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The “FTO List” and Congress: Sanctioning Designated Foreign Terrorist Organizations

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The “FTO List” and Congress: Sanctioning Designated Foreign Terrorist Organizations

Summary

The purpose of this report is to provide Congress with an overview of the nature and status of the designated foreign terrorist organizations list, as a potential tool in overseeing the implementation and effects of U.S. legislation designed to sanction terrorists. It centers on the list of terrorist groups that are formally designated by the Secretary of State pursuant to section 219 of the Immigration and Nationality Act, as amended under the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132). These groups are often collectively referred to as the “FTO list.”

FTO list designations, which last for two years and must be renewed, occur after an interagency process involving the departments of State, Justice, Homeland Security, and the Treasury. Since the designations can be challenged in court, they require a detailed administrative record often based on classified information. An organization that is placed on the FTO list is subject to financial and immigration sanctions, potentially including the blocking of assets, the prosecution of supporters who provide funds, refusal of visas, and deportations of members. There have been a number of designations and changes since the list was established, but it currently includes thirty-six organizations. (See Appendix A.)

The FTO list is often confused with some of the other “terrorist lists” that are maintained by the U.S. government. These include the “state-sponsors of terrorism” list, which is pursuant to Section 6(j) of the 1979 Export Administration Act (P.L. 96-72; 50 U.S.C. app. 2405(6)(j)); the “Specially Designated Terrorists” (SDTs) list, which is pursuant to the International Emergency Economic Powers Act (P.L. 95-223; 50 U.S.C. 1701 *et seq.*) and was initiated in 1995 under Presidential Executive Order 12947; the “Specially Designated Global Terrorists” (SDGT) list, initiated in 2001 under Presidential Executive Order 13224; and, finally, the “Specially Designated Nationals and Blocked Persons” (SDN) list, a master list that contains the other lists. All of these are summarized and maintained by the Office of Foreign Assets Control of the Treasury Department. Lastly, the “Terrorist Exclusion List” or “TEL,” which relates to immigration and is pursuant to Section 411 of the USA Patriot Act of 2001 (8 U.S.C. 1182) is maintained by the State Department. Like the FTO list, the TEL includes the names of terrorist organizations, but it has a broader standard for inclusion, is subject to less stringent administrative requirements, and is not challengeable in court. There is a complicated interplay among all of these lists, and it is important to distinguish them from the better-known FTO list.

The FTO list has been of considerable interest to Congress, and there are arguments in favor and against it. It publicly stigmatizes groups and provides a clear focal point for interagency cooperation on terrorist sanctions; however, some argue that it is inflexible and misleading, since groups that are not on the list are still often subject to U.S. sanctions. The report concludes with a discussion of potential policy options for Congress, including some of the recently proposed amendments to the legislation that establishes it. It will be updated as events warrant.

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The “FTO List” and Congress: Sanctioning Designated Foreign Terrorist Organizations

Introduction

The purpose of this report is to provide Congress with an overview of the nature and status of the designated foreign terrorist organizations list (FTO list), as a potential tool in overseeing the implementation and effects of U.S. legislation designed as a basis for imposing sanctions on terrorists. The report centers on the list of terrorist groups that are formally designated by the Secretary of State pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*), as amended under the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132). These groups are often collectively referred to as the “terrorist group list” or “FTO list.”

The focus here is on the operation and effectiveness of the FTO list as a U.S. counterterrorism tool. The first part of the report provides a background on the process for designating a group, as well as the procedure used to remove a group. It describes the administration of the list and the role of the various Executive agencies involved in maintaining it.¹ Next follows a section explaining the distinctions between the FTO list and other terrorist lists that are maintained by the U.S. government, with an emphasis on both tracing the complicated interplay among the numerous lists and untangling their confusing acronyms. The arguments in favor and against the FTO list are then discussed, with information about the practicalities of implementing it. The report concludes with a discussion of potential policy options for Congress, including some of the recently proposed amendments to the legislation that establishes it.

The potential issue for Congress is to assess, as part of its oversight responsibility, the effectiveness of the FTO list in confronting terrorist groups that are a threat to the United States. This report will be updated as events warrant.

