Prevention or Pretext
The Designation of Foreign Terrorist Organizations

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Abstract

This paper examines whether the “Foreign Terrorist Organization” & “Specially Designated Foreign Terrorists” designations are applied in a consistent manner. The author concludes that the designations are applied inconsistently and are used in the post September 11th era as a tool not only against legitimate terrorist targets, but also against the ideological opponents of United States foreign policy. Specifically the designations are used against Islamic based political movements. The pre-textual use of terrorist designations against ideological opponents weakens the United States position in the battle against terrorism, and undermines their legitimate security concerns. The current application of the designation schemes are not in the policy interests of the United States and its citizens.
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Introduction

In the post 9/11 world, the word “terrorist” is used quite liberally. Be it in political campaigns, on the evening news, or over the internet, it has become a loaded term tied to the politics of war. Yet being a terrorist is not an actual crime in the United States. What an individual or a group may be prosecuted for are crimes under the terrorism statutes, codified in title 18 of the United States Code.¹ The focus of this article will be on the process by which foreign organizations are designated as terrorist organizations by the United States, and the legal and policy ramifications which ensue.

There are two commonly utilized methods whereby a foreign organization is deemed a terrorist organization by the United States government. One manner is by being designated a “Foreign Terrorist Organization” (FTO), and the second manner is by being designated a “Specially Designated Global Terrorists” (SDGT). Being named an FTO or a SDGT by the United States of America has significant ramifications for any organization or group. However when an organization is designated an FTO or SDGT it impacts not only the organization and its members, but also foreign governments, foreign civilians, American citizens, and international relations. It is therefore imperative to carefully examine the process by which an organization is designated a FTO or SDGT, and whether this process is applied consistently across the political spectrum. If applied consistently, is it applied in a way which is over, or under-inclusive? If it is not applied consistently, then is it in the best interest of the United States to continue with the current designation regime?

¹ 18 USC §2331 – 2339 (2002)
After taking a much closer look at the process of terrorist organization designation and its application, our examination shall briefly move to a focus on individuals. Specifically, what acts or omissions must an individual partake in, in order to be in contravention of the “material support” statute and subject to criminal prosecution? We shall specifically be looking at the First Amendment considerations which are at play. Are the standards given to American citizens consistent and clear, or vague and ripe for confusion? After determining whether the material support statutes are clear and narrowly tailored to justify the legitimate state interest of stymieing terrorist funding, we will be in stronger position to make a policy analysis.

**Purpose of Designating a Terrorist Organization**

What is the purpose of designating an organization an FTO or SDGT? One perspective would be that of the U.S. government. The State Department mentions five intended effects which they hope stem from the legal designation. As we move forward in analyzing the designation criteria it is important that we keep these intended effects in mind. This will guide our eventual conclusions as to the impact of the designation criteria as compared to their intended effects. We may determine that there are actually more purposes for the designations than those officially mentioned.

According to the State Department, the five intended effects of the FTO designation are:

1) It supports efforts to curb terrorism financing and to encourage other nations to do the same;
2) It stigmatizes and isolates designated terrorist organizations internationally; 3) It deters donations or contributions to and economic transactions with named organizations; 4) It

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heightens public awareness and knowledge of terrorist organizations; and 5) It signals to other 
governments our concern about named organizations. It would not be a leap to propose that these 
same criteria can generally be kept in mind when considering the designation process of an 
SDGT. Of course this would need to be balanced with the main purpose of designating an 
organization an SDGT: regulating international economic transactions during wars or national 
emergencies.  

**Ia.) Overview: The Process of Designating a Terrorist Organization**

There are two primary methods of designation. The first avenue is to designate a foreign 
organization a “Foreign Terrorist Organization” (FTO). When an organization is designated a 
FTO by the United States government, the impact is significant and far reaching. Since the 
passage of the US PATRIOT Act in 2001, an FTO is also known as a Tier I terrorist 
organization.  

FTOs are designated by the Secretary of State in accordance with § 219 of the 
Immigration and Nationality Act (INA), as amended by the AEDPA and then by the US 
PATRIOT Act.  

According to the State Department the process of being designated as an FTO is as 
follows. The Office of the Coordinator for Counterterrorism in the State Department 
continuously monitors the activity around the world of potential FTOs. When reviewing a 
potential FTO, the State Department looks at actual terrorist attacks carried out, as well as 

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4 *Material Support and related bars to refugee protection summary of key provisions of the immigration and nationality act (INA); available at* http://www.rcusa.org/uploads/pdfs/ms-summ-unhrkeyprov12-06.pdf  
capability and intent to carry out such acts.\textsuperscript{6} If the Secretary of State decides to make the designation, Congress is notified of the Secretary’s intent and given seven days to review the designation.\textsuperscript{7} At the expiration of the seven-day waiting period, notice of the designation is published in the Federal Register, at which point the designation takes effect.\textsuperscript{8} At no time during the process is the Secretary of State required to notify the organization that it is being considered for designation as an FTO.\textsuperscript{9}

There are three criteria used to evaluate whether a group is a FTO:\textsuperscript{10} (1) It must be a foreign organization; (2) The organization must engage in terrorist activity or retain the capability and intent to engage in terrorist activity; and (3) The organization’s terrorist activity or terrorism must threaten the security of U.S. nationals or the national security of the United States. We will take a closer look at these three criteria after reviewing the entire designation process.

