textbooks and reach out to the resources at my fingertips in Washington, DC. Second, to my father for coaching me in “legalese” and, more importantly, taming any irrational panic attacks (Mom, you definitely helped out on that one too!). Finally, to the AU Honors Office for encouraging me and my peers to engage in creative and inspiring research projects.

So, here is what I wrote…

April 16, 2011
Introduction

“This is a moment of great possibility for American policy.” -Daniel Benjamin, Coordinator, Office of the Coordinator for Counterterrorism

U.S. government watch lists have steadily become a central counterterrorism measure. However, from the Treasury Department to USAID, their use has attracted scrutiny from civil libertarians and others out of concern that they impinge upon civil liberties, such as free speech, freedom of association, and freedom to travel. One watch list in particular, the Foreign Terrorist Organization (FTO) List, and its designation process has been called into question. Less than one month following September 11, 2001, eight militant groups were added in rapid succession to the FTO list. Now totaling forty-seven groups, only six groups have been removed from the FTO list during its fifteen year history. The purpose of this three-part case study is to explain the U.S. State Department FTO listing and removal processes as part of the U.S. counterterrorism effort. It should inform policymakers on how the watch list can be used as a more effective counterterrorism tool in a manner to less, if not eliminate, infringements of civil liberties.

For a majority of the American people, terrorism is a relatively new phenomenon. However, for many counterterrorism policy experts, the attacks of September 11, 2001 were simply another episode in a more than thirty-year battle commanded by radical groups against the U.S. and U.S. interests around the globe. Indeed, President Bill Clinton stated in 1998 that the United States was in “a long, ongoing struggle between freedom and fanaticism between the rule of law and terrorism.” The president later told the United Nations General Assembly that

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1 In a speech “Testimony Before the Subcommittee on Terrorism, Nonproliferation, and Trade of the House Foreign Affairs Committee” April 14, 2011 http://www.state.gov/s/ct/rls/rm/2011/160853.htm
3 As of March 2011
4 Address to the nation by President Bill Clinton <http://www.pbs.org/newshour/bb/military/july-dec98/clinton2_8-20.html>.
“terrorism is at the top of the American agenda—and should be at the top of the world agenda.”

Decidedly, it is clear that the country had entered a phase of more acute conflict and engagement with these groups and the countries and non-state actors that support them.

Today’s threats around the globe and within U.S. borders have necessitated policy discussion in the federal government as to how to best counter and prevent future attacks. The fruition of terrorist plots, such as the 1993 bombing of the World Trade Center, prompted Congress to enact the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) as a means of deterring and punishing terrorist activities. The FTO list was a result of this legislation. Congressional findings further indicated that “some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds in the United States, or use the United States as a conduit for the receipt of funds in other nations.” A more recent policy manifestation is the National Commission on Terrorist Attacks on the United States, which has only added to an already extensive and professional intelligence community, as well as to buttress several ongoing Congressional oversight hearings that continue to this day on the so-called “global war on terror” (GWOT).

While there are many counterterrorism tools at the disposal of the U.S. government, one of the most extensive means by which to identify potential threats is the growing phenomenon of terrorist watch lists: the compilation of names of “known” or “suspected” terrorists and terrorist groups that is then checked against selected individuals at specified occasions, triggering certain

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7 Id. § 301(a)(6)
8 http://www.9-11commission.gov/
consequences. Watch lists existed even before September 11, but are now being consolidated, expanded, and applied in a greater number and variety of settings. Some of the impetus lies in the fact that the “names of at least three of the [September 11] hijackers were in the information systems of the intelligence community and thus potentially could have been watch listed.”

Interest in this technique is part of a larger effort to connect and exploit terrorism intelligence. Watch listing can now deny visas, bar access to air travel, and block financial transactions. Similarly, association is an additional consideration of counterterrorist strategy, penalizing people under criminal and immigration laws for providing “material support” to politically selected “terrorist” groups, without regard to whether an individual’s support was intended to further or in fact furthered any terrorist activity.

If wielded effectively, watch lists warn would-be supporters of such listed entities that association with listed groups yields stringent consequences, and provide the Department of Justice and Treasury Department with a basis to prosecute and freeze the assets of those found to be supporting people or organizations who actively threaten the security of the U.S. However, it is unclear that designating terrorist groups through these lists is, in practice, an effective counterterrorism tool, or if they serve as deterrents to the formation of terrorist groups. Additionally, it is less than clear what the actual process is for groups and individuals to appeal

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12 Steinbock, 68.
their designation and be removed from the lists.\textsuperscript{13} Widespread dissatisfaction has reached Congress, where a bill providing redress for being incorrectly placed on the list passed House of Representatives in early 2009.\textsuperscript{14}

The FTO designation has been criticized for putting the same label on an extremely diverse group of organizations, and not accurately reflecting the blurred and ever-changing organizational lines that characterize modern international terrorism.\textsuperscript{15} Indeed, the list itself is diverse and far-reaching, encompassing a kaleidoscope of organized groups with varying backgrounds, purposes, ideologies, goals, tactics and strategies. From (a) large multifaceted groups based on Islamist ideologies (Hamas, Hezbollah), Marxism (the FARC and ELN in Colombia), a combination of the two (the PMOI in Iran) or ethnicity (the LTTE, PKK, and ETA); to (b) European groups that have always been small but deadly (e.g. the Revolutionary Struggle in Greece and the Revolutionary People’s Liberation Party/Front in Turkey); to (c) radical Islamist organizations like bin Laden’s al-Qaida and related allied groups (Gama’at al-Islamiyya, the Philippines’ Abu Sayyaf Group, and the Islamic Movement of Uzbekistan), the FTO designation is a blanket label—a uniform division—for dozens of fundamentally distinct


\textsuperscript{14} Yvette D. Clark, \textit{Bill Summary & Status 111th Congress (2009-1010) H.R. 559 CRS Summary}. http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00559:@@@D&summ2=m&. The bill sought to amend the Homeland Security Act of 2002 to direct the Secretary of Homeland Security to establish: (1) a timely and fair process for individuals who believe they were delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat when screened against any terrorist watch list or database used by the Transportation Security Administration (TSA) or any component of the Department of Homeland Security (DHS); and (2) an Office of Appeals and Redress within DHS to implement, coordinate, and execute the process. No action has yet been taken in the Senate.

organizations.\textsuperscript{16} Moreover, the FTO designation challenges diplomatic relations by potentially burning bridges with groups the U.S. might want to deal with in the future.

Official U.S. lists of terrorist groups need to be accurate, thorough, and up-to-date representations of the dynamics of international terrorism, as they currently are not. They need to be in order to keep U.S. counterterrorist policy sincere, fulfill their objectives to improve terrorist-related behavior, safeguard basic civil liberties, and provide a rational and useful frame of reference in discussions of terrorism with foreign partners, the American public, and the groups and states that are on the lists (or should be). It is time to re-think the role of watch lists in counterterrorism strategy, and therefore, understand how certain organizations are selected for FTO designation, how they are removed, along with the processes and politics involved.

Accordingly, this paper begins with a review of the relevant literature regarding the use of counterterrorist tools and watch-lists and the methodology used in this study. Part I describes the range of terrorist watch-lists used in counterterrorist strategy, the protocol by which an organization can be designated as an FTO, the implications of an FTO classification, and the official procedure for being removed from the list. Part II describes three case studies related to group FTO designation and removal. Part III discusses the findings of the official procedure review and case study reviews. Finally, this paper concludes with a summary and recommendations for future research.

**Methodology**

The primary intent of this paper is to address how groups are designated as and removed from the U.S. State Department’s Foreign Terrorist Organizations list. The objectives are to clarify the FTO designation or removal procedures by examining the contextual conditions and factors pertinent to the designation and de-listing process of FTOs. As such, this analysis uses an

\textsuperscript{16} Pillar, p. 153.
exploratory multi-case study research strategy design. A multi-case study design is a comprehensive research strategy that “investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident” (Yin, 2003). The visual model of the procedures for the multi-case study research design of this study is presented in Figure 1.

![Diagram](image_url)

**Figure 1**

The research questions guiding this study are as follows:

**Guiding RQ:** How are groups classified and removed from the U.S. State Department Foreign Terrorist Organization (FTO) list?

- **RQ1:** What is the official procedure for a group to be classified and removed as an FTO?
- **RQ2:** How has the designation been applied to groups?
- **RQ3:** What are the main factors prohibiting revocation of an FTO designation?

I have chosen a multiple-case study design due to its ability to manage a full variety of evidence. Multiple-case study designs are advantageous because evidence drawn from several sources is generally considered more compelling, and the overall study is therefore considered more robust (Herriott & Firestone, 1983). Thus, I have chosen three groups to illustrate and determine the criteria and processes for FTO designation and de-listing: the Democratic Front for
the Liberation of Palestine (DFLP), the People’s Mojahedin Organization of Iran (PMOI), and Turkish Kurdistan Workers’ Party (PKK). The DFLP was chosen because it was selected for FTO list removal by the Secretary of State. A closer look at its removal process is useful to determine the criteria basis for FTO declassification in general. I then contrast the results of the DFLP case with the processes and characteristics involved with the PMOI’s individual petition for FTO list removal. Finally, I look at the PKK’s filed suit for FTO list removal, which has been brought by a third party seeking to make contributions to the organization.

One disadvantage of the multiple-case study approach is that it can require extensive resources and time beyond the means of a single student (Yin, 2003). Thus, I chose to examine no more than three cases.

To collect information for the case studies, I used documents, archival records, and semi-structured interviews. Documents included legislation, legal briefs and court records, court opinions obtained via Westlaw, as well as newspaper clippings accessed online. Archival records included government press releases, Federal Register notices, and terrorist watch lists. Finally, to corroborate certain facts that I thought had already been established, I conducted semi-structured interviews with the chief of the Office of the Coordinator for Counterterrorism and the director of the Charity & Security Network. The interviews were focused; each conversation took no longer than 60 minutes. However, questions were open-ended and the delivery was conversational (see Appendix).

By drawing on various sources for evidence and data, and by using a case study protocol, I enhanced external validity and reliability of the study. One predominate limitation to the study was due to the sensitive nature of information surrounding counterterrorism; many of the documents I wished to access were either difficult to obtain access to or were deemed classified.
Similarly, the Westlaw database can only be accessed by a research librarian at the American University Washington College of Law, which meant that I could not conduct searches directly. In addition, some of the interviewers were either reluctant or not forthcoming about certain information regarding specific terrorist groups. In this event, the report should indicate that the interviewee was asked, but declined to comment. These limitations to the study must be kept in mind in the analysis; nonetheless, by drawing on various other data sources, the validity and reliability of the research remains intact and worthy of analysis (Yin, 2003).