Background

The 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), which amends section 219 of the Immigration and Nationality Act (P.L. 82-414; 8 U.S.C.

¹For descriptions of the specific terrorist organizations that are on the list, see the U.S. State Department’s annual publication *Patterns of Global Terrorism*. The report is accessible at [<http://www.state.gov/s/ct/rls/pgtrpt/>].

1101 *et. seq.*), states that the Secretary of State is authorized to designate an organization as a “foreign terrorist organization” if three conditions are met:

1. The organization is foreign;
2. The organization engages in terrorist activity;
3. The terrorist activity threatens the security of United States citizens or the national security of the United States.²

If the Secretary of State decides that an organization meets these conditions, he or she may add it to the terrorist group list at any time by informing Congress and publishing a notice to that effect in the *Federal Register*. Designations last for two years, at which time they may be renewed. Groups can also be removed from the list at any time, either by the Secretary of State or by Act of Congress. 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 of the United States warrants a revocation of the designation.³ Designations normally occur after an involved interagency process; but the Secretary of State makes the ultimate decision.

Although the State Department officially designates a group and takes the lead, there are a number of agencies involved in administering the FTO list. Before the determination, the intelligence community is an important player, because the designation is based upon evidence of a group’s terrorist activity. This often involves classified information and entails assembling an administrative record that will potentially stand up in court. The intelligence community also provides the information upon which decisions to renew an organization’s designation are based.⁴ The Justice Department weighs the legal evidence before the designation is approved, and when renewal is being considered. The Department of Homeland Security is also consulted before designations are made.

After the designation, the Treasury Department may block financial transactions involving an organization’s assets and determine whether U.S. banks are complying with the law. The Justice Department determines whether or not to prosecute offenders who violate any aspect of the Treasury Department’s sanctions. Judges from the Department of Justice’s Executive Office of Immigration Review decide immigration cases, with appeals potentially going all the way to the Attorney General. A variety of different agencies in the Department of Homeland Security are then involved in carrying out immigration sanctions, including deportations.

Thus, from the perspective of the members of a group, the legal consequences of being designated a foreign terrorist organization are in two general areas: financing

²See “Designation of foreign terrorist organizations,” in the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. 1189.

³8 U.S.C. 1189 (a)(6)(A).

⁴In each case, classified summaries of the administrative records gathered on each group are provided to Congress, and the unclassified descriptions of designated foreign terrorist organizations are included in the State Department’s *Patterns of Global Terrorism*.

and immigration. Under the AEDPA, people who provide funds or other material support to a designated FTO are breaking the law and may be prosecuted.⁵ This applies to both the members of a group and to those who may be sympathizers. If Treasury imposes sanctions, U.S. financial institutions are required to block the funds of designated FTOs and their agents and to report that blockage to the Treasury Department. This can have important consequences for a designated terrorist organization's ability to access its resources. As for immigration, members of designated FTOs can be denied visas or excluded from entering the United States, and/or they can be deported once they are in the country.

Not the Only U.S. "Terrorist List"

The FTO list is not the only so-called "terrorist list" that the U.S. government keeps.⁶ There are a number of others, and it is important to clarify the distinctions among them.⁷

Probably the best known is the "state-sponsors of terrorism" list, which is pursuant to section 6(j) of the Export Administration Act of 1979 (P.L. 96-72; 50 U.S.C. app. 2405(j)(as amended)).⁸ Under the terms of the act, the Secretary of State provides Congress with the list of countries that have "repeatedly provided support for acts of international terrorism." There are currently seven states on the state sponsors of terrorism list: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria.⁹ Being on the list subjects a country to a range of severe U.S. export controls, especially of dual-use technology and military weapons. The provision of U.S. foreign aid (except humanitarian assistance) is also prohibited.

The state sponsors of terrorism list has been remarkably static since its initiation in 1979, with only two states ever having been removed: South Yemen, which was

⁵18 U.S.C. 2339B.