An organization that is designated as an FTO may seek judicial review of the designation in the US Court of Appeals for the District of Columbia Circuit.\textsuperscript{11} It must seek review within 30 days of their designation being published in the Federal Register.\textsuperscript{12} Only the organization itself may challenge this designation, although they are not entitled to due process.\textsuperscript{13} Review of the designation is only based on the administrative record used by the Secretary of State to make the decision.

\textsuperscript{6} Id.
\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} \textit{Humanitarian Law Project v. U.S. Dep’t of Justice}, 352 F.3d 382 (9th Cir. 2003)
\textsuperscript{10} reflecting amendments to § 219 of the INA in the USA PATRIOT Act of 2001 available at http://www.state.gov/s/ct/rls/fs/2003/17067.htm (last checked Dec. 27, 2008)
\textsuperscript{12} http://www.state.gov/s/ct/rls/fs/2003/17067.htm
\textsuperscript{13} \textit{32 County Sovereignty Committee v. Dep’t of State}, 292 F.3d 797 (D.C. Cir. 2002)
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The designation in the first place.\(^\text{14}\) Some courts have even found the designation of an FTO to fall under the Political Question Doctrine, and thereby not reviewable.\(^\text{15}\) A designation lasts two years, and the Secretary of State can re-designate for an additional two years if the statutory criteria continues to be met. A designation may also be revoked by an Act of Congress, or set aside by a Court order.\(^\text{16}\) Courts will invalidate a designation if it is found to be “arbitrary, capricious, an abuse of discretion;” “contrary to constitutional power;” “in excess of statutory jurisdiction;” or “lacking substantial support in the administrative record.”\(^\text{17}\)

The second commonly used method to designate groups as terrorist organizations is when the President designates a group as being “Specially Designated Global Terrorists” (SDGT). The International Emergency Economic Powers Act (IEEPA)\(^\text{18}\) authorizes the President of the United States to regulate international economic transactions in order to deal with any unusual or extraordinary foreign threat to the national security, foreign policy, or economy of the United States. This can only be done if the President declares a national emergency with respect to such threat.\(^\text{19}\) When President George Bush declared a national emergency\(^\text{20}\) to deal with the September 11, 2001 attacks, he authorized the freezing of all assets of SDGTs. The US PATRIOT Act provided that when an organization is under investigation for providing material support to an SDGT, its assets may be frozen.\(^\text{21}\)

\(^{18}\) 50 U.S.C.A. § 1701
\(^{19}\) Id.
\(^{21}\) 50 U.S.C.A. § 1702 (a)(1)(B)
This method has been commonly used in the aftermath of September 11 domestically to freeze the assets of charities which donate financially or in-kind to organizations in the Middle East.\textsuperscript{22} For example, when an Islamic relief organization was thought to be a branch of an organization named a SDGT, its assets were blocked and frozen.\textsuperscript{23} While the IEEPA does include a humanitarian aid exception,\textsuperscript{24} an organization that receives donations of both money and goods cannot benefit from the exception due to its inability to access the blocked funds needed to purchase the humanitarian goods.\textsuperscript{25}

**b.) The far reaching implications of designation**

When an organization is designated as an FTO or SDGT, the very real implications are felt by many actors. Beginning in the United States, being designated negatively brands a foreign organization, and for all intents and purposes, puts them off limits to those living in the United States. Once an organization is designated an FTO, it is unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide “material support or resources” to the organization.\textsuperscript{26} This is the major consequence of being branded by the United States government, and it will be the focus of the latter part of this article. Briefly, “Material support or resources” is defined as:

“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, transportation, and other physical assets, except medicine or religious materials.”\textsuperscript{27}

\textsuperscript{22} *Holy Land Found. For Relief & Dev. v. Ashcroft*, 219 F.Supp.2d 57 (D.C. 2002)
\textsuperscript{23} *Islamic American Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007), cert. denied, 2007 WL 1479842
\textsuperscript{24} International Emergency Economic Powers Act: IIEPA § 1702 (b)(2)
\textsuperscript{25} *Holy Land*, 219 F.Supp.2d at 69 n.14
\textsuperscript{26} 18 U.S.C. § 2339(B) (2002)
\textsuperscript{27} *Id.*
Furthermore, it is unlawful for aliens who are members of a FTO to be admitted into the United States.\textsuperscript{28} If already in the United States, one’s chances of being naturalized or gaining asylum may also be tempered due to any affiliation with an FTO or SDGT.\textsuperscript{29} An accused non-citizen can also be subject to mandatory detention since the Attorney General may designate an individual as a terrorist threat.\textsuperscript{30} This detention could be indefinite or even lead to physical removal from the United States.\textsuperscript{31} Also, any U.S. financial institution that becomes aware that it has possession or control of funds in which the FTO has an interest, must retain those funds and report them to the Office of Foreign Assets Control of the U.S. Department of Treasury.\textsuperscript{32}