Part I. Policy Review: The Listing and Removal Process & Foreign Terrorist Organizations (FTOs)

“It is widely acknowledged that the FTO process is badly flawed.”
- Michael B. Mukasey, TIME Magazine, April 18, 2011

To better appreciate some of the foreign policy ramifications of the listing process, it is useful to briefly discuss the several lists used by the U.S. to exclude and sanction individuals, groups, nations, and non-state actors or, a process that will be referred to throughout this paper as the ‘listing process’.

a. Structure and Purpose of the Listing Process

The general purpose of the listing process is a “means by which to disrupt the financial support network for terrorists and terrorist organizations by authorizing the U.S. government to designate and block the assets of foreign individuals and entities that commit, or pose a significant risk of committing, acts of terrorism.” There are also legal and other consequences

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of being designated by the State Department or other agencies. In addition to freezing of all assets in the U.S., there are civil and criminal penalties, including heightening of public awareness of individuals or entities linked to terrorism, alerting other governments. In effect, terror networks are interrupted by “cutting off access to financial and other resources from sympathizers,” and encourage listed entities to get out of the “terrorism business.”

In order to accomplish the aforementioned goals and purposes there are several lists, some in existence prior to September 11, that are utilized by the State Department, the Treasury Department, the Federal Bureau of Investigation, among others. This inter-agency process includes, essentially, six lists briefly summarized below before discussing one of the six in more detail.

The State-Sponsors of Terrorism List currently lists six state sponsors of terrorism designated by the Secretary of State annually. The current “members” include Cuba (1982), Iran (1984), Libya (1979), North Korea (1988), Sudan (1993) and Syria (1979). The law requires the Secretary of State to provide Congress with the list of countries that have “repeatedly provided support for acts of international terrorism.” Created in 1979, the state-sponsors list has lost two members, including South Yemen and Iraq. South Yemen was removed because it ceased to exist, and Iraq, because it is believed that the U.S. succeeded in “liberating” the country in 2003.

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19 Id.

20 Section 6(j) of the Export Administration Act of 1979 (P.L. 96-72; 50 U.S.C. app. 2405(j)). States may also be designated as supporters of international terrorism, for which sanctions may be imposed, Section 40(A) of the Arms Export Control Act (P.L. 90-629; 22 U.S.C. 2781); and Section 620(A) of the Foreign Assistance Act of 1961 (P.L. 87-195; 22 U.S.C. 2371).

21 Year in parenthesis signifies the year that the country was first added to the list.

22 P.L. 96-72; 50 U.S.C. app. 2405(j)
The Specially Designated Terrorists List (SDTs)\textsuperscript{23} was created by Executive Order 12947 in 1995, and was specifically oriented toward individuals and entities who threatened to disrupt the Middle East peace process efforts. After the September 11\textsuperscript{th} attacks, President Bush expanded the scope of this list through E.O. 13224,\textsuperscript{24} and created a much longer list: the Specially Designated Global Terrorists List (SGDTs). These two lists maintained by the Department of the Treasury focus principally on terrorist financing. According to the Congressional Resource Service (CRS), there are approximately more than 200 individuals, groups, and entities on the aforementioned lists.\textsuperscript{25} The Foreign Terrorist Organizations List (FTOs), the subject list of this paper, will be explained in greater detail in the next section.

The fourth list is the Specially Designated Nationals and Blocked Persons List (SDN),\textsuperscript{26} which overlaps members of the State Sponsors list, SDT, SDGT, and FTO lists. The SDN list is maintained by the Treasury Department’s Office of Foreign Assets Control (OFAC). According to the Congressional Research Service (CRS), there are fourteen different sanction programs that are consolidated under the SDN list process at Treasury.\textsuperscript{27} In this case, economic sanctions are used to punish or disrupt SDNs by targeting either specific economic sectors or generally restricting trade.\textsuperscript{28} This web of groups, individuals, and entities is not limited to terrorist activities, but also includes known or suspected drug smugglers.

The fifth and most recent addition to this listing process is the Terrorist Exclusion List

\begin{itemize}
  \item \textsuperscript{23} Created by E.O. 12947 on 25 January 1995 pursuant to the International Emergency Powers Economic Powers Act (P.L. 95-223; 50 U.S.C 1701 et seq.).
  \item \textsuperscript{24} Can be located at the Department of State web site at <http://www.state.gov/s/ct/rls/other/des/122570.htm>.
  \item \textsuperscript{25} Audrey Kurth Cronin, The “FTO List” and Congress: Sanctioning Designated Foreign Terrorist Organizations. Congressional Research Service, October 21, 2003.
  \item \textsuperscript{26} The complete list may be viewed at <http://www.treasury.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>.
  \item \textsuperscript{27} Cronin, 2003.
\end{itemize}
An organization can be placed on this list by the Secretary of State in consultation with or upon the request of the Attorney General if: (1) “it commits or incites to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (2) prepares or plans a terrorist activity; (3) gathers information on potential targets for terrorist activity; or (4) provides material support to further terrorist activity.” The TEL is maintained by the State Department.

Finally, in addition to the aforementioned lists, the federal government consolidated terrorist screening into a single, comprehensive anti-terrorism watch list on September 16, 2003 called the Terrorist Screening Center Watch List (TSC). The TSC itself is “a multi-agency center, anchored by the Departments of Justice, Homeland Security, the State Department, and the Intelligence Community, and administered by the FBI.” The goal is to “consolidate the Government’s approach to terrorism screening and provide for the appropriate and lawful use of terrorist information in screening processes.”

The Foreign Terrorist Organization (FTO) list has been one of the most recent publicly litigated designations in the political and legal context. Thus, it will be the main focus for the balance of this paper and the case study of the DFLP, PMOI, and PKK.

b. The Foreign Terrorist Organization List

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) the State

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29 Created pursuant to section 411 of the USA PATRIOT Act of 2001 (P.L. 107-56; 8 U.S.C. 1182).
30 Id.
32 Id.
34 Cronin, 2003.
Department can designate individuals and groups as FTOs. The AEDPA empowers the Secretary of State to designate an entity as an FTO whenever s/he determines the: (1) the entity is foreign; (2) the entity engages in terrorist activity; and (3) the terrorist activity threatens our national security or the security of American nationals.35

Terrorist activity, as applicable to the FTO listing process, is defined in section 212(a)(3)(B) of the Immigration and Naturalization Act (8 U.S.C. § 1182(a)(3)(B)), or as defined in 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. § 2656f(d)(2)), or simply as an individual or entity retaining the capability to engage in terrorist activity or terrorism. This is a rather extensive and generalized definition that comprises a litany of various activities. Activities include, but are not limited to: the “high-jacking or sabotage” of transportation; the seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (or organization) to do or abstain from acting as a bargaining tool; a violent attack upon an internationally protected person, the use of a biological agent, chemical agent, or nuclear weapon or device, or explosives, etc. with intent to endanger one or more individuals, or to cause substantial damage to property; etc.”36

The implications for FTO designation are substantial. The assets of groups on the FTO list may be frozen by U.S. financial institutions, and members of these groups may be blocked from entry into the U.S. It makes it unlawful for any person in the U.S., or subject to U.S. jurisdiction, to provide “material support or resources” to an FTO.37 Members of designated FTOs can also be denied visas or excluded from entering the United States, and/or they can be

35 8 U.S.C. § 1189(a)(1)
36 8 U.S.C. § 1189(3)(b)(1)
37 18 U.S.C. § 2339A(b) defines “material support or resources” as “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”
deported once they are in the country.\textsuperscript{38} In addition to the legal sanctions, other goals of the designation include stigmatizing and isolating FTOs internationally, effectively deterring donations or contributions to, and economic transactions with, an FTO. This heightens public awareness and knowledge of an FTO, and signals to other governments the U.S. concern about the named organization.\textsuperscript{39}

In the summer of 2004, Congress made two principal changes to AEDPA. First, an amendment to H.R. 4548 by Rep. Elton Gallegly (R-Calif.), Chairman of the Subcommittee on International Terrorism, Nonproliferation and Human Rights of the House International Relations Committee and Member of House Permanent Select Committee on Intelligence, replaced the requirement to formally re-designate FTOs every two years with a procedure allowing a listed group to petition the Secretary of State at two-year intervals to have its designation revoked. This gives the Secretary 180 days to issue a determination and 30 days afforded to an organization to secure judicial review upon publication of the Secretary’s determination in the Federal Register.\textsuperscript{40} The Secretary is required to review the designation of each FTO at least once every five years even if the FTO does not submit a petition for revocation (i.e., Review of Designation upon Petition).\textsuperscript{41} Where a group does not respond, the Secretary’s decision is not subject to judicial review. Second, a new procedure was established to handle situations in which a designated group changes its name or uses new aliases to avoid U.S. law.\textsuperscript{42}

\textsuperscript{38} Cronin, 2003.
\textsuperscript{39} U.S. Department of State: Fact Sheet by the Office of Counterterrorism (Foreign Terrorist Organizations) at <http://www.state.gov/r/pa/prs/ps/2010/09/146554.htm>.
\textsuperscript{40} 8 U.S.C. § 1189(2)(a)(1) & (2)
\textsuperscript{41} 8 U.S.C. § 1189 (2)(a)(3)
\textsuperscript{42} The amendments were originally introduced as H.R. 3978, “The Designation of Foreign Terrorist Organizations Reform Act.”
An FTO designation can remain in place until it is revoked by an Act of Congress or set aside by the U.S. Court of Appeals for the District of Columbia Circuit.\textsuperscript{43}

As a result, the Executive Branch now wields a tremendous amount of power to designate foreign organizations as terrorists, which is a significant statement given that concern about the Executive Branch’s leverage over the designation process existed even before the AEDPA became law.\textsuperscript{44} The designation process has become increasingly politicized as the State Department picks and chooses which groups to designate as foreign terrorist organizations.

c. The Procedure for Getting on the List

As of March 2011, there were forty-seven groups designated as FTOs.\textsuperscript{45} The inter-agency designation process involves the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, and other components of the intelligence community. Once a target group is identified by the State Department Office of Counterterrorism (S/CT), an “administrative record” is created that includes a compilation of open source and classified materials demonstrating that the statutory criteria have been identified.\textsuperscript{46} This process is highly time-intensive and can take six months or more to complete.\textsuperscript{47} The State Department informs Congress of its intent to designate a group, after which Congress has seven days to review the administrative record. Exclusive of any opposition from Congress,\textsuperscript{48} the designation is published in the Federal Register, which is a government publication, to notify the public. Figure 2 illustrates the official designation procedure.

\textsuperscript{43} 8 U.S.C. § 1189 (2)(a)(3)
\textsuperscript{45} U.S. Department of State: Fact Sheet by the Office of Counterterrorism (Foreign Terrorist Organizations) at <http://www.state.gov/r/pa/prs/ps/2010/09/146554.htm>.
\textsuperscript{46} Id.
\textsuperscript{47} “Jason M. Blazakis, Chief of Office for the Coordinator Counterterrorism, U.S. State Department,” in discussion with author, April 2, 2011. [Hereinafter “Jason Blazakis”].
\textsuperscript{48} To date, this has yet to occur.
Figure 2

To inform U.S. nationals of a designation, the District of Columbia Court of Appeals has held that “as soon as the Secretary [of State] has reached a tentative determination that the designation [of a U.S. national] is impending, the Secretary must provide notice of those unclassified items upon which [s/he] proposes to rely to the entity to be designated … at least in written form.”49 As mentioned, legislation has been passed to require this notice as well. Due to national security concerns, however, such groups are not entitled to access classified sections of the administrative record used to make the FTO designation.50

d. The Procedure for Getting off the List

Groups can be removed from the FTO list at any time, either by the Secretary of State or by Act of Congress.51 The criteria for removal by the Secretary are general and are subject to interpretation: the Secretary of State may revoke a designation if he or she finds either that the circumstances that were the basis for the designation have changed, or that the national security

49 National Council of Resistance of Iran v. Secretary of State, 251 F.3d 192, 209 (D.C. Cir. 2001)
50 Jason Blazakis
51 8 U.S.C. § 1189 (a)(6)(A)
of the United States warrants a revocation of the designation. Former State Department spokesman Richard Boucher interpreted “change in circumstances” to mean that an organization that has been previously designated has “definitely stopped any terrorist activities, renounced it, and changed their stripes.”