⁶And there are many lists internationally. For example, the United Nations maintains its own list of individuals and entities that are sanctioned under U.N. Resolutions 1267 (1999), 1333 (2000), 1390 (2002) and 1455 (2003). See the list at [<http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>]. The European Union also maintains its own list.

⁷All of the lists are available at the Treasury Department's Office of Foreign Assets Control web site, accessible at [<http://www.treas.gov/offices/eotffc/ofac/sdn/index.html>]. The Treasury Department has a compilation, in alphabetical order, of all of the persons (individuals and entities) designated under OFAC's economic sanctions regimes and includes those entities designated as FTOs by the Secretary of State. Additionally, the entire list is published as Appendix A to Chapter 5 of the CFR (See 31 CFR Ch V, App. A).

⁸States may also be identified as supporters of international terrorism and sanctioned under the terms of section 40A of the Arms Export Control Act (P.L. 90-629; 22 U.S.C. 2781); and sec. 620A of the Foreign Assistance Act of 1961 (P.L. 87-195; 22 U.S.C. 2371).

⁹The fact that Afghanistan was not on the list of state sponsors of terrorism before 9/11 is often cited as evidence of the negligence of pre-9/11 counterterrorist policies of the U.S. government. The explanation was that the Taliban national government was not recognized by the United States and so that state could not be named a state sponsor.

removed in 1990 when it effectively ceased to exist, merging with North Yemen to form the current state of Yemen; and Iraq, which was removed from the list in 1982 (when it was allied with the United States) and was returned to the list in 1990 (after its invasion of Kuwait).¹⁰ This list differs from the FTO list, as it is directed specifically toward states, not substate actors — like the terrorist groups that the states allegedly support. It also derives from different legislation.¹¹

At least three other important U.S. “terrorist lists” are in use. The “specially designated terrorists” (SDTs) list was generated pursuant to the International Emergency Economic Powers Act (P.L. 95-223; 50 U.S.C. 1701 *et seq.*). It was initiated under Presidential Executive Order 12947 on 25 January 1995 and was specifically oriented toward persons (individuals and entities) who threaten to disrupt the Middle East Peace Process. Later, following the events of September 11, 2001, the President invoked the same emergency authorities in Presidential Executive Order 13224, to block “all property and interests in property” of certain designated terrorists and individuals and entities materially supporting them.¹² This established another, much longer list, known as the Specially Designated Global Terrorists (SDGTs) list. There are currently over three hundred persons identified as SDGTs. These two lists are especially targeted toward blocking terrorist financing, and they do not have an immigration element.

The Treasury Department maintains the so-called SDT and SDGT lists, and, unlike the FTO list, the Secretary of the Treasury takes the lead in adding individuals or organizations to the lists and then freezing the assets of persons or entities that are on them. The lists have grown to include more than 200 entities, organizations, and/or individuals. They derive from different legislation and, again, are not the same as the designated FTO list.¹³

The SDT, SDGT, state sponsors, and (as of October 2002) FTO lists were placed together in a new, larger roster called the “Specially Designated Nationals and Blocked Persons” (SDN) list maintained by the Office of Foreign Assets Control of the Treasury Department.¹⁴ Although the individual lists retain separateness pursuant to their legislation, this comprehensive SDN list presents in one place all of the terrorist entities that are economically sanctioned through having their assets

¹⁰Paul Pillar, *Terrorism and U.S. Foreign Policy* (Washington, D.C.: Brookings Institution Press, 2001), p. 170. For more information specifically about adding and removing countries from the state sponsors of terrorism list, see CRS Report RL30613.

¹¹For further information on state sponsors of terrorism see CRS Report RL30613, *North Korea: Terrorism List Removal*; CRS Report RL3119, *Terrorism: Near Eastern Groups and State Sponsors, 2002*; and CRS Issue Brief IB10119, *Terrorism and National Security: Issues and Trends*. There are also individual CRS reports on each of the listed countries.

¹²The President, “Blocking Property and Prohibiting Transactions to Commit or Support Terrorism.” Executive Order 13224 of September 23, 2001. 66 FR 49079-49081; September 25, 2001.

¹³For more information about these sanctions, see CRS Report RL31658, *Terrorist Financing: The U.S. and International Response*.