The impact of the designation will be felt by the organization itself. Organizations such as al-Qaeda have found it more difficult to operate or transfer funds once designated by the United States. Yet many international organizations which are designated as being an FTO or SDGT by the United States are far different from the al-Qaeda operatives the “War on Terror” was designed to defeat. For example, some of the organizations designated as FTOs are considered legitimate political parties in their home country, and some even hold parliament seats in democracies. For example, Hamas (an FTO) has won elections\textsuperscript{33} which former President

\begin{flushright}
\textsuperscript{28} 8 U.S.C. § 1182 (a)(3)(B)(i)(IV) \\
\textsuperscript{29} Sahar Aziz, \textit{The Laws on Providing Material Support to Terrorist Organizations: The erosion of constitutional rights or a legitimate tool for preventing terrorism?}, 9 TEX. J. ON C.L. & C.R. 45, 57 (2003) \\
\textsuperscript{30} 8 U.S.C.S. § 1158(b)(2)(v) \\
\textsuperscript{31} See Aziz supra note 29 \\
\textsuperscript{32} 8 U.S.C.A. § 1189 \\
\end{flushright}
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Jimmy Carter (whose Atlanta based Carter Center monitors elections internationally) called “completely open, honest and fair.”

The impact the FTO designation has had on Hamas is particularly apparent. From a policy perspective we see that the act of designating Hamas an FTO has made life for a population of 1.5 million in the Gaza Strip very difficult. According to the State Department, 80% of private sector businesses have been closed in Gaza due to the economic situation there.

Politically we see that the international community remained silent when the elected Hamas government was dismissed by President Mahmoud Abbas due to a state of emergency and again during the 2009 Israeli war on Gaza. This silence was due in large part to the United States stance on Hamas as being a Foreign Terrorist Organization and not a democratically elected sovereign. The implications of this for Hamas was that they lost their democratic right to rule, were unable to provide basic needs for the people of Gaza due to the border blockades, and were not able to receive aid from the UN or international donors. Their truce with Israel ended and they faced weeks of war.

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34 The Carter Center Democracy Program, found at http://www.cartercenter.org/peace/democracy/index.html (last checked Dec. 27, 2008)
36 See supra note 2
37 Hamas dismisses new Abbas post, Middle East Online, Nov. 28, 2008 available at http://www.middle-east-online.com/English/?id=28902 (last checked Dec. 27, 2008)
38 War in Gaza: Israel accused of shelling house full of children, Jan. 9, 2009, Times Online available at http://www.timesonline.co.uk/tol/news/world/middle_east/article5480440.ece (last checked March 3, 2009)
40 Id.
41 18 U.S.C. § 2339(B)
The current realities in the Gaza Strip are a clear example of how an FTO designation can impact a civilian population. Even prior to the January 2009 shelling and bombardment of Gaza, the situation had deteriorated to the point where a case could have been made that there was collective punishment underway. Many policy experts and scholars advocated this type of collective punishment as a legitimate means of forcing political change and securing results in the interest of peace. Of course rather than call this collective punishment, they dress up the tactic as being “justifiably over-inclusive” to translate into pressure on leadership to change. In reality the strategy is to starve a group of civilians until they reach the breaking point, and thereby change their political affiliations. This strategy proposed by some analysts and perhaps adopted by some nations could be construed as being in direct contravention of International law and the Fourth Geneva Convention, which states that “collective penalties and all measures of intimidation are prohibited.”

Whether or not this tactic is illegal is outside the scope of our discussion. What is clear is that designating an organization an FTO impacts innocent civilians in foreign lands by stopping the flow of humanitarian aid, and increasing political and military pressure on a people. There

44 Id.
47 Id. at 110
48 Id.
are many similar examples around the globe where civilian populations are negatively impacted due to the FTO designation of a group they live near or with.\textsuperscript{51} And there are signs that this policy will continue. As former U.S. Ambassador to Lebanon Jeff Feltman recently noted, a Hizbullah electoral victory in 2009 will mean that “U.S. aid to Lebanon will be threatened…[T]here must be no illusions about that.”\textsuperscript{52}

Finally, the impacts of designations are felt in the realm of international relations and policy. In staying with our case study of Palestine, the way the United States, UN, EU, Arab governments, and many others interact with the Palestinian Authority is colored by the FTO designation. Similarly the designation of groups such as the Mujahideen-e-Khalq (MEK), Tamil Tigers, and others directly impacts the sort of diplomatic relations the United States has with such groups. The United States also holds tremendous influence over other nations. For example, the designation of Hizbullah as an FTO has pressured other nations to do the same.\textsuperscript{53} Even interfaith peace delegations from American churches receive immense pressure and bad press after meeting an FTO.\textsuperscript{54}

The designation of a group can lead to very serious consequences, perhaps even war. Outside of the obvious example of the situation in Gaza in 2009, the designation of the Iranian