Procedures for challenging designation are also detailed in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). Under the statute, an FTO may file for revocation two years after its previous designation date, and following a designation, has 30 days to file a legal challenge in the federal court of appeals in Washington, DC. The court does not consider any new evidence, but reviews the evidence the State Department developed individually. The State Department is also able to present the record in secret and behind closed doors (in camera). Finally, in order to revoke a designation, the Secretary of State must follow the same procedures that are required to designate an organization in the first place.

e. Groups that have been Removed from the List

Since the creation of the FTO list in 1996, only six groups have been removed: the Manuel Rodriguez Patriotic Front Dissidents (FPMR/D), the Democratic Front for the Liberation of Palestine (DFLP), the Khmer Rouge, the Japanese Red Army, The Revolutionary Nuclei, and The Armed Islamic Group (GIA). Kahane.net was also removed as an alias for Kahane-Chai.

In 1999, the government cited lack of terrorist activity, “as defined by relevant law, by those groups during the past two years” to justify its elimination of the FPMR/D and the DFLP. The government noted that these groups had been dropped from the list “because their

52 8 U.S.C. § 1189 (a)(6)(A)
54 “Foreign Terrorist Organizations” http://www.state.gov/s/ct/rls/other/des/123085.htm
involvement in terrorist activity had ended and they no longer met the criteria for designation.”

The executive order signed by President Clinton in January 1995, however, that barred financial transactions with the DFLP and blocked its assets in the United States, remained in effect. The State Department also dropped the Khmer Rouge, as it “effectively ceased to exist.”

The Japanese Red Army (JRA) was removed from the FTO list in 2001 by then-Secretary Colin Powell. However, Powell admitted that he removed the JRA despite the fact that he “remain[ed] concerned about their potential for renewed terrorist activity” and would “continue to monitor them closely,” because he had “not received sufficient information during the past two years to justify designation” under the statute.

Between 2004 and 2009, no groups were removed from the FTO list (see Figure 3). This inaction can likely be attributed to the amendment to H.R. 4548 in the summer of 2004, which modified the two-year review requirement to every five years, unless otherwise personally initiated by the Secretary of State or brought by petition of a designated organization. Figure 3 also generally illustrates the steady rise in groups designated as FTOs since September 11.

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Part II. Case Studies: Designated FTOs

1. Case Report: The Democratic Front for the Liberation of Palestine (DFLP)

Overview

The Democratic Front for the Liberation of Palestine (DFLP) is a Marxist-Leninist organization that, in the past, asserted the goal of a Palestinian state could only be accomplished in the context of a working class revolution brought about through violence. While in operation, the DFLP maintained the Palestinian cause a part of the greater international “war of liberation” in which the United States was considered the central enemy. It was placed on the original 1997 FTO list, but was removed two years later by then-Secretary Madeleine Albright. Nonetheless, the DFLP continues to be viewed as a threat and remains on the Treasury Department’s SDN list as a result of the group’s recent suicide bombings involving Israeli civilians.\(^6\)

History

The group known as the DFLP—also known as the Red Star Forces, the Red Star Battalions\(^\text{63}\), or the Palestinian Resistance Battalions\(^\text{64}\)—was founded in 1969 by Nayef Hawatmeh after its initial split from the Popular Front for the Liberation of Palestine (PFLP). Shortly after its establishment, a number of leftist Arab organizations joined the DFLP, making it the third largest Palestine Liberation Organization (PLO) faction, with about 500 members.\(^\text{65}\)

During the group’s early years, members saw themselves as Marxist Leninists fighting against Israel, viewing the Jewish state as imperialistic and racist, and regarding the Arab monarchies as “petty bourgeois.”\(^\text{66}\)

Throughout its existence, the DFLP carried out numerous attacks on Israeli military and civilian targets. Its most high-profile attack occurred in 1974 in Maalot, a town in Northern Israel, when DFLP assailants took over a school, killing 27 schoolchildren and wounding 134 civilians.\(^\text{67}\)

Initially, the DFLP leadership was initially very critical of the PLO’s peace negotiations with Israel. In the 1980s, tensions came to a head between leaders of the organization after one, Yasir Abd-Rabbuh, expressed support for PLO Chairman Yasir Arafat’s initiative for peace with Israel. Rabbuh later left the DFLP and formed the Palestinian Democratic Union (FIDA).\(^\text{68}\)

However, after the collapse of the USSR in the early 1990s, the DFLP, along with other leftist oriented groups, lost Moscow’s funding and prestige. Gradually, the DFLP began to alter its


\(^{68}\)Palestinian Secular Terrorism, p. 49.
political stance. In 1998, Hawatmeh indicated that the DFLP was prepared to engage in talks with Israel as a means of “testing whether or not Israel would permit a Palestinian state.” Two years later, the group participated in the U.S.-brokered Israeli-Palestinian final status summit negotiations at Camp David as part of the Palestinian delegation.

*Designation as FTO*

The U.S. State Department’s original 1997 designation of FTOs included the DFLP. The Federal Register notice announcing its designation does not include a rationale, but according to the Chief of Terrorist Designations Unit in the Office of the Coordinator for Counterterrorism, Jason M. Blazakis, the Secretary of State is not required to publish the reasons for designation.

*Revocation of FTO Designation*

In 1999, the DFLP reconciled with Arafat and hinted that it might recognize Israel in the event of a signed peace treaty. As a result of this apparent “change in circumstances,” the State Department withdrew the DFLP from its list of terrorist organizations on October 10, 1999. The stated reason for revocation of the FTO designation was primarily due to the “absence of terrorist activity, as defined by relevant law, by those groups during the past *two years.*”

Since its removal from the list and the Palestinian uprising in September 2000, the DFLP has claimed responsibility for a few attacks on Israeli military patrols and settlers in the occupied territories. It has further openly supported the Palestinian uprising. Two commandos from the

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70 Katzman, CRS Report, 2002.
71 Jason Blazakis
72 *Palestinian Secular Terrorism*, p. 49
73 Italics added for emphasis
74 1999 FTO List
group attacked a heavily fortified Israeli military position in the Gaza Strip on August 25, 2001, and killed three Israeli soldiers; the two guerrillas were killed in the exchange of fire.  

2. Case Report: The People’s Mujahedin of Iran (PMOI)

Overview

The largest organized opposition to the current Iranian government, the People’s Mujahedin of Iran (PMOI), serves as a conduit for the National Council of Resistance of Iran (NCRI), a coalition comprised of 570 members that claims to be a transitional government-in-exile. The PMOI has been on the US State Department’s list of designated foreign terrorist organizations since 1997 based upon its killing of civilians in previous decades. It has filed multiple petitions for revocation of the FTO designation, and the organization’s opposition to Iran and its democratic leanings have earned it support among some American and European officials. In March 2011, a bill was introduced to Congress with broad bi-partisan support for the revocation of the PMOI’s FTO designation. The European Union removed the PMOI from its terrorist list in 2009.

History

The group known as the People’s Mujahedin Organization of Iran (PMOI)—also known as the Mujahedin-e Khalq (MeK or MKO), the Muslim Iranian Students’ Society, the National Council of Resistance (NCOR), the Organization of the People’s Holy Warriors of Iran, the National Liberation Army of Iran (NLA), the National Council of Resistance of Iran (NCRI), or

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78 Rachel Christiansen, “Congress tries to remove pro-democracy Iranian group off terrorist list”, the Talk Radio News Service, Mar 17, 2011.
79 Mark John, “EU takes Iran opposition group off terror list”, Reuters, Jan 26, 2009.
the Sazeman-e Mujahedin-e Khalq-e Iran—was formed in 1965. Led by husband and wife, Massoud and Maryam Rajavi, its goal then was to overthrow the Shah of Iran. In the 1970s, members of the group killed American military and civilian personnel who were working in Iran. The group also supported the takeover of the U.S. Embassy in 1979. After the Iranian Islamic Revolution, however, the group began to fight against the Khomeini regime, and most of its members fled Iran. Many ended up in Europe, but a large group found safe haven in Iraq. Saddam Hussein armed and supported the group, and sent its members into action against Iran. Throughout the 1990s, the PMOI engaged in an ongoing campaign of violent terrorist attacks, mostly targeting the Iranian regime.

In 1997, the Secretary of State Madeleine Albright designated the PMOI as a foreign terrorist organization under INA §219. This designation was somewhat contentious, but it has withstood five separate court challenges. Despite numerous attempts by PMOI—and some of its prominent supporters—to get the State Department to lift the designation, it remains in place today. In April 2009, the State Department described the group as follows:

The MEK (PMOI) emerged in the 1960s as one of the more violent political movements opposed to the Pahlavi dynasty and its close relationship with the United States. [PMOI] ideology has gone through several iterations and blends elements of Marxism, Islam, and feminism. The group has planned and executed terrorist operations against the Iranian government for nearly three decades from

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80 Country Reports on Terrorism, 2008.
82 Abrahamian, 1989.
83<http://db.mipt.org/Group.jsp?groupId=3632>.
84 Country Reports on Terrorism, 2008.
86 Cafarella, 3.
88 One such supporter is Republican Congressman Tom Tancredo of Colorado. See John P. Gramlich, “Iranian ‘Terror’ Group Divides Washington,” United Press Int’l, Dec. 20, 2005 (describing how Congressman Tancredo has “publicly expressed support for” the PMOI/MEK). Congressman Tancredo, ironically, has campaigned vigorously in favor of anti-terrorism provisions of the immigration laws, and was a staunch support of the REAL ID Act of 2005.
its European and Iraqi bases of operations. Additionally, it has expanded its fundraising base, further developed its paramilitary skills, and aggressively worked to expand its European ranks. In addition to its terrorist credentials, the [PMOI] has also displayed cult-like characteristics.89

This official State Department description echoes other accounts of the PMOI, which has been the subject of several high-profile news reports. In 2003, for example, Elizabeth Rubin published a lengthy profile of the group in the New York Times magazine. She described how the group had “transformed itself into the only army in the world with a commander corps composed mostly of women.”90

Characterizing the group as “bizarre,” Rubin reported that they were conducting small arms and artillery training, while going through “routine self-criticism” and “weekly ideological cleansings.” She also cited a former member of the group who described the PMOI as “a totalitarian mini-state” and others who claimed that “the Rajavis, given the chance, would have been the Pol Pot of Iran.” Her account of the group was reinforced by other reports, including a widely-publicized Human Rights Watch report in which runaways from the group described various human rights abuses perpetrated by the PMOI on its members and former members from 1991 to 2003.91