¹⁴The National Council of Resistance for Iran is excepted from the SDN list.

blocked. (It also includes individuals and organizations that are sanctioned by having their assets blocked for narcotics trafficking and other activities.) There are thus fourteen different sanctions programs included in the SDN list, not all of which pertain to terrorists. The list is accessible via the Internet and is frequently updated to reflect the fluid nature of U.S. economic sanctions.¹⁵

There is also the so-called “Terrorist Exclusion List” or “TEL,” which is pursuant to Section 411 of the USA Patriot Act of 2001 (P.L. 107-56; 8 U.S.C., 1182). It authorizes the Secretary of State, in consultation with (or at the request of) the Attorney General, to designate terrorist organizations strictly for immigration purposes. Individuals associated with organizations on the TEL list are prevented from entering the United States and/or may be deported if they are already here.¹⁶ (It is worth noting, that none of these immigration sanctions has an effect on the behavior of U.S. citizens.) The TEL list expands the grounds for exclusion from the United States and has a broader standard and less detailed administrative procedure than does the FTO list. The State Department maintains the TEL list.¹⁷

In sum, with respect to sanctions against terrorists, the Executive branch maintains an intricate array of lists pursuant to various legislation and Executive Orders. These lists do overlap; however, the Executive Branch implements sanctions against state sponsors of terrorism, terrorist organizations, and individual terrorists somewhat differently depending upon which legislation applies, what the purpose is, and which list is being considered. There are also international lists maintained by the United Nations and the European Union, for example, that are not considered here. This report looks in detail only at the designated FTO list and its sanctions, which the State Department takes the lead in administering and which names only specially designated terrorist organizations. The FTO list has unique importance not only because of the specific measures undertaken to thwart the activities of designated groups but also because of the symbolic, public role it plays as a tool of U.S. counterterrorism policy.

¹⁵Again, see the Office of Foreign Assets Control web site, accessible at [<http://www.treas.gov/offices/eotffc/ofac/sdn/index.html>]. The Treasury Department’s master list, which includes SDTs, SDGTs state sponsors and FTOs and is accessible at this web site, is called the “Specially Designated Nationals and Blocked Persons” list. At the end of each entry is the acronym standing for the relevant list (SDT, SDGT, FTO, etc.) that led to the terrorist entity’s inclusion on the list. (SDGTE and SDGTI stand for “Specially Designated Global Terrorist Entity” and Specially Designated Global Terrorist Individual, respectively.)

¹⁶See Fact Sheet, Office of the Coordinator for Counterterrorism, “Terrorist Exclusion List,” November 15, 2002; accessible at [<http://www.state.gov/s/ct/rls/fs/2002/15222.htm>]; and *Patterns of Global Terrorism 2002*, pp.151-152.

¹⁷In addition to these lists, there are also a number of “watch lists” maintained by various agencies, currently being consolidated into the Terrorist Screening Center. For further information, see “New Terrorist Screening Center Established: Federal Government Consolidates Terrorist Screening Into Single Comprehensive Anti-Terrorist Watchlist,” White House press release, available at [<http://www.whitehouse.gov/news/releases/2003/09/print/20030916-8.html>].

History of the FTO List

The first terrorist organizations were designated and put on the FTO list in October 1997, about eighteen months after the passage of the AEDPA. There were thirty organizations on that initial list. In October 1999, the first review and redesignation occurred. Of the 30 groups originally on the list, 27 were redesignated, three were allowed to lapse, and one more group was added.¹⁸ Notably, the group that was added to the FTO list that year was Al Qaeda, which was designated a foreign terrorist organization especially because of its involvement in the August 1998 bombings of the U.S. embassies in Nairobi, Kenya, and Dar Es Salaam, Tanzania.