\textsuperscript{52} See Lamb, supra note 35
\textsuperscript{54} Presbyterian Church Leaders Meet with Terrorists in Lebanon; ADL Says “Irresponsible” Decision Furthers Interfaith Rift, ADL, Oct. 24, 2004 available at http://www.adl.org/PresRele/ChJew_31/4578_31.htm (last checked Dec. 27, 2008)
Revolutionary Guards Corps (IRGC) as an SDGT\textsuperscript{55} was seen by some experts as a legal precursor to launching an offensive war on Iran.\textsuperscript{56} It was used to “heighten the political and psychological pressure on Iran…by using the designation to persuade foreign governments and financial institutions to cut ties with Iranian businesses and individuals.”\textsuperscript{57} Although former Secretary of State Condoleezza Rice stated that the sanctions were tailored “not to have a general effect on the Iranian people” she conceded that “they are having an effect on the Iranian economy.”\textsuperscript{58} Just as a designation of a terrorist organization impacts the organization itself, citizens in the United States, and citizens abroad, it also impacts international relations and policy. Having clearly identified some of the major ramifications of being designated an FTO or SDGT, we now zero in on some major points of concern in regards to the criterion used for designation, and how it is applied.

**c.) Analysis: Classification criteria of an FTO**

There are three criteria used to evaluate whether a group is a FTO\textsuperscript{59}: (1) It must be a foreign organization; (2) The organization must engage in terrorist activity or retain the capability and intent to engage in terrorist activity; and (3) The organization’s terrorist activity or terrorism must threaten the security of U.S. nationals or the national security of the United States. In the second and third criteria there is ample room for confusion. Particularly two questions demand deeper investigation. First, how are “terrorist activity” and “terrorism”

\begin{itemize}
  \item \textsuperscript{55} U.S. to name Iran Revolutionary Guards as Terrorists, Fox News, Aug. 15, 2007 available at http://www.foxnews.com/story/0,2933,293285,00.html (last checked Dec. 27, 2008)
  \item \textsuperscript{56} Iran’s Revolutionary Guard labeled terrorists, The RealNews, Oct. 23, 2007, See Seymour Hersh’s discussion with Wolf Blitzer of CNN available at http://www.youtube.com/watch?v=kHs1UmUsELU (last checked Dec. 27, 2008)
  \item \textsuperscript{58} Robert McMahon, Rice Defends Regime Change in Iraq, Stresses Diplomacy Elsewhere, CFR, Dec. 19, 2008 available at http://www.cfr.org/publication/18048/ (last checked Dec. 27, 2008)
  \item \textsuperscript{59} Reflecting Amendments to § 219 of the INA in the USA PATRIOT Act of 2001. available at http://www.state.gov/s/ct/rls/fs/2003/17067.htm (last checked Dec. 27, 2008)
\end{itemize}
defined? Second, how broadly or narrowly is the term “national security of the Untied States” interpreted? We will begin by looking at how terrorism is defined.

The full language of the second criteria states that the organization “must engage in terrorist activity, as defined in § 212 (a)(3)(B) of the INA (8 U.S.C. § 1182(a)(3)(B)), or terrorism, 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 retain the capability and intent to engage in terrorist activity or terrorism.”60 The State Department then denotes that § 212(a)(3)(B) of the INA defines terrorist activity to mean: "any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following…"61 It then lists a litany of crimes from highjacking, murder, & assassination, to nuclear or biological warfare & property damage.62

The list of what denotes terrorist activity under the statute is lengthy. It includes a discussion of material support for terrorism63 and states that the standard for intent is one of “reasonableness.”64 However the definition of terrorism given by the State Department is less clear. We are pointed to § 140(d)(2) of the Foreign Relations Authorization Act, which defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents."65

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60 See 8 USC § 1189 Designation of Foreign Terrorist Organizations
61 Id.
62 Id.
63 § 212(a)(3)(B)(II) of the INA at http://www.state.gov/s/ct/rls/fs/37191.htm
64 Id.
65 See definitions of terrorism and terrorist activity available at http://www.state.gov/s/ct/rls/fs/37191.htm
Before criticizing the State Department’s vague definition, we should pause for a moment to ask the normative question of whether terrorism even has a real definition. A 2003 study by the US Army found that there are currently 109 different definitions of the word terrorism.\footnote{http://en.wikipedia.org/wiki/Definition_of_terrorism#cite_note-Record-fn10-1; Crystal Record. Bounding the Global War on Terrorism, 1 December 2003 ISBN 1-58487-146-6, p. 6 (page 12 of the PDF document), citing in footnote 10 Stacey M. Fleet, Meghan L. Knapp, et al., Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature, New Brunswick, NJ: Transaction Books, 1988, pp. 5-6.} Edward Peck, former Deputy Director of the Reagan White House Task Force on Terrorism once stated that “they asked us to come up with a definition of terrorism that could be used throughout the government. We produced about six, and each and every case, they were rejected, because careful reading would indicate that our own country had been involved in some of those activities.”\footnote{National Exclusive: Hezbollah Leader Hassan Nasrallah Talks With Former US Diplomats on Israel, Prisoners and Hezbollah’s Founding, Dem. Now, Jul. 28, 2006 available at http://www.democracynow.org/2006/7/28/national_exclusive_hezbollah_leader_hassan_nasrallah (last checked Dec. 27, 2008)} Some legal scholars have pointed out that the lack of a comprehensive definition of terrorism “has left a hole in a very important area of international law”\footnote{See Conn supra note 43 at 93} and made it difficult on states to “know what these legal obligations entail.”\footnote{Id.} As author Jason Burke put it, “There are multiple ways of defining terrorism, and all are subjective.”\footnote{Jason Burke, Al Qaeda: The True Story of Radical Islam, I.B. Tauris & Co. Ltd 2003, p. 22} While informed citizens can not expect the State Department to do the impossible, neither can we allow a phrase to be thrown around with impunity that in fact is entirely subjective.