During Operation Iraqi Freedom, under alleged suspicion of concealing Iraqi illegal weapons programs, US-led Coalition forces bombed the PMOI bases in Iraq in early April 2003, forcing the PMOI to surrender soon after. A report by the Wall Street Journal presents another view:

89 Country Reports on Terrorism, 2008.
In a move to persuade Iran not to meddle in Iraq, U.S. forces have bombed the camps of Iranian opposition fighters on the Iraqi side of the border and have reached a surrender agreement with the group’s remaining fighters, U.S. officials said….The dismantling of the Iranian opposition force in Iraq…fulfills a private U.S. assurance conveyed to Iranian officials before the start of hostilities that the group would be targeted by British and American forces if Iran stayed out of the fight, according to U.S. officials said.\(^\text{92}\)

Ultimately, U.S. Army General Ray Odierno negotiated the group’s “surrender,” and believed that “the group’s commitment to democracy in Iran meant its status as a terrorist organized should be reviewed.”\(^\text{93}\) The following month, French authorities arrested one of the organization’s main leaders, Maryam Rajavi, along with 160 other members. She was later released; however, many of these suspects, including Rajavi, were confined to their homes as the French authorities continued investigations.\(^\text{94}\)

**FTO Designation**

When the State Department created its list of FTOs in 1997, it designated the PMOI as an FTO. In 1999, it also added the NCRI and its related affiliates as an alias of the PMOI.\(^\text{95}\) According to the State Department, the PMOI’s status as a designated FTO was based upon its use of Saddam Hussein as its major funding source, its support of the 1979 seizure of the US embassy in Tehran and the subsequent hostage crisis, and its role in the deaths of Americans in the 1970s.\(^\text{96}\)

At the time of its designation, various sources indicated that the PMOI listing as an FTO was based more on political considerations and “insider tips”—or hearsay—than scrutinized evidence of terrorist activity. On October 9, 1997, the *Los Angeles Times* wrote, “one senior

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\(^{93}\) Rubin, 26.  
\(^{95}\) “Determination Pursuant to Section 1(b) of Executive Order 13224 Relating to the Mujahedin-e Khalq (MEK).” Federal Register 68 (Aug 15, 2008) p. 48984.  
Clinton administration official said inclusion of the [PMOI] was intended as a goodwill gesture to Tehran and its newly elected moderate president, Mohammad Khatami.97 Similarly, years later, a Newsweek article interviewed Martin Indyk, the US Assistant Secretary of State for Near Eastern Affairs, disclosed that at the time of the PMOI designation “[There] was White House interest in opening up a dialogue with the Iranian government. At the time, President Khatami had recently been elected and was seen as a moderate. Top administration officials saw cracking down on the [PMOI], which the Iranians had made clear they saw as menace, as one way to do so.”98 Indeed, while the State Department saw no problem in listing the PMOI as a FTO, U.S. Congressional members widely objected. A majority of House members issued a declaration in 1998 describing the PMOI as a legitimate resistance movement and called for its revocation from the FTO list.99

*Petition of FTO Designation*

In repeated yet unsuccessful bids, PMOI sought to have its designation overturned by U.S. courts, in cases decided in 1999, 2001, 2003, 2004, and 2010. By contrast, the group had greater success in more recent attempts in Europe. Between 2006 and 2008, listings of the PMOI as a terrorist organization by the European Union (EU) were repeatedly overturned by the European Court of Justice; however, the EU Council of Ministers removed PMOI definitively from its terrorist list in January 2009.100 Two years prior, Britain's Proscribed Organizations Appeal Commission (POAC), whose purpose is to review terrorist designations and has access to all classified British government information, ruled, "Having carefully considered all the material before us, we have concluded that the decision [made] at the First Stage [that PMOI was engaged

100 Mark John, “EU takes Iran opposition group off terror list”, Reuters, Jan 26, 2009.
in terrorism] is properly characterized as perverse. We recognize that a finding of perversity is uncommon."\textsuperscript{101} In 2008, the English Court of Appeal stated, "The reality is that neither in the open material nor in the closed material was there any reliable evidence that supported a conclusion that PMOI retained an intention to resort to terrorist activities in the future."\textsuperscript{102}

In the U.S., however, the Court has been less relenting.

1) \textbf{First Petition - People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17 (D.C. Cir. 1999)}

In November of 1997, the PMOI filed petition with the D.C. Circuit seeking judicial review of their FTO designation.\textsuperscript{103} In its challenge, the group asserted that: (1) 8 U.S.C. § 1189 deprived the PMOI of liberty and property without due process; (2) the designation violated the PMOI’s First Amendment associational rights; (3) the statute is overbroad under the First Amendment because its requirement of a “threat to foreign relations” encompasses protected activity; and (4) the judicial review provision of the statute deprives organizations of due process, because it permits court decision on the basis of an ex parte record.\textsuperscript{104}

Nonetheless, the D.C. Circuit quickly declined the constitutional claim, holding that "[a] foreign entity without property or presence in this country has no constitutional rights under the due process clause."\textsuperscript{105} Under the provisions of the AEDPA, the PMOI is considered a foreign entity.\textsuperscript{106} Furthermore, the Court held that it could not perform full judicial review based on the Secretary’s finding that the PMOI threatened national security; in short, the finding was “non-


\textsuperscript{102} \textit{Secretary of State v. Lord Alton of Liverpool & Ors, [2008] EWCA Civ 443 § 53.}

\textsuperscript{103} \textit{People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17, 18-19.}

\textsuperscript{104} \textit{Id. at 18-19.}

\textsuperscript{105} \textit{Id. at 22.}

\textsuperscript{106} \textit{Id. at 25.}
justiciable” based on the “Political Question” principle. Such questions concerning the foreign policy decisions of the Executive Branch present political judgments, "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”

Finally, in review of the Secretary’s determination that the PMOI engages in “terrorist activity” within the context of AEDPA, the court ruled that “substantial support” existed within the administrative record for such a determination. “The Secretary had before her information that the organization engaged in bombing and killing in order to further [its] political agenda. Any one of the incidents…would have sufficed under the statute.” Thus, the D.C. Circuit refused to set aside the designation.

2) Second Petition - Nat’l Council of Resistance of Iran (NCRI) v. Dep’t of State, 251 F.3d 192, (D.C. Cir. 2001)

In October 1999, the PMOI’s initial two-year designation as a FTO was set to expire, requiring a reassessment of its record by the State Department. Months earlier, President Clinton had sent a letter to President Khatami, seeking assistance to bring the Iranian Revolutionary Guard Corps (IRGC) members to justice, as well as members of Lebanese and Saudi Hezbollah, who the U.S. believed were directly involved in the planning and execution of the 1996 truck bombing of the Khobar Towers military complex in Saudi Arabia.

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107 People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17, at 23.
108 Id.
109 The Court further explained, “We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organization affected.” Id. at 25.
110 Id. at 24.
111 Id. at 24-25.
112 Id. at 25.
On October 3, the news media reported that Iran had rebuffed President Clinton’s request for assistance.\textsuperscript{114} A few days later, the State Department relisted the PMOI as an FTO. A week later, Assistant Secretary Indyk publicly stated that the Clinton Administration had renewed its “offer of unconditional dialogue with the Iranian government.”\textsuperscript{115} As evidence of America’s good faith effort, he said the State Department had “re-designated the PMOI as a foreign terrorist organization.”\textsuperscript{116} He said the Department had also “for the first time, listed the National Council of Resistance (NCR) as an alias of the [PMOI].” Asked why the Department had added the NCRI to the FTO list, Indyk replied, "the Iranian government had brought this to our attention."\textsuperscript{117} He further explained, “Such designations have the effect of making it illegal to provide financial support to these organizations.”\textsuperscript{118}

The PMOI and NCRI both petitioned for review. The D.C. Circuit consolidated the two into one case.

Like the previous case, the PMOI and NCRI petition argued the due process question with regard to the failure of the statute to grant them notice of the designation and a description of the content of the administrative record, as well as an opportunity to be heard. This time, the Court found that NCRI did have presence or property, and was therefore entitled to assert due process rights.\textsuperscript{119} Further, it held that the statute, as applied by the Secretary, did not provide "the fundamental requirement of due process;" that is, "the opportunity to be heard at a meaningful time and in a meaningful manner."\textsuperscript{120} Based on the holding that the PMOI/NCRI had not

\textsuperscript{114} "Iran rebuffs U.S. over Saudi bombing case,” Reuters, Oct. 3, 1999.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{119} NCRI, 251 F.3d at 201-02.
\textsuperscript{120} Id. at 208
received the process they were due, the Court remanded the question to the Secretary for reconsideration.\textsuperscript{121} It asserted that the group should have:

“the opportunity to file responses to the non-classified evidence against them, to file evidence in support of their allegations that they are not terrorist organizations," and provide them "an opportunity to be meaningfully heard" on the issues before the Secretary.\textsuperscript{122}

3) **Third Petition - People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 327 F.3d (D.C. Cir. 2003)**

In 2001, the Secretary of State yet again re-designated the PMOI as an FTO, and the PMOI yet again filed a petition for review. In this case, the PMOI’s main argument rested on the claim that its opportunity to be heard was “not meaningful,” thus violating the group’s due process rights.\textsuperscript{123} In addition, the group argued that the re-designation as a terrorist organization under 8 U.S.C. § 1189 [was] unconstitutional under the Due Process Clause of the Fifth Amendment of the Constitution because the statute permitted the Secretary to rely upon secret evidence—the classified information that respondents refused to disclose and against which PMOI could therefore not effectively defend.\textsuperscript{124}

The Court decided, however, that even the unclassified portion of the Secretary’s administrative record is “adequate” evidence to support the designation.\textsuperscript{125} Petition, again, was denied.\textsuperscript{126}

4) **Fourth Petition- Nat’l Council of Resistance of Iran (NCRI) v. Dep’t of State, 373 F.3d 152 (D.C. Cir. 2004)**

In May 2003, the State Department completed its review process and re-designated the NCRI as an FTO. The NCRI filed a petition for review and the case was heard in April 2004. The

\textsuperscript{121} NCRI, 251 F.3d at 209.
\textsuperscript{122} Id.
\textsuperscript{123} People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 327 F.3d, 22
\textsuperscript{124} Id. at 19
\textsuperscript{125} Id. at 23
\textsuperscript{126} Id. at 42
NCRI’s primary argument was that the Secretary’s conclusion that NCRI is an alias of PMOI lacked substantial support in the administrative record.\textsuperscript{127} The NCRI has insisted that it is an umbrella organization of Iranian dissident persons and groups of which PMOI is only a single member, no more powerful than any other. Again, however, the Court drew the same conclusion as in the decision made in PMOI II.\textsuperscript{128}

5) Fifth Petition – People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 327 F.3d (D.C. Cir. 2003)

The PMOI filed petition for review with the Secretary of State for its revocation from the FTO list in July 2008. According to the New York Times, Dell Dailey, then-Coordinator for Counterterrorism, advocated the removal of the PMOI.\textsuperscript{129} Nevertheless, Secretary Condoleeza Rice refused the petition.