The first exercise of the Secretary of State's ability to add a group outside the usual two-year cycle occurred in 2000, when the Islamic Movement of Uzbekistan was designated on its own. Then in the regular biennial review in 2001, the State Department added two new groups, the Real Irish Republican Army (RIRA) and the United Self-Defense Forces/Group of Colombia (AUC), and combined two other groups (Kahane Chai and Kach) into one.¹⁹ That brought the total to 28 FTOs. Since that time, the list has grown significantly. There have been eight groups added to the FTO list since October 5, 2001: the Al-Aqsa Martyrs Brigade (which is an armed wing of the Fatah movement), 'Asbat al-Ansar (a Lebanese-based group associated with Al Qaeda), the Communist Party of Philippines/New People's Army (CPP/NPA) (a Maoist group), Jaish-e-Mohammed (JEM) (an Islamic extremist group based in Pakistan), Jemaah Islamiya (JI) (a southeast Asian terrorist network connected with Al Qaeda), Lashkar-e-Tayyiba (LT) (a Pakistan-based group fighting in Kashmir), and Salafist Group for Call and Combat (GSPC) (apparent outgrowth of the Algerian GIA, active in Europe, Africa and the Middle East). There are 36 groups currently designated as foreign terrorist organizations. (See Appendix A.)

Advantages of the FTO List

There are advantages and disadvantages for the United States in using a formal list as a mechanism for counterterrorism purposes.²⁰ Chief among the advantages is

¹⁸The Manuel Rodriguez Patriotic Front Dissidents (FPMR/D) and the Democratic Front for the Liberation of Palestine (DFLP) were dropped "primarily because of the absence of terrorist activity, as defined by relevant law, by those groups during the past two years." The third group was the Khmer Rouge, dropped because it ceased to exist as a viable terrorist organization. See "Foreign Terrorist Organization, Designations by the Secretary of State," Released by the Office of the Coordinator for Counterterrorism, October 8, 1999; accessible at [<http://www.state.gov/s/ct/rls/rpt/fto>].

¹⁹See the "2001 Report on Foreign Terrorist Organizations," Released by the Office of the Coordinator for Counterterrorism, October 5, 2001; accessible at [<http://www.state.gov/s/ct/rls/rpt/fto>].

²⁰The best single source of the arguments for and against the use of lists is Pillar, pp. 150-156. Although it was published before September 11, 2001, the book remains one of the best sources of information on this issue and was used extensively in the preparation of this (continued...)

the fact that the FTO list brings legal clarity to efforts to identify and prosecute members of terrorist organizations and those who support them. Having the designated FTO list helps to target U.S. counterterrorist sanctions 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 sanctions apply; if not, they do not. Thus, being added to the list can have very substantial implications for both the organization and for U.S. counterterrorist efforts.

In practical bureaucratic terms, the FTO list also provides lucidity in the often complicated interagency process of coordinating the actions of Executive agencies, by giving them a central focal point upon which the efforts converge. U.S. counterterrorism is therefore potentially more effective. State, Treasury, Justice, Homeland Security, and other agencies all recognize that groups on the list are subject to scrutiny and sanctions. And these measures arguably make Americans more secure from terrorist attacks, for example, by cutting down on terrorist organizations' access to resources and preventing terrorist group members from entering the country. Specifically, the departments of Homeland Security and Justice have used affiliation with an FTO as grounds for deportation of aliens.²¹ The Treasury Department, working with the interagency and international communities, has used the FTO list (among the other U.S. terrorist sanctions programs) in its effort reportedly to block more than \$125 billion in assets worldwide.²² And, of course, the Justice Department has prosecuted individuals affiliated with FTOs.²³ Having a focal point for agency coordination enhances the effectiveness of government implementation and may also serve as a deterrent to organizations that consider engaging in illegal behavior.

Likewise, the FTO list is a useful mechanism in dealing with other governments, especially those that are coordinating counterterrorism efforts with the United States. Labeling and listing terrorist organizations also opposed by other states can be an

²⁰(...continued)
section.

²¹Pillar, p. 151. This is not, however, the typically preferred grounds for deportation. Other grounds are often easier to prove in deportation hearings and do not potentially require revealing sensitive intelligence sources and methods in a hearing.