Rather than get lost in the semantics of the word, it is sufficient for our discussion to acknowledge that the working definition of “terrorism” provided by the State Department is broad, and does not give interested actors the clarity we receive when we look up the term.
“terrorist activity.” Whether the reasoning for this is due to the subjective nature of terrorism itself, or due to poor legislative work, is irrelevant. In either case for the purposes of § 219 of the INA, a better choice of words would provide a clearer picture for potential designees, and would weaken the notion that the United States is simply applying the term to their ideological opponents. 71

The inclusion of the term national security in the third prong of the FTO designation further complicates matters. Examining this term is even more relevant as it is also used in the designation criteria of an SDGT. 72 Again, the third prong states that “the organization’s terrorist activity or terrorism must threaten the security of U.S. nationals or the national security of the United States.” 73 But what acts by an organization are seen as being threats to the national security of the United States? Is it enough to threaten the success of a foreign military operation, no matter its nature? What if it is an unprovoked offensive war? Would it be enough to threaten the national security of an ally? What if the ally is an aggressor? What if the ally’s interests are not tied to those of the United States? How broadly is national security defined? Answering these questions would give us a clearer understanding of the designation criteria.

At this juncture things begin to get murky. Since the Secretary of State’s classification can depend on classified information, 74 it is difficult to know what “national security” actually means. It has been ruled that non-disclosure of classified information in this context does not

71 Bruce Hoffman, Inside Terrorism, Columbia University Press 1998, p. 32. Quoting Bruce Hoffman in his book “Inside Terrorism” where he states: “On one point, at least, everyone agrees: terrorism is a pejorative term. It is a word with intrinsically negative connotations that is generally applied to one's enemies and opponents, or to those with whom one disagrees and would otherwise prefer to ignore”

72 50 U.S.C.A. § 1701

73 8 U.S.C.A. § 1189

74 People's Moahedin Organization of Iran v. Department of State, 327 F.3d 1238 (C.A. D.C. 2003)
offend the Due Process Clause, as the minimum required due process is to disclose the unclassified portions of the administrative record and provide an opportunity to be heard.\textsuperscript{75} One very useful case for our analysis is that of the People’s Mojahedin Organization of Iran (MEK) v. Department of State.\textsuperscript{76}

In 2003 the MEK challenged their designation as a Foreign Terrorist Organization.\textsuperscript{77} The MEK is a group that admits to carrying out terrorist activity, as defined by the United States.\textsuperscript{78} In its own defense the MEK claimed that its activities were against the Islamic Republic of Iran, a nation the United States considers a state sponsor of terror.\textsuperscript{79} They claimed therefore that their actions were therefore not against the “national security” interests of the United States, and they could not therefore being designated an FTO.\textsuperscript{80} It would seem a plausible argument given the United States history of making friends with its enemy’s enemy (e.g. Saddam Hussain). However the D.C. Court of Appeals relied upon the political question doctrine and ruled it a non-justiciable issue as it is a matter of foreign policy.\textsuperscript{81} The political question doctrine can be traced all the way back to Marbury v. Madison, when it was stated by Justice Marshall that some government actions are “mere political acts” that are not “examinable in a court of justice.”\textsuperscript{82}

Stating that the determination of what was in the national security interest of the United States was non-justicable appears to have effectively closed the door to any judicial oversight of whether the actions of an FTO are in fact counter to the national security interests of the United

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 1241
\textsuperscript{79} Id. at 1243
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Marbury v. Madison 5 U.S. 137, 164 (1803)
States. Combined with the classified administrative record, organizations are left to guess the Secretary of State’s reasoning, and the national security interests of the Executive, with no clear standard to follow. This leads to further skepticism in regards to the FTO designation and whether it is being applied consistently. The current designation criteria therefore do not seem to be in line with the purported goals of designation as mentioned by the State Department since the designation gives confusing and unclear signals to foreign organizations, nations, and international bodies.

d.) Analysis: Consistent Application or Selective Labeling

Now that we have identified some ambiguities in the designation process, we turn our focus to actual designations. Thus far we have identified the problems of using terms such as terrorism and national security, as well as some due process concerns in challenging designations. If organizations are being labeled on a consistent basis perhaps these ambiguities are less harmful. Therefore the question that must be answered is as follows; are the FTO and SDGT labels applied to groups and organizations consistently across the ideological spectrum? Are like groups being treated alike? After taking a look at some examples of FTO designations, it appears that the terrorist organization designations are not being applied in a consistent manner across the ideological spectrum. This is problematic, as inconsistent and counterintuitive application of the designations does not fulfill their intended purpose of sending a clear message to foreign organizations and governments as the State Department hoped it would.84

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83 See supra note 2
84 Id.
Islamic and Middle Eastern groups have been cited disproportionately on past and present FTO lists. On a 1997 FTO list, 15 of the 31 listed FTOs were affiliated with Muslims or Middle Easterners; in a 1999 FTO list, 14 out of 23 were affiliated with Muslims or Middle Easterners; in a 2001 FTO list, 21 out of 39 were affiliated with Muslims or Middle Easterners, and in 2002, 19 out of 33 organizations. Of the 42 FTOs currently listed on the State Department website, 25 are on their face related to Muslims or Middle Eastern groups.