In its 2008 petition, the PMOI listed the following changes in circumstances since its previous argument to merit revocation from the list:\textsuperscript{130}

\begin{itemize}
  \item Ceased its military campaign against the Iranian regime and disbanded its military units in Iran (2001).
  \item Voluntarily handed over its arms to U.S. forces in Iraq (2003).
  \item Disbanded its military units and disarmed PMOI members at Camp Ashraf, Iraq (2003).
  \item Formally rejected violence and terrorism (2004).
  \item Cooperated with U.S. officials at Camp Ashraf (2003 - present).
  \item Shared intelligence with the international community and the U.S. government regarding Iran’s nuclear program and its support for terrorism (2002 - present).
  \item Obtained a “protected person” status under the Fourth Geneva Convention for all PMOI personnel. The designation was made after a multi-U.S. government agency investigation concluded the PMOI members were not combatants and had not committed any crime under U.S. laws (2004).
  \item Obtained a delisting as a terrorist organization from the United Kingdom, following an appeal adjudicated by the Proscribed Organizations Appeal Commission (POAC) and reaffirmed by the Court of Appeal (2008).
  \item Obtained a delisting from the European Union, by the European Court of First Instance
\end{itemize}

\textsuperscript{127} NCRI II, 373 F.3d., 15.
\textsuperscript{128} Id. at 27.
\textsuperscript{130} Brief for Petitioner, PMOI v. U.S. Department of State; 09-1059, p. 21-22.
Despite provable change of circumstances, the U.S. Secretary of State denied the PMOI’s petition for revocation as an FTO in January 2009, maintaining the changes were insufficient to warrant the removal of the organization from the list.131

On February 11, 2009, the PMOI filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, arguing its FTO designation should be revoked based on a lack of substantial evidence for the State Department’s decision.132 The PMOI also stated in its appeal that the Secretary of State again had failed to comply with due process requirements. In August 2009, the State Department released a heavily redacted, unclassified version of the administrative record, which the Secretary based its assessment of the PMOI’s terrorist activity.

On July 16, 2010, the Court ruled the Secretary of State failed to afford the PMOI due process protection, and stated that a strict application of the statute required a revocation of the designation.133 Nonetheless, the Court remanded the Secretary’s denial of the PMOI’s petition for revocation of its designation as a FTO.134

Interestingly, the State Department itself acknowledged that the public portion of the administrative record was devoid of any evidence to justify the Secretary’s decision. The State Department further claimed that the PMOI no longer possess weapons, tanks, armored vehicles, or heavy artillery,135 and also reported that a “significant number of [PMOI] personnel have voluntarily left the . . . group, and several hundred of them have been voluntarily repatriated to

131 "In the Matter of the Review of the Designation of Mujahedin-e Khalq Organization (MEK), and All Designated Aliases, as a Foreign Terrorist Organization Upon Petition Filed Pursuant to Section 219 of the Immigration and Nationality Act, as Amended," Federal Register 74: 7 (Jan 12, 2009), p. 1273.
132 Brief for Petitioner, PMOI v. U.S. Department of State; 09-1059, p. 21-22.
134 Id. at 19.
135 Id.
In other words, no unclassified statement had been released that summarized, or even hinted at, the classified evidence used by Secretary Rice in reaching her decision.

6) **House Resolution 60 – 112th Congress**

Many members of the U.S. House of Representatives disagree with the PMOI’s placement on the FTO list. House Resolution 60 was introduced to Congress on January 26, 2011. With broad bipartisan support, the bill was led by Representative Ted Poe (R-TX) in order to “shift power away from the oppressive mullah regime.” Among other things, the bill highlights that “the [PMOI] has continued to reveal valuable intelligence about Iran's nuclear program, including additional secret and underground sites” and have been right “90 percent of the time.”

In summary, the 2009 decision to continue listing PMOI and the 2010 petition decision were striking for several reasons. First, that the former Coordinator of Counterterrorism, Dell Dailey, and other counterterrorism officials supported revocation makes Secretary Rice’s decision to overrule highly dubious. It leads one to wonder if counterterrorist intelligence was the primary factor in the decision to designate. Second, the secretary’s decision followed the European court cases won by PMOI, in which the group overcame repeated efforts by European governments to continue listing it—listings widely perceived to be for foreign policy purposes rather than based

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136 People’s Mojahedin Organization of Iran v. U.S. Department of State, 613 F.3d 220, at 19.
137 “Urging the Secretary of State to remove the People's Mojahedin Organization of Iran from the Department of State's list of Foreign Terrorist Organizations” H.Res.60, 112th Congress (2011-2012).
138 Other Americans calling for PMOI delisting include former and current House Foreign Affairs Committee chairs, Reps. Lee Hamilton (D-IN) and Ileana Ros-Lehtinen (R-FL); president Bill Clinton’s UN envoy Bill Richardson, CIA director James Woolsey, and FBI director Louis Freeh; president George W. Bush’s attorney general Michael Mukasey, homeland security secretary Tom Ridge, and UN envoy John Bolton; President Barack Obama’s former national security advisor General James Jones; former joint chiefs chairs Generals Hugh Shelton and Peter Pace; former DNC chair Howard Dean; and former NYC mayor Rudy Giuliani. Additionally, a bipartisan coalition of 113 House members invited Secretary Clinton to delist the MeK (H.Res.1431, sponsored by Rep. Bob Filner D-CA) in June 2010. Fred Gedrich, “Terror Labels Shouldn’t Benefit Enemies,” The Jerusalem Post, Apr 20, 2011.
139 Rachel Christiansen, “Congress tries to remove pro-democracy Iranian group off terrorist list,” The Talk Radio News Service, Mar 17, 2011.
140 H.Res. 60.
on counterterrorism principles. Third, the State Department's Country Reports on Terrorism is devoid of any indication that the PMOI continues to engage in terrorism. The most recent episodes cited are several years old.

In light of these factors, and given that the original designation was described by the official then serving as assistant secretary of state for Near East affairs as an action taken after the Iranian government raised the matter, one can only wonder if the secretary's decision was based on foreign policy considerations freestanding from the criteria set out in the law.

3. Case Report: The Kurdistan Workers’ Party (PKK)

*Overview*

The Kurdistan Workers’ Party (PKK) is the largest ethnic separatist and militant organization in Turkey. For decades it has called for an independent state for the minority Kurdish people, and at times it has attempted to achieve this through violent struggle and terrorism. As a result, the PKK has brought the Kurdish issue to the forefront of Turkey’s internal and external national security concerns.\(^1\) It was designated as an FTO in 1997, and like the PMOI case, observers have maintained that the designation “may be a political rather than legal decision.”\(^2\) Since 1998, petition for review of the PKK’s FTO designation has been filed five times not by the group itself, but by a third party—the Humanitarian Law Project, together with a retired judge, a doctor, and five other non-profit organizations—that wish to provide support to the peaceful reconciliation of the Kurdish conflict, but have been barred from doing so due to the “material support” statute, 18 U.S.C. § 2339B. Consequently, these groups are


individually considered criminals by the U.S. government and, thus, deprived certain free speech liberties. The PKK remains on the FTO list today.

**History**

The Kurdistan Workers’ Party (PKK), also known as the Partiya Karkeran Kurdistan, the People’s Defense Force, or the Halu Mesru Savunma Kuvveti (HSK),[^143] was founded by Abdullah Ocalan in 1978. Influenced by the Cold War’s ideological struggle and the worldwide anti-colonial movement of the 1970s, the PKK charter called for a Marxist proletarian revolution. It envisioned the PKK as the “vanguard of the global socialist movement,” in which the revolution’s fundamental force would be a “worker-peasant alliance.” The charter condemned “the repressive exploitation of the Kurds” and called for a “democratic and united Kurdistan.”[^144]

Indeed, the Kurdish population has suffered decades of documented rights abuses by the Turkish government, both physically, culturally, and politically. Article 88 of the original Turkish constitution of 1924 emphasized homogenization, asserting all inhabitants of Turkey were to be considered Turkish, irrespective of their religion or race.[^145] As a result, the government has pursued compulsory assimilation by enforcing measures such as the prohibition of Kurdish cultural practices, speaking the Kurdish language, and publishing Kurdish documents.[^146]

Ocalan believed the establishment of a Kurdish state in southeast Anatolia (Turkey) would be the first step toward the creation of an independent and united “Greater Kurdistan,” encompassing a vast territory that would include Kurds with different dialects, from different

[^146]: Id., 3.
Muslim denominations, and from different countries.\textsuperscript{147} In Turkey alone, Kurds account for twenty percent of the population in a country of 70 million people.\textsuperscript{148}

Ocalan devised the PKK to be a strict hierarchical organization, operating under a Stalinist-style order. He became the ultimate authority, and, it has been reported, cultivated a “cult of personality,” brutally suppressing dissent, and purging opponents. For example, in 1986, up to sixty PKK members were executed, including five of the original central committee members.\textsuperscript{149} Others went underground. The PKK set about implementing a guerrilla war on Maoist principles, through which it was able to effectively take over large tracts of the countryside in the south-east by the early 1990s.\textsuperscript{150} Its principle targets have been Turkish government security forces and local officials. Additionally, the PKK’s urban terrorist arm has primarily attacked tourist areas in Western Turkey.\textsuperscript{151} At its peak, the PKK had as many as 10,000 armed militants, with about half of them concentrated in Turkey at any one time.\textsuperscript{152} The Turkish military responded, however—at a $4-7 billion investment—and the PKK’s strength began to ebb.\textsuperscript{153} Ocalan was captured by Turkish forces in 1999, and by early the next year the government had largely regained control of the situation, through a variety of legal and illegal methods.\textsuperscript{154}

After Ocalan’s capture, the PKK transformed itself ideologically and organizationally, based on directions passed on by Ocalan to his lawyers from his prison cell on the island of

\textsuperscript{149} Ergil, p. 38.
\textsuperscript{150} Country Reports 2008, p. 306.
\textsuperscript{151} Id...
\textsuperscript{152} Pillar, p. 135.
\textsuperscript{153} Id.
\textsuperscript{154} Legal methods include the reorganization of the army for counter-insurgency; illegal methods include extrajudicial killings, the evacuation and destruction of around 3000 villages and hamlets (see Jongerden, 2007).
Today, the PKK no longer advocates separation from Turkey as official policy, but seeks the transformation of – and its integration into – a democratized Turkey. Furthermore, it has sought to engage in negotiations for a peace agreement on several occasions, starting in 1993. Since then, it has additionally called for various periods of unilateral ceasefire, the longest occurring from 1999-2004. In 2002, the pro-Kurdish Democratic Society Party (DTP) established itself in government, with representation both at the national and the local levels. However, the party struggled to gain credibility in the eyes of the national government, generally viewed as the political wing of the PKK, although members adamantly rejected the claim. In 2009, the Constitutional Court of Turkey officially shut down the DTP, ruling that the DTP had become the “focal point of activities against the indivisible unity of the state, the country and the nation.” In light of these setbacks and what it views as the unrelenting oppression of the Kurdish people, the PKK renounced its ceasefire in 2004 and has steadily escalated its use of terrorist tactics ever since.