²²Testimony of Juan C. Zarate, Deputy Assistant Secretary of the Executive Office of Terrorist Financing and Financial Crime, U.S. Department of the Treasury, testimony before the Senate Foreign Relations Committee, March 18, 2003; accessible at [<http://www.treas.gov/press/releases/js139.htm>]. Other estimates place the number somewhat lower; see Council on Foreign Relations, Questions and Answers, [<http://www.terrorismanswers.com/responses/money2.html#Q7>]; and "Terrorist Financing," *Report of an Independent Task Force Sponsored by the Council on Foreign Relations*, New York, 2002.

²³It is worth noting, however, that from the perspective of the Justice Department, the designated FTO list is only one tool for controlling or deterring the behavior of terrorist organizations that threaten the United States. Members of organizations listed as designated FTOs who engage in criminal behavior are also subject to prosecution under other criminal statutes. And often prosecution for the other crimes that terrorists typically engage in is more promising than relying upon the sanctions legislation. See Pillar, p. 151.

important source of convergence in bilateral national relations. There is a sense of alliance against a common enemy. Often important benefits are derived in counterterrorism or other aspects of the bilateral relationship as a result. Moreover, states that are, actually or potentially, supporting organizations on the list can be left in no doubt about U.S. policy on the issue. Clearly labeling what the United States government considers a foreign terrorist organization can have significant domestic and international foreign policy advantages. It can be a powerful diplomatic tool, residing in the State Department's Office of the Coordinator for Counterterrorism.

Another important benefit is the attention that the FTO list gives to the organizations that are on it. Drawing attention to terrorist groups aids in identifying them not only for states but for nongovernmental organizations and individuals. And likewise the terrorist organizations are fully placed on notice that someone is watching what they do. This can make it more difficult for them to operate.

The groups on the FTO list are stigmatized. Many modern terrorist organizations have a varied portfolio of activities, some of which may be ostensibly legitimate. Some who may have previously viewed an organization primarily as a charity or as a public advocacy group may reconsider supporting it. Publicizing which groups are formally designated has important legal implications: since the law punishes those who wittingly support terrorist organizations, ignorance of a listed organization's activities is less defensible. Potential donors may not necessarily be willing to contribute to an organization that is designated as "terrorist," especially if the gift may result in prosecution under U.S. law. The moral relativity that some people claim dogs the "terrorist" label is removed, at least as far as official U.S. policy is concerned.

Disadvantages of the FTO List

Although it has important legal and symbolic significance, some argue that having a "list" is overly mechanistic, restrictive and inflexible, especially in an area of foreign policy that requires flexibility. Nonstate actors such as terrorist organizations are often able to change their names and/or characteristics much more quickly than ponderous bureaucratic lists can reflect. This is a serious problem in an era when international terrorism is increasingly globalized in its reach and capabilities, with borders becoming more permeable and less relevant, in an age of Internet links and open trade areas.²⁴ Likewise, such lists are not very effective in dealing with ad hoc activities engaged in by "volunteers," who may not have a clear long-term relationship with an organization. This has become a particular worry with respect to Al Qaeda, for example.²⁵

²⁴For more on the globalization of 21st century international terrorism, see Audrey Kurth Cronin, "Behind the Curve: Globalization and International Terrorism," *International Security*, Vol. 27, No. 3 (Winter 2002/2003), pp. 30-58.

²⁵See, for example, Sebastian Rotella, "Al Qaeda's Stealth Weapons; Muslim Converts Who are Drawn to Fanaticism Pose Special Dangers Well Beyond their Symbolic Impact. 'The Blue-eyed Emir' is One Example," *The Los Angeles Times*, September 20, 2003, p. A1; and
(continued...)

The statement that a group is “on the list” or “off the list” can be very misleading, and its significance is often misunderstood. It is true that the FTO list is generally considered the primary means of imposing sanctions against terrorist organizations. However, not being on the FTO list does not necessarily mean that the U.S. government has failed to recognize that a group is engaged in terrorism, is a threat, and should be subject to sanctions. Sometimes, for various reasons, groups²⁶ are not on the FTO list, but are on the SDT or SDGT list. They can also be on the Terrorist Exclusion List. There may be competing priorities in dealing with a group, such as a desire to engage a group in negotiations or to use the FTO naming as leverage for another foreign policy aim. Without a full appreciation of the interplay among different sanctioning lists, not to mention the interplay between competing foreign policy goals and all of the sanctioning lists, statements about whether or not a group is on a particular list may ring hollow.