The list of SDGT and Specially Designated Nationals (SDN) is vast. Yet an examination of the list gives a strong indication that the same pattern exists. For example of the first 67 SDGT designations under Executive Order 13224 at least 60 on their face appear Muslim or Middle Eastern. An examination of 2008 displays a similar trend. From July 2, 2008 until December 4, 2008, 15 of 19 SDGTs were of Muslim or Middle Eastern background. These numbers by themselves prove that Muslim and Middle Eastern individuals are a majority of the FTO and SDGT designations, a fact already widely accepted.

However these numbers in and of itself may not be enough to prove that the designations are being applied inconsistently or in a discriminatory manner. Pundits will argue that today the United States is fighting Islamic extremism at home and abroad, and therefore it is natural to see

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85 See Aziz supra note 29 at 69
87 65 Fed. Reg. 55112 (Sept. 12, 1999)
89 8 U.S.C.A. § 1189
90 Executive Order 13224 discussed at http://www.state.gov/s/ct/rls/fs/2002/16181.htm
92 Id. at 16
93 Even the introduction of the widely used wikipedia article on the subject says as much, available at http://en.wikipedia.org/wiki/U.S._State_Department_list_of FOREIGN_Terrorist_Organizations
the disproportionate application. The normative question that would need to be answered to satisfy such pundits is whether Muslims and those from Middle Eastern nations are designated more because they fit the criteria of FTOs and SDGT, or because the criterion is applied in a manner which fits them? Simply put, are they fitting the crime, or are the crimes being made to fit them due to the political climate & foreign policy objectives of the United States? For the purposes of our analysis, it is sufficient to note that the designations are disproportionately applied to Muslims and individuals from the Middle East. The question of why this is so is for the reader to decide. Rather then dive headfirst into an examination of international politics and normative evaluations of American foreign policy, we will shift our focus to less nuanced examples which will continue to shed light on the designation process and its consequences.

Even within the Arab and Muslim population, the FTO & SDGT designations are not applied consistently. Once again, Palestine stands as a clear example through the difference in treatment by the United States of the groups Fatah and Hamas. Fatah and Hamas are both political parties in the Palestinian territories.94 Both engage in political advocacy, social welfare, and according to the State Department, have ties to terrorism.95 The example of these Palestinian groups is an important one, as amorphous and multi-dimensional organizations continue to survive and even flourish in the Middle East today. When humanitarian aid and military operations are carried out by the same organization, the United States has choices to make. The State Department can either: designate an entire organization, designate part of an organization, or not designate the organization at all. Whichever it chooses, a level of consistency in

application would promote the ideal that the United States is committed to curbing what it views as illegitimate activity, and not simply applying labels as pretext against its ideological opponents.

The al-Aqsa Martyrs Brigade is listed as an FTO.\textsuperscript{96} The State Department describes its structure as being localized and autonomous, united under a common alliance to Fatah.\textsuperscript{97} It has been widely described as the “military wing” of Fatah.\textsuperscript{98} In its 2006 Country Report, the State Department noted that the Brigade continues intra-Palestinian violence and adds to the “overall chaotic security environment.”\textsuperscript{99} Despite the State Department’s acknowledgment of Fatah’s ties to the al-Aqsa Martyrs Brigade, Fatah is not listed as an FTO. On the contrary, Fatah has become a staunch ally to the United States and Israel in the Middle East “peace process.” The leadership of Fatah even visited President Bush at the White House in December 2008.\textsuperscript{100}

In contrast, the military wing of Hamas, the Izz ad-Din al-Qassam Brigades\textsuperscript{101} is not listed as a terrorist organization by the United States. Rather its parent organization, Hamas, is designated as the FTO.\textsuperscript{102} Conversely, in Australia and the United Kingdom, Hamas is designated in the same manner as Fatah is here in the United States. That is, in Australia and the United Kingdom, the Izz ad-Din al-Qassam Brigades are listed as a terrorist organization and

\textsuperscript{96} See FTO designations, \textit{supra} note 2.
\textsuperscript{97} Holly Fletcher, \textit{Al-Aqsa Martyrs Brigade}, CFR, Apr. 2, 2008, \textit{available at} \url{http://www.cfr.org/publication/9127/} (last checked Dec. 27, 2008).
\textsuperscript{98} \textit{Fatah elections: Military wing leads in Ramallah}, Isreal News, Nov.22 2008 \textit{available at} \url{http://www.ynetnews.com/articles/0,7340,L-3626950,00.html} (last checked Dec. 27, 2008).
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{The White House, President Bush to Welcome Palestinian Authority President Mahmoud Abbas to Washington,} Dec.16, 2008, \textit{available at} \url{http://www.whitehouse.gov/news/releases/2008/12/20081216.html} (last checked Dec. 27, 2008).
\textsuperscript{101} \textit{Hamas, discussed at} \url{http://encyclopedia.farlex.com/Izz+ad-Din+Al-Qassam+Forces} (last checked Dec. 27, 2008).
\textsuperscript{102} See \textit{supra} note 2.
Hamas is not.\textsuperscript{103} When it comes to Fatah, the United States therefore makes a distinction between Fatah itself and what is widely considered its military wing. Conversely, Hamas is not granted the same distinction.