**FTO Designation**

In 1997, then-Secretary of State Madeleine Albright included the PKK on the initial FTO list. The group’s aliases, the Kurdistan Freedom and Democracy Congress (KADEK) and Kurdistan Society Congress (Kongra-Gel), were added in 2002 and 2004, respectively.

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159 “DTP Closure Published in Official Gazette,” Plus News Pakistan, Jan 1, 2010.
The Turkish government espouses the FTO designation and views it as a symbol of U.S.-Turkey security relations. However, the Prime Minister Erdogan has also been harshly critical of an alleged lack of U.S. efforts to curtail PKK terrorism. “The words by our friends that Workers' Party of Kurdistan (PKK) is a terrorist organization, is not enough for Turkey. We want an implementation of these words,” Erdogan demanded at the 5th World Chambers Congress held in Turkey in 2007, at which Madeleine Albright was present.\footnote{“Turkish Premier criticizes USA for absence of support “in its fight against Kurdish terrorists,” PanArmenian.net., July 7, 2007.} In 2007, he further stated the U.S. should monitor the PKK as it does with al-Qaeda, and should repay Turkey for its assistance in Afghanistan by supporting Turkey’s struggle against the PKK.\footnote{“Turkey Expects U.S. Actions against Kurd Rebels-PM,” Reuters, Oct 20, 2007.} Failure to support Turkey against the PKK would constitute an inconsistent foreign policy towards terrorism, and could significantly threaten Turkish cooperation in combating other terrorist groups that pose a more direct threat to the United States, and thus this FTO designation has become heavily politicized.

### Petition of FTO Designation

Appeal for the revocation of the PKK’s FTO designation is particularly enlightening because it has been brought, not by the PKK itself, but by a group of third party petitioners. The PKK has never sought judicial review of the designation.\footnote{See Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998)} Instead, the Humanitarian Law Project (HLP), a nonprofit organization dedicated to “promoting the peaceful resolution of conflict,”\footnote{See HLP website: <http://hlp.home.igc.org/>} along with a doctor, a retired judge, and five other nonprofit organizations have been the central plaintiffs in a series of cases argued before the federal courts in California, and, most recently, in the Supreme Court. The U.S. government has accused the petitioners of abetting terrorist activity by providing material support to the PKK, which violates §2339B of the

\footnote{\textcopyright{} Alexander B. Goldman, July 2007.}
AEDPA. According to the legislation, it is illegal to provide material support and resources to designated FTOs. “Material support or resources” is defined as:

Any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel…and transportation, except medicine or religious materials.  

The statute does not require any showing of intent to further terrorist or other illegal activity. Essentially, there can be zero communication with FTOs. Two other federal laws authorize U.S. officials to punish ‘material support’ provided to designated FTOs, immigration law codified in 8 U.S.C. §1182 and the International Emergency Economic Powers Act (IEEPA). Under §1182, foreign nationals can be denied entry to the U.S. or deported for having provided material support, even when forcibly coerced to do so. Further, the IEEPA has the effect of freezing an entity’s assets in the U.S. and making it a crime in the U.S. to engage in any transactions with the groups, regardless of the purpose and effect of the support in question. Consequently, if accused of providing material support, a group or individual can be added to the SDGT list. No one has yet succeeded in challenging their designation in court.

It is against this legal backdrop that the HLP has pursued its right to assist the PKK in methods for peacefully resolving its disputes with the Turkish government, and in carrying out

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166 Under this definition, however, almost anyone who speaks for an FTO can be prosecuted as a ‘terrorist.’ Former President Jimmy Carter has voiced concern over the provisions of the ‘material support’ ruling, wary that his organization, the Carter Center—like the HLP—could be convicted under the statute. His organization has met with groups such as Hamas and Hezbollah to encourage fair elections. See “Brief of Amici Curiae the Constitution Project and the Rutherford Institute” (“Constitution Project”) in Support of Petitioner at 6. Also see Patrick Goodenough, “Jimmy Carter Worries Court Ruling May Affect His Interaction with Terror Groups,” CNSNews.com, June 22, 2010.
169 50 U.S.C. §§1701-06.
human rights monitoring in Kurdish parts of Turkey. The HLP’s principle complaint is that the AEDPA imposes guilt by association by punishing moral innocents not for their own culpable acts, but for the culpable acts of the groups they have supported.


In its first petition filed in 1998, the HLP challenged the constitutionality of 18 U.S.C. § 2339B. They alleged that the “material support” law violated their First Amendment right to freedom of association and Fifth Amendment right to due process on the grounds that the §2339B(a) imposed a criminal penalty for their association with the designated organizations without requiring the government to prove that they had specific intent to further FTOs’ unlawful goals. Petitioners also argued that the statute was “unconstitutionally vague”, and that the Secretary of State’s power to designate groups was “too broad,” affording the executive too much discretionary power to label groups as “terrorist” and blacklist their supporters as “outlaws.” The Court partially granted preliminary injunction, declaring that the terms ‘personnel’ and ‘training’ were “impermissibly” vague. However, it rejected the HLP’s argument that § 2339B violates the First Amendment.

2) Second Petition - Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000)

The federal Court of Appeals for the Ninth Circuit affirmed the Central District Court’s previous 1998 decision, declaring ‘training’ and ‘personnel’ unconstitutionally vague.

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170 Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998) at 1215. Of note, the court explained that the AEDPA does not criminalize mere membership but rather “conduct that provides ‘material support or resources’ to a designated foreign terrorist organization.” Id.


172 Id.

173 Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir, 2000).
However, in 2001, the USA PATRIOT Act amended the AEDPA’s definition of “material support or resources,” which expanded to include “expert advice or assistance.”174

3) Third Petition - Humanitarian Law Project v. U.S. Department of Justice, 393 F.3d 902 (9th Cir. 2004)

The HLP then argued that the ban on providing “expert advice or assistance” to an FTO was also unconstitutionally vague. In 2003, the Ninth Circuit Court found the term to be vague, but not “overbroad.”175 The Court also argued that “to sustain a conviction under § 2339B, the government must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization’s unlawful activities that caused it to be so designated.”176

The parties sought en banc review of the petition.

However, three days after the oral argument, Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA), which amended the AEDPA to include a “knowledge” clause. The AEDPA now states:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.177

In addition, IRTPA includes an additional ban on providing “service” and narrows the definitions of “training” and “personnel.”178 As a result of these developments, the case was “vacated” and remanded to the district court.179

174 18 U.S.C. § 2339A(b) and § 2339B(g)(4).
175 Humanitarian Law Project v. United States Dep’t of Justice, 352 F.3d 382 (9th Cir. 2003)
176 Id. at 403.
177 18 U.S.C. § 2339B(a)(1)
178 Id.
179 Humanitarian Law Project v. United States Dep’t of State, 393 F.3d 902, 902 (9th Cir. 2004)

The Court again ruled that several aspects of the definitions of “material support” in the statute were unconstitutionally vague. Specifically, it enjoined the government from enforcing the bars on providing “training” and “service” to the PKK. The Court held that each of these terms was unconstitutionally vague, in violation of the Fifth Amendment. However, the terms “scientific” and “technical” knowledge, as well as the new definition for “personnel” were not vague. All other challenges were rejected.


The government and HLP each filed for writs of certiorari in 2009. The Supreme Court announced that it would accept the case for review in September the same year. Oral argument took place on February 23, 2010, and the Supreme Court’s opinion was issued on June 21, 2010.

The HLP enumerated its arguments against §2339B once again:

1. That it violates their First Amendment freedom of speech
2. That it violates their First Amendment freedom of association
3. That it is unconstitutionally vague

In regard to the First Amendment issues, Solicitor General Elena Kagan, who represented the U.S. government, argued stated her rationale for the criminalization of providing advice to groups to abandon terrorism. She asked, "Can you say to an organization, look, you guys really should lay down your arms?...Well, now you can't. Because when you tell people, here's how to apply for aid and here's how to represent yourself within international organizations or within the U.S. Congress, you've given them an extremely valuable skill that they can use for all kinds of...

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181 Id. at 1151.
purposes, legal or illegal.”\textsuperscript{182} Ultimately, the Supreme Court ruled that the plaintiffs’ claim in “unfounded” because “they may say anything they wish on any topic.”\textsuperscript{183} Moreover, with respect to the association issue, the Court disregarded the HLP’s claim that “mere association” with the PKK is criminal under §2339B.\textsuperscript{184} Justice Breyer dissented, joined by Justices Ginsburg and Sotomayor. Breyer stated that in his view, “the Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in [the training of organizations to use nonviolent means to achieve their goals].”\textsuperscript{185}

In regard to the issue of vagueness, the Supreme Court held, by a 6-to-3 vote, that the statute’s bans on “expert advice,” “training,” “service,” and “personnel” were not vague, and did not violate speech or associational rights as applied to plaintiffs’ intended activities.\textsuperscript{186} Chief Justice Roberts wrote the majority opinion, which reversed the Court of Appeals’ decision on vagueness claims, asserting that any form of “support” given to these FTOs, whether money, legal aid or political advice, “frees up other resources within the organization that may be put to violent ends.”\textsuperscript{187} The law’s regulation of speech must be subject to a demanding level of scrutiny, but the government’s sweeping restrictions were justified by the interest of combating terrorism. Essentially, the Court agreed with the plaintiffs that the statute does criminalize speech on the basis of its content, but decided that the government’s interest in isolating groups on the FTO list was sufficiently great to overcome the heightened level of scrutiny. As a result, the case has been rendered moot; like the PKK’s FTO designation, the HLP’s “material support” designation has, to date, yet to be amended.

\textsuperscript{182} Holder v. Humanitarian Law Project, Transcript of Oral Argument, p. 53 at 3.
\textsuperscript{184} Id., p. 35.
\textsuperscript{185} Id. (Breyer, J., dissenting)
\textsuperscript{186} Id.
\textsuperscript{187} Id., p. 25.
In sum, U.S. government asserts that the AEDPA, as amended by the IRTPA, is a valuable tool in combating terrorism financing and is sufficiently accurate to avoid violating First and Fifth Amendment rights. However, the HLP argues that the law criminalizes activity protected under the Constitution. Similarly, the parties disagree about the potential effects of the Supreme Court’s decision on anti-terrorism efforts and the ability of individuals and groups to provide humanitarian assistance.