It is not necessarily the case that the FTO list is the most effective or prosecutable mechanism to act against terrorist organizations, if that is the aim. Sometimes it is easier to prosecute organizations or their associates by using the Executive Orders under IEEPA. For example, it can be more difficult to prove that someone is materially supporting, or working for or on behalf of, an FTO under AEDPA than it is to prove that someone is violating the terms of Executive Order 13224. In that case, it might be to the benefit of U.S. counterterrorism efforts to name a group a SDGT rather than an FTO. If a group is then also put on the Terrorism Exclusion List, the combined effects of the sanctions overall could be comparable to being formally named an FTO.²⁷ Of course, the public attention and diplomatic leverage that goes along with being on the better-known FTO list is not equalled; however, the point is that in terms of the results with respect to fighting an organization’s activities, the U.S. sanctions regime is far more complicated than either being “on” the list or “off” the list would imply.

Competing foreign policy concerns often result in decisions to keep groups off the list. This is not necessarily a problem, as U.S. foreign policy considers numerous competing priorities in any given situation. The law “authorizes” but does not require the Secretary of State to make any given designation. If there are countervailing foreign policy priorities, then his or her judgment prevails. Nonetheless, inconsistencies of standards from the perspective strictly of terrorism can make the U.S. government appear hypocritical, especially in the eyes of those who see the FTO list only in black and white terms and may not appreciate the existence of other terrorist lists. Statements about organizations that are not designated regularly appear in the press, journals and academic writing, for

²⁵(...continued)

Al Qaeda after the Iraq Conflict, CRS Report for Congress, RS 21529 May 23, 2003.

²⁶Groups, or (to use more specific legal language) those who work for or on their behalf; are owned or controlled by them; provide material, technological, or financial support to them; or are otherwise affiliated with them, are candidates to be included on the list.

²⁷Another significant difference between the FTO and the SDGT list is that under the UN Sanctions regime (1390 Committee), the U.S. is obligated to designate terrorists and does so through E.O. 13224. The FTO program remains unilateral.

example.²⁸ Having such a high-profile list can politicize and oversimplify what is actually a complex web of legal sanctions that may be in addition to, or instead of, those pursuant to the AEDPA.

Furthermore, as noted, above, the FTO list is subject to judicial review. Thus, on a number of occasions, groups have filed law suits to be removed from it. For example, the Mujahedin-e Khalq (MEK) and the Liberation Tigers of Tamil Eelam (LTTE, or Tamil Tigers) in 1999 both filed suits in the District of Columbia arguing that they had been denied due process; but they lost in court.²⁹ A separate legal challenge was undertaken by the LTTE and the Turkish Kurdistan Workers' Party (PKK), which argued that the FTO portion of the AEDPA was unconstitutional. The suit was brought by individuals and groups seeking to make contributions to the designated organizations. They also lost their case; however, the ability to win in court has at times evidently been an element in the initial decision whether or not to designate a group.³⁰ This may mean that the designation has more to do with the legalities of the evidence than with the protection of U.S. national security from a terrorist threat.

Policy Options for Congress

In the 108th Congress, a number of amendments have been offered to change the AEDPA legislation so as to improve the effectiveness and ease of implementation of the FTO list. Some have proposed that the law should be changed so that the designation does not lapse if the Secretary of State fails to renew it every two years. It is a significant bureaucratic burden to ensure that the designations are appropriately reviewed, investigated, the administrative record updated, the appropriate agencies consulted, and the public statement of renewal made every two years after the initial designation. Some might argue that the burden of proof should be placed on the terrorist organization, and that the designations should stand unless a successful appeal is placed by the organization. The requirement for renewal is one of the aspects that some believe make the FTO list less desirable than the other sanctioning tools available under IEEPA and the relevant Executive Orders.