The real world implications of this are obvious. Due to the distinction not given to Hamas that is given to Fatah, providing “material support” to Hamas is illegal while providing material support to Fatah is legal.\textsuperscript{104} Donating blankets to a Hamas run orphanage is illegal, while donating blankets to a Fatah run orphanage is legal. Sending food into the Hamas controlled Gaza Strip is nearly impossible, while sending food into the Fatah controlled West Bank is much easier. The question which must be asked is, why the distinction? If both the al-Aqsa Martyrs Brigade & the Izz ad-Din al-Qassam Brigades are seen as terrorists by the State Department, why is Fatah shielded from FTO designation while Hamas is not? What is the difference between Fatah and Hamas?

The obvious answer would seem to lie in the ideological philosophies of each organization. Hamas is an Islamic organization which refuses to recognize Israel\textsuperscript{105} while Fatah is a secular nationalist organization which has agreed to recognize Israel.\textsuperscript{106} Hamas makes trips to Beirut and Tehran, while Fatah has traveled to Washington DC and Tel Aviv. Some may argue that due to the rhetoric of the Hamas they are clear enemies of an American ally (Israel), and thereby a threat to the national security interests of the United States. As we have discussed previously, due to the political question doctrine there is no point in attempting to argue that the

\textsuperscript{103} Id.
\textsuperscript{104} 18 USC § 2339(B) (2002)
\textsuperscript{105} See supra note 95
\textsuperscript{106} See Fletcher supra note 91
national security interests of Israel are not in line with the national security interests of the United States, despite respected perspectives stating as much.\textsuperscript{107} What we know is that the United States has designated Hamas a terrorist organization and not their military wing, while they have only designated the military wing of Fatah and not Fatah itself. Taking into account the United States reaction to Hamas’s win in the Palestinian elections as well as its animus to Islamic groups throughout in the Middle East, Africa & Asia, it seems likely that in this instance the FTO designation is not being applied consistently but rather is being used as a pretext to designate an unwelcome group. Further proof substantiates this point.

Oddly enough, even among those organizations designated as FTOs by the State Department, some are given support or protection…by the United States! A prime example of this is the treatment of the MEK. As mentioned above, the MEK is a socialist organization which advocates the overthrow of the Islamic government in Iran, and is a designated FTO.\textsuperscript{108} Since the 1960s, the MEK has carried out terror attacks and assassinations in Iran, killing U.S. citizens as well as Iranians, including one attack which killed 70 Iranian state officials and the president of Iran.\textsuperscript{109} In the 1980s the MEK moved to Iraq and supplied Saddam Hussain with intelligence and military resources during the Iran-Iraq War.\textsuperscript{110} After the United States invasion of Iraq, the MEK was disarmed, but it remained under the protection of U.S. forces at Camp Ashraf, the U.S. military base north of Baghdad.\textsuperscript{111} The official U.S. perspective of the MEK at the start of the

\textsuperscript{107} See John Mearsheimer and Stephen Walt, \textit{The Israel Lobby}, London Rev. of Books, Mar. 23, 2006 \textit{available at} \url{http://www.lrb.co.uk/v28/n06/mear01_.html} (last checked Dec. 27, 2008)
\textsuperscript{108} \textit{The Mujahideen-e-Khalq (MEK)}, PBS, Oct. 23, 2007 \textit{available at} \url{http://www.pbs.org/wgbh/pages/frontline/showdown/themes/mek.html}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
Iraq War was that it is a “terrorist organization…designated as such, and that we saw it as part of Saddam’s military”.

However in practice things are not as clear. As former U.S. deputy secretary of state Richard Armitage stated, “there were some in the administration who wanted to use the Mujahideen-e-Khalq as a pressure point against Iran, and I can remember the national security advisor, Dr. [Condoleezza] Rice, being very specific about it, saying no, a terrorist group is a terrorist group.” When pressed on the issue, the U.S. undersecretary of state for political affairs refused to comment on whether the United States currently uses the MEK for any intelligence gathering or other purposes. Others have not been as shy. Some American officials, such as Rep. Tom Tancredo (R-CO) have even gone as far as to call the Mujahedeen-e-Khalq a “democratic Iranian force” which he hoped President Obama considers engaging.