Two main themes can be observed in the HLP’s series of petitions: (1) helping terrorist organizations, and (2) national security concerns. As to helping FTOs, it has been argued that aid to humanitarian arms of FTOs enhances their terrorism aims. The Anti-Defamation League (ADL), for example, wrote an amicus brief in support of the U.S. government contending that by providing humanitarian services, FTOs are able to gain adherents by portraying themselves as beneficial organizations for the community.\(^{188}\) However, the amici supporting the HLP argue that the AEDPA prohibits funding benevolent activities of designated FTOs.\(^{189}\) The Constitution Project and the Rutherford Institute further maintain that, even if these activities show a beneficial effect in combating terrorism, they are still prohibited.\(^{190}\)

Regarding threats to national security, the U.S. government argues that the AEDPA is an integral part of protecting the U.S. against terrorism. Amici for the government included former members of the military, who pointed to the judgment of the Department of Justice that prohibitions on funding are “critical features of law enforcement’s current approach to counterterrorism.”\(^{191}\) Conversely, supporters of the HLP contend that the law is dangerously ambiguous, and argue that the vagueness could be used to selectively prosecute disfavored

\(^{188}\) Brief of Amicus Curiae the Anti-Defamation League (“ADL”) in support of Respondent, at 5-6.
\(^{189}\) See “Carter Center” at 13-14.
\(^{190}\) See Brief of Constitution Project at 6.
\(^{191}\) See Brief of Maj. Gen. Altenburg at 34-35.
individuals or groups.\textsuperscript{192} Furthermore, groups and individuals will not know what activities are prohibited and may avoid engaging in otherwise valuable work.\textsuperscript{193}

\textbf{Part III. Discussion}

The intent of this study is to determine how groups are designated as FTOs, and how that designation can be revoked, by both examining the official procedures as well as the contextual underpinnings that are at the root of three separate cases: the designations of the DFLP, the PMOI, and the PKK. Based on the above cases, it is apparent that the official procedures, codified in AEDPA § 1189, reveal a plethora of inconsistencies, yet illustrate the current realities surrounding the utilization of watch lists in the fight against terrorism. Whether for better or worse (and clear arguments exist supportive of either position), counterterrorism actions and foreign policy have become inextricably linked, and the politicization of FTO designations is inherent to the process.

The criteria for FTO designation are, however, very much open to interpretation. Without a narrow definition of what constitutes “terrorist activity” or a “threat to national security,” the decision to designate one group over another provides much fodder for critics. This ambiguity is particularly acute in the PMOI case; multiple sources have argued and shown that the PMOI does not engage in violence or criminal activity, nor does it target the U.S., yet for what appears to be political reasons, it remains on the FTO list. Similarly, the official procedures seem to be consistently slow to respond to developments in international affairs, a situation which has only been exacerbated by the more recent five-year review period. The DFLP, for instance, was removed from the FTO list after having only abrogated terrorism for two years. In contrast, the

\textsuperscript{192} See Brief of Amici Curiae Academic Researchers and the Citizen Media Law Project ("Academic Researchers") at 9.

\textsuperscript{193} Id.
PMOI has for several years been shown not engage in terrorism, even in the face of staunch opposition to it. This example lends itself, as well, to underscore the wooly mechanics behind the State Department’s fact-finding process when compiling the Secretary’s administrative record. While it is understandable that certain intelligence must remain confidential to the general public, a fully classified record cannot operate as a foolproof indicator of terrorist threat, and ultimately as the sole factual basis for an FTO designation. Overall, the chief issue is that if the standards themselves are vague, designations are hollow at best.

Indeed, FTO designations have become overtly political. As previously mentioned, the decision to designate the PMOI epitomizes the juxtaposition of American foreign policy interests with anti-terrorist objectives. The U.S. will continue to re-designate the group as long as the U.S. seeks to appease the Iranian regime. The offshoot of politicizing the designations, however, is a dangerous slippery slope. In the U.S., justice is supposedly about bringing accused individuals to trial, not indiscriminately criminalizing, or even assassinating them. Yet, the government has created a system in which the burden of proof is on the designated groups who are rendered guilty until they prove themselves innocent. This is evident in the PMOI case as well as the HLP’s fight to challenge rough accusations of ‘guilt by association,’ as much as it is also evident in the Guantanamo Bay detainee cases.

Since September 11, the U.S. public is generally supportive of any measure to crack down on terrorism. Besides, hardly anyone would argue trading in a certain amount of civil liberties for enhanced national security and protection. However, it is hard to believe that most Americans would tolerate the punitive decisions made in ‘material support’ suits that trample

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194 The recent murder of Osama bin Laden, for example, speaks to this point. Personally, as much as I understand the country’s elation that bin Laden has been brought to task and feel no remorse for his death, I am wary of the public majority’s outright display of jubilation and celebration of another human being’s death. What does that reveal about the American value system? Do we more readily support measures that possess no consideration for basic civil liberties? For this author, the jury is out.
upon basic freedoms of speech and association if they better understood the cases. In the HLP’s case, the Supreme Court noted that the language regarding ‘material support’ is excessively vague, yet dodged overturning the statute in the “greater interest” of U.S. counterterrorism policy.

Naturally, internal inconsistencies exist throughout the U.S. court system, and there is no easy answer to solve sensitive cases that deal with issues such as terrorism. The difficulty, however, is that people rely on these rulings to make their petitions. The more common these inconsistencies become, the more they impede upon the government’s authority in fighting terrorism. Ultimately, the public is not blind and will not accept barefaced breaches of civil liberties forever.

All things considered, it is important, however, to still appreciate the tangible advantages of using terrorist watch lists. First and foremost, it serves as an easy focal point for the increasing miasma of government and non-government agencies that deal with counterterrorism. The departments of Homeland Security and Justice, for example, use the FTO list as grounds for deportation of aliens. The Department of Treasury, too, uses the FTO list to deny assets of designated groups and individuals. Of course, the system is not perfect; individuals have occasionally slipped by Transportation Security Association (TSA) scanners, for example. However, watch lists provide a ready source to monitor potential threats to national security understandably heightened as a result of September 11.

Second, the FTO list clarifies methods to prosecute members of terrorist organizations and those who support them. Having the designated FTO list helps to target U.S. counterterrorist interests under the AEDPA because there is no ambiguity about which groups are included and which are not. If a group is on the FTO list, then the AEDPA provisions apply; if not, they do not. Thus, being added to the list can generate very substantial implications for both the organizations and for U.S. counterterrorist efforts.
In addition, the list draws attention to groups and stigmatizes them. The PKK, for example, has shown itself to be a ready potential threat whose terrorist activities are both unpredictable and frequent. Its inclusion on the FTO list effectively focused efforts to restrain the situation in Turkey. Consequently, today, most Kurds avoid affiliation with the PKK. Likewise, another advantage of the list is that it is one mechanism to coordinate counterterrorist strategy with other governments. Theoretically, by harmonizing tactics, governments gain wider latitude to patrol terrorism. The main drawback to this argument, however, is the price to be paid for coordinating with countries; that is, like Turkey, partner countries may expect greater more material or political assistance from the U.S., which it oftentimes cannot provide for a variety of reasons, or only begrudgingly provides to gain its own political advantages—but at what other short and long range cost.

Policy Recommendations

There are no simple solutions in the juxtaposition of national security/the fight against terrorism and civil liberties concerns. Indeed, the laws associated with counterterrorist policy could be analyzed and re-analyzed for decades before resolutions are reached that satisfy most impacted parties. At the same time, given the obvious national and international concerns concerning terroristic acts and national as well as individual securities, it would be foolhardy and politically expedient, to simply eliminate the laws associated with the FTO designations, like the AEDPA, altogether. Besides abandoning the seemingly practical and utilitarian advantages of the list(s), a full repeal would propagate a mixed bag of messages about the U.S. commitment to counterterrorism. That said, I posit a few tentative suggestions for enabling potentially fairer and
accurate use of watch lists that promote national security while also seeking to protect civil liberties.

> *Make the FTO list more reliable.* In its current scheme, the FTO list is not only applied inconsistently by various agencies and upon a diverse mix of organizations, but is also invariably slow to react to global security dynamics. The fact that the FTO list is only compiled every five years means that there is a notable gap in what the list depicts and the realities of international terrorism today, since terrorist groups seem to emerge overnight. One proposed way to enhance dependability and accuracy would be to consolidate the numerous lists used by different government agencies that monitor terrorists, such as the SGDT, SDN, TEL, TSA, and FTO lists and to have the consolidated list updated more frequently. As mentioned earlier, perhaps the most significant advantage to the FTO list is that it functions as a readily accessible focal point for these various government agencies. Centralization of all lists would enable the government to increase reaction times by pooling resources, such as intelligence materials and response mechanisms, which are otherwise time-consuming and costly for these agencies to sort independently. This further tangentially affects a public reemphasis on the importance U.S. foreign policy places upon countering terrorist organizations. In addition, it would allow for more frequent and accurate updates to the list due to streamlined communications, and, presumably, a centralized agency maintaining the list.

> *Establish a specialized tribunal.* Another model to expedite response time to changes in the external international environment is to establish a specialized tribunal tasked with the sole purpose of administering petitions brought by designated FTOs and addressing related issues, such as material support cases. Having a separate tribunal eliminates the need to navigate a court system already heavily burdened by immeasurable caseloads. Currently, cases can take years to
progress through U.S. courts, and, in the meantime, individuals remain on terrorist watch lists either rightfully or wrongfully and the costs of judicially seeking relief can be substantial. If possible, this tribunal would be staffed by specialists in counterterrorist legal affairs that could, in theory, accelerate the process. This, of course, is an ideal template; oftentimes, cases may, at any rate, be referred back to the appellate court system for due process reasons.

> Introduce a third-party arbitrator to evaluate the administrative record. Non-transparency is a significant factor in FTO designation. It is currently unclear where the government sources its intelligence from, and whether that intelligence can precisely be held to scrutiny. Therefore, it is proposed that a third-party arbitrator could be introduced to review the administrative record as compiled by the Secretary of State before he or she makes a designation to confirm its validity.

> Apply provisions of the FTO designation on a case-by-case basis. The current one-size-fits-all arrangement of the FTO list does not account for the diverse contexts and profiles of the designated groups. Groups like the PMOI, who have not engaged in terrorist activity for some time, for example, are treated with equal penalty as that afforded to more actively violent groups, like the PKK. Therefore, addressing each organization in its unique context would help to ensure the tools are only being used where they have a chance of being effective and are specifically determined to support particular U.S. policies. Similarly, a uniform direct link between designations and the criminalization of providing ‘material support’ should be scrapped.

> Seriously reconsider the ‘material support’ statute. Congress must give serious reconsideration to the ‘material support’ statute, as detailed in 18 U.S.C. § 2339B of the AEDPA. While this is not a firm recommendation, the ‘material support’ aspect of the FTO designation appears to represent the greatest threat to civil liberties as set down in related legislation. The
fact that a group or individual can be labeled as a terrorist organization, thereby having their assets frozen and actions under constant surveillance, by vague ‘guilt by association’ is, as the Supreme Court has ruled, unconstitutional and a havoc upon civil liberties. That the Supreme Court has acknowledged the danger of ‘guilt by association,’ yet has decided to overlook the gravity of associated implications for individuals belies the very rationale for the U.S. Constitution—to delegate certain limited powers to the government and protect the rights of citizens—is particularly telling. If the government cannot prove outright that a group, in fact, aids groups in conducting terroristic activity, it should have no right to wantonly label it as ‘terrorist,’ or aim therefore. Moreover, while the public is generally supportive of any measure meant to crack down on terrorism, it is dubious how supportive they would be if cases, like Holder v. Humanitarian Law Project, were more widely understood.