On the other hand, opponents may point out that the powers of the federal government under the Patriot Act are already extensive, and that placing the burden of proof on designated FTOs essentially makes them guilty until they prove

²⁸See, for instance, Gary Leech, "Good Terrorists, Bad Terrorists: How Washington Decides Who is Who," *Colombia Journal Online*, May 7, 2001, accessible at [<http://www.colombiajournal.org/colombia62.htm>].

²⁹See the 1999 report, "Foreign Terrorist Organization, Designations by the Secretary of State," Released by the Office of the Coordinator for Counterterrorism, October 8, 1999; accessible at [<http://www.state.gov/s/ct/rls/rpt/fto>].

³⁰Pillar, pp. 154-155. There was also an unusual recent case involving the MEK where the court held that the FTO designation decision under the AEDPA was obtained in violation of the Constitution, and that such a designation could not be a predicate for a criminal prosecution. See *United States of America v. Roya Rahmani*, 2097.Supp.2d 1045 (C.D. Cal. 2002).

themselves innocent. The state sponsors of terrorism list has been largely static in part because states remain on the list until the Secretary of State is able to attest to listed states having stopped being involved in supporting terrorism. It is always difficult to prove a negative. Some might argue that the FTO list is a more flexible document with the current arrangement regarding renewals and should be kept that way. The FTO list provides a public venue for the State Department periodically to reemphasize the importance U.S. foreign policy places upon countering these organizations.

Another idea is to remove the requirement for judicial review of the FTO list. This would make it much harder for terrorist organizations to appeal their placement on the list. The arguments for and against this suggestion are similar to those presented above, since judicial review is an important mechanism available for organizations whose members believe that they have been wrongly labeled and punished. There is a precedent for trying this suggestion. The Foreign Narcotics Kingpin Designation Act (passed in December 1999) originally contained a “no judicial review provision.” This caused concern among some owners of private businesses who feared that they might somehow be added to the list for unwitting business relationships with narcotics traffickers. Shortly thereafter, legislation was passed to remove the provision, and judicial review was restored.

Appendix A. Designated Foreign Terrorist Organizations

Abu Nidal organization (ANO)
 Abu Sayyaf Group (ASG)
 Al-Aqsa Martyrs Brigade
 Armed Islamic Group (GIA)
 'Asbat al-Ansar
 Aum Supreme Truth (Aum) Aum Shinrikyo, Aleph
 Basque Fatherland and Liberty (ETA)
 Communist Party of Philippines/New People's Army (CPP/NPA)
 Al-Gama'a al-Islamiyya (Islamic Group, IG)
 HAMAS (Islamic Resistance Movement)
 Harakat ul-Mujahidin (HUM)
 Hizballah (Party of God)
 Islamic Movement of Uzbekistan (IMU)
 Jaish-e-Mohammed (JEM)
 Jemaah Islamiya (JI)
 Al-Jihad (Egyptian Islamic Jihad)
 Kahane Chai (Kach)
 Kurdistan Workers' Party (PKK, KADEK)
 Lashkar-e-Tayyiba (LT)
 Lashkar I Jhangvi (LJ)
 Liberation Tigers of Tamil Eelam (LTTE)
 Mujahedin-e Khalq Organization (MEK or MKO)
 National Liberation Army (ELN — Colombia)
 Palestine Islamic Jihad (PIJ)
 Palestine Liberation Front (PLF)
 Popular Front for the Liberation of Palestine (PFLP)
 Popular Front for the Liberation of Palestine-General Command (PFLP-GC)
 Al Qaeda
 Real IRA (RIRA)
 Revolutionary Armed Forces of Colombia (FARC)
 Revolutionary Nuclei
 Revolutionary Organization 17 November (17 November)
 Revolutionary People's Liberation Party/Front (DHKP/C)
 Salafist Group for Call and Combat (GSPC)
 Sendero Luminoso (Shining Path or SL)
 United Self-Defense Forces/Group of Colombia (AUC)

Source: U.S. Department of State, *Patterns of Global Terrorism 2002*, published April 2003; accessible at [<http://www.state.gov/s/ct/rls/>], p. 99ff. (Some spellings have been adapted.)