A former National Security Council Staff member at the White House, Professor Raymond Tanter went a step further. After pointing to a log documenting 81 meetings between Iraqis, U.S. military officials, and the MEK, he stated that the U.S. would lose a “valuable intelligence asset and an important mediator in Iraqi politics” if the MEK were removed from Iraq. These sorts of statements seem very odd considering MEK’s status as a Foreign Terrorist

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112 Id. quoting Hilary Mann, Iran director, U.S. National Security Council, 2001-03
113 Id. quoting Richard Armitage, U.S. deputy secretary of state, 2001-05
114 Id. quoting Nicholas Burns, U.S. undersecretary of state for political affairs
116 Id.
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Organization. As one author noted, when dealing with the MEK, the United States policy can best be described as “One man’s terrorist is the same man’s freedom fighter.” 117

Despite the FTO designation, scholars have noted that the MEK has still raised funds, held meetings and rallies in Washington DC, and carried on other activities which other FTOs have been barred from.118 The MEK been referred to by the State Department’s counter terrorism coordinator as a “pretty special group.” 119 While the actual nature and amount of support or protection the United States provides the MEK is unclear, what is clear is that the United States is treating some FTOs better than others, in a manner which is counterintuitive. Other examples exist which further add to the confusion.

One such example is that of the Kurdish Workers Party (PKK). The PKK is designated an FTO by the United States State Department.120 They are known to use terrorist tactics including kidnapping foreign tourists in Turkey, suicide bombings, and attacks on Turkish diplomatic offices in Europe.121 The PKK has also been accused of attacking civilians who refuse to assist it.122 Yet former American ambassador to Iraq, Zalmay Khalilzad, was often seen as encouraging the PKK in operations against Turkey from northern Iraq. 123 In regards to the PKK’s presence in Iraq, current Turkish president Abdullah Gul once stated that “I have said to the Americans many times: suppose there is a terrorist organization in Mexico attacking America. What would you

118 Id.
119 Id.
120 Supra note 2 (See Kongra-Gel (KGK, formerly Kurdistan Workers’ Party, PKK, KADEK))
122 Id.
do?"  

It seems odd that a foreign head of state is giving the United States advice on the importance of treating an FTO as terrorists, when it is the United States itself which designated the FTO as a terrorist organization!

At other times it seems as though Turkey and Iran view the United States as the protector of the PKK, and are disappointed the United States has not dealt with the PKK more seriously in post war Iraq. Even well respected western publications have noted that “the de facto autonomy enjoyed by Iraqi Kurds [following the fall of Saddam Hussain] has encouraged the PKK.” The United States policy of strengthening the PKK is an odd given that the PKK is viewed as a terrorist organization by Washington. Just as in the example of the MEK, the United States interaction with the PKK leaves us scratching our heads and wondering what the terrorist designation really stands for.

e.) Designation: Conclusions & Recommendations

After analyzing the words and classification criteria used to designate a terrorist organization, it is clear that some problems with the criteria exist. To begin, the word terrorism is not clearly defined, leaving room for confusion. The State Department should specifically flush out what “terrorism” means as they did for the term “terrorist activity.” If due to the subjective nature of the word they are unable to do so, then the word terrorism should be replaced with clearer terminology. It is important to give all interested parties a clear understanding of the law, and this can not be done with subjective or loaded language. Furthermore, the subjective nature

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124 Id.
125 Id.
126 Id. quoting “The Economist.”
127 See Bruno supra note 116.
of the term adds credence to the argument that the entire designation is itself arbitrary, a line of thinking the United States hopes to avoid if it is to gain allies in its fight against illegal & criminal activity.

From our analysis we also found that the term “national security” as used in the third prong of the FTO designation criteria is one which is vague. Arguments can be made about what conduct actually impacts the national security of the United States. However these arguments are neutered by the ruling that the definition of national security is a political question, and a matter for the Executive to decide. Although the Executive has been granted the right to make the assessment about what acts constitute threats to the national security of the United States, this should not preclude them from providing some guidance to the rest of us. It would be beneficial for the Executive to lay out guidelines about which activities constitute threats to United States national security interests. Yet even if this course of action were to be undertaken it would still not solve the fundamental problem of arbitrary designations, due to the State Department’s ability to define national security in whatever manner is politically expedient. As long as the Executive is given such wide authority on what defines national security, the opportunity for inconsistent designations will continue to be a problem.

The inconsistent application of the FTO and SDGT designations is a negative for all parties involved. Not only does it send confusing and sometimes counterintuitive signals to foreign actors, but it also weakens the United States efforts in combating illegal & criminal activity. Statistics prove that Muslim and Middle Eastern groups are the most likely to be designated. The reasoning for this is a normative question, but it appears that those groups with
an ideology rooted in political Islam are more likely to be designated than others. This was the
case in our comparison of the treatment of Hamas and Fatah.

As previously noted, it is in the interest of the United States to apply their designations consistently. Therefore in the case of Palestine, either Hamas should be removed as an FTO, and their military wing designated (as is the case in Australia & United Kingdom), or Fatah should be designated as an FTO. Either course of action would display to the world that the United States of America is not using their terrorist designations for political or ideological purposes, but rather to combat criminal activity.

All FTOs should be treated alike. Regrettably, the examples of the MEK and PKK showed that currently the United States affords some FTOs better treatment then the rest. This activity weakens the claim of the United States that the FTO designation is a legitimate tool in combating terrorism, and further increases skepticism about the designation process. The fact that the FTOs which are given these perks are nationalist groups with interests in combating Iran