**Part IV. Conclusion**

Terrorism is a global problem and its suppression clearly requires concerted action at the national level. Terrorist watch lists, like the U.S. State Department’s list of FTOs, represent one tool in a battery of counterterrorist strategies. Their application among different groups, however, has been inconsistent. Moreover, the ensuing consequences of designation may criminalize groups or individuals without sufficient basis to do so, and with severe negative ramifications to civil liberties, including freedoms of speech, unimpeded travel, and from justified governmental surveillance. Policy makers must bear in mind that the line between liberty and security is not drawn by the degree to which the government can prosecute potential sympathizers with ease; the line is drawn by the Constitution. As the cases reviewed in this study demonstrate, where such action fails to incorporate adequate protections of civil liberties, like freedom of speech and
the right to due process, the credibility—and ultimately the effectiveness—of these efforts is undermined. It remains to be seen how the relevant actors in the U.S. will respond to the recent court decisions discussed. Policy recommendations in this paper are tentative first steps to the construction of a more sound counterterrorist strategy.

In terms of future research, it is recommended that studies be undertaken that further analyze designation processes for different types of terrorist organizations. For example, a cross-examination of a greater array of FTO case studies—particularly those with different goals, orientations, histories, and trajectories—may advance a more comprehensive understanding of the process and identify factors that might have been missed in this article. In addition, it would be instructive to look at the composition and designation processes employed by other governments, such as the UK, EU, and UN terrorist lists, as well as how they manage the groups and individuals designated on those lists. By tracing common themes and patterns, one may be better able to glean a more integrated understanding of the possibilities for U.S. counterterrorist measures and policy in this moment, and the refinements that some are warranted to the same.
Appendix

Figure 1.

Chronology of DFLP FTO Designation

1997 1998 1999 2000
- FTO Designation
- DFLP Indicates Peace Talk Interest
- DFLP Announces Ceasefire
- FTO Revocation
- Hamas Reconciliation with Arafat

Legend:
- State Department Action
- External Context

Figure 2.

Chronology of PMOI's Petition for FTO Revocation

- FTO Designation
- First Petition
- Second Petition
- EU Designated PMOI as a Terrorist Organization
- US Bombs PMOI bases in Iraq
- Third Petition
- Pressure mounted
- H.R. 4548 Amended Changing Designation Review Procedure
- Fourth Petition
- US Declares PMOI members at Camp Ashraf “protected persons” under the 4th Geneva Convention
- EU Removes PMOI from Terrorist Watch List
- Fifth Petition
- H.J. Res. 69 Submitted

Legend:
- PMOI Petition
- Lobbying Efforts
- State Department Action
- External Context

Created with Timeline Maker Professional. Produced on May 02, 2011.
Figure 3.

Chronology of PKK’s Petition for FTO Revocation

Legend:
- PKK Petition
- State Department Action
- External Context

Created with Timeline Maker Professional. Produced on May 02, 2011.
Interview with Jason Blazakis: Chief, Terrorist Designations Unit

Notes

3/30/11 – Interview conducted via telephone

1. Please describe your role as the Chief of U.S. State Department Terrorist Designations Unit.

B: Develops actual administrative record or evidentiary for any designation that goes forward in terms of the FTO list, under exec order 13224 (individuals or groups) also state sponsors of terrorism. Direct work related to the crafting of our legal case underpinned by intelligence and open source information as to why a group needs be designated.

2. Please describe the FTO designation process.

B: To add a group to the list, we must look at all information that – including intelligence reports or open source documents about organization that may pose a threat to national security interests. Then we make a determination if there is a concern, and begin collecting and reviewing. Determine if there is reason to designate under our legal authorities. Put together a story why they should be labeled. Must show that the group is:

a) Foreign based (leadings, base of operations are located abroad)
b) Illustrate that group is committing terrorism under immigration and nationality act and/or intends to commit a terrorist attack
c) Organization’s activity is a threat to us national security—broadly defined (political, economic, defense)

In our unit, we have analysts that review all of that information; the information included in the administrative record needs to be legally sufficient and can sustain legal scrutiny.

We are legally required to work with DOJ and Treasury. They provide letters of concurrence to Secretary of State (interagency process) in support of a designation.

Send up item for secretary’s consideration, if she agrees, then required to notify Congress (7 day clock) of designation – Congress never tried to do anything to STOP a designation (yet), and is only involved at tail end of process

Finally, the Secretary must publish the designation in the Federal Register to provide effective public notice.

3. Can you please describe the removal process from the FTO list?

B: Secretary of State must review a group’s status every 5 years. This is called the “FTO Review”. Over the course of the 5 years, determine the circumstances have changed since designation, then required to remove the groups. Two conditions: (1) change of circumstances (2) in national security interests

However, Secretary can at any time determine removal (doesn’t have to wait 5 years).
4. How can a group petition its designation?

B: If they have significant domestic presence (bar is pretty low, if us have frozen some assets before) then the group can petition their designation.

(ex: MEK/PMOI) – have frozen $21,000 of their money, which allows them to petition their designation

Since 2004, the Immigration and Nationality Act was amended – only the MEK has petitioned; before that the LTTE & Kahane-Chai also petitioned.

Groups have only come off based off of the first way—by the Secretary’s discretion.

5. What triggers a fact finding inquiry to put someone on a list? Is there some type of system in place?

B: Analysts or people who look at reporting see that a group has a lot reporting to warrant concern or further examination and drives whether or not a target will be pursued. This includes every day reading, newspapers and intelligence notices.

6. What sources does the State Department use to determine designations? Does your office work with any other intelligence agencies?

B: Review all information that exists that are submitted by all intelligence agencies, but no formal relationship exists. There is a noted distinction between intelligence and policy worlds.

7. Is notice given to the group that it is being investigated?

B: No. Notice isn’t provided because would negate the effects of a designation (could hide their assets). One exception, if they have already been designated or have substantial/domestic presence – no problem with asset flight. New groups would have a problem petitioning their designation.

8. Is a designation completely based on fact finding? How much discretion is involved? Assuming discretion is involved, what standards are used to guide that discretion?

B: Could argue discretion involved in any policy decision – there is great amount of discretion involved in determining a designation. Typically, try to craft list that has most significant threats added to it. For other threats designated under executive order authorities, the implications are basically the same – example: Sect for Revolutionaries –we are concerned, but the group didn’t merit FTO designation (which is a loftier designation). We compare their historical past (terrorist activity), number of attacks that have failed, frequency and effectiveness of attacks, how sophisticated the group is, how successful the group is. This is a very anticipatory approach – before they become bigger on the map – for a designation, the groups needs to have the CAPABILITY & intent to conduct terrorism; recruitment is a large component of intent and messaging, which may indicate a group’s capability.

Adding a group takes over a year (very long process), so it is hard to be anticipatory all the time, at least in the public’s view. This is probably the one of the list’s biggest weaknesses.
9. Are there any statistics on when the groups are investigated? What percentage of groups are actually listed after initial inquiry or investigation?

B: No statistics. There are many groups that haven’t been designated, but were looked at (they don’t meet legal criteria).

10. If the State Department determines a group cannot be removed from the list, does it have to publish the reasons why? If so, where can those published documents be found?

B: No, just has to publish the Federal Register notice (that the group meets the criteria for designation) – cannot say for reason “x, y, z” publicly

For every new designation there is a press release on the State Department website.

11. How are groups supposed to contest designation if the information is classified? How do they ensure that the information is reliable?

B: We give the group a redacted version to base legal briefs on. It is a criminal case. District Court of Appeals is where all legal challenges go – in camera and ex parte (behind closed chambers) – that’s where the courts look at the information and that’s where due process is afforded.

12. Related to barring individuals from entering the U.S., when the Secretary designates an organization on the FTO list, how does it determine who is a member? Does an individual have a right to contest that?

B: For all intents and purposes, could argue that that repercussion is more symbolic. After the fact, an individual could argue the terrorist label, but it is more likely that the Court would prosecute the individual – could send them out of the country.

If there is an individual who has provided material support (as noted in their visa application) would be grounds for having their visa rejected – tertiary effect

13. Can a third party seek to remove a group from the list?

B: To do so, it would have to show it has some sort of standing – if it was part of the terrorist organization/has been impacted by the sanctions/speaks for the organization in some sense, then it would have standing.

Unlikely to successfully challenge the designation. Ex: Humanitarian Law Project case – courts rejected their arguments.

14. Where are the data/profiles on these groups published?

B: Have to do them every 5 years theoretically in Federal Register
CRS every year – only based on open source / CRT – very truncated because there is only certain amount of space that can use – not able to share info publicly

World Wide Incidence Database (WITS) is also useful – provides accounts to academics and public – use that information for a lot of our evidentiaries (NCTC website) https://wits.nctc.gov – various ways to filter the information

Since 2008, 2 or 3 groups have been removed “Revolutionary Nuclei and the Armed Islamic Group (GIA) out of Algeria” – recessions happened after 2004

Prior to that, 2 year reviews, Tupac Amor, Japanese Red Army, DFLP, Khmer Rouge – no more information (6-7) – Federal Register notice published and note that the circumstances have changed... these groups are defunct

Interview with Kay Guinane, Director of the Charity & Security Network

3/23/11, Notes

Charity & Security Network is a coordinating hub for an advocacy campaign that represent many nonprofit sector with the idea that they wanted to come together and develop specific reform proposals that are getting in the way of our national proposals – sanctions are so harsh that it is really making it difficult to operate in the way that it is supposed to. Come up with specific changes that we think are practical without sacrificing security needs.

During the next few years, develop specific policies

Goal now is to develop awareness – regular monitoring and reporting of news developments, reports and analyzes to get and make info readily available, events, discussion panels, participate in events sponsored by, meet with govt officials – public education and briefings for public officials

Staff 2 full time, based in dc

Idea of the list isn’t necessarily bad – whether or not you have a reasonable process to put people on the list; question of the credibility – only useful if it’s useful if it’s based on solid information; unfortunately, under the current the system, its so secretive and can be based on uncorroborative info that you can’t appeal – doesn’t carry a lot of credibility

What can you use the list for? All kinds of lists. Way that the list is used in a terrorist context because there is no differentiation between each group because you can have a charity that spent all of its money on humanitarian aid on groups that weren’t even on the list – no degrees to the list**– ex: hamas, then a group that spent all of its group on humanitarian aid, but prosecuted the same way
These lists are used – no contact with anyone or any group on the list – if group controls a territory – have to negotiate access to that civilian population to make arrangements to get aid in—

If you’re gonna have a list system, people should be able to rely on the list. Holy Land – all the money went to human aid, but still prosecuted b/c local charitable partners controlled by HAMAS BUT weren’t put on the list – list aren’t updated reliably – have reasonable uses for it—integrity

Don’t represent charities directly

2 constitutional challenges that are still in the courts- Holy Land criminal appeal (whether or not a charity can be convicted if they ---)

In implementation, Bush was shutting down a charity every year (every Ramadan) – Obama recognized the issue with charitable giving, but has been very slow – other issues that seem to be higher up on the agenda (ie: military commissions) – nothing formal has changed, and still some of the same staff at Treasury (civil servants) and haven’t changed their approach

More openness to discussion

Treasury as well for designation; cited newspaper reports except in Holy Land trial (b/c criminal case), appeared relied a lot on foreign intelligence that had some serious translation problems—through website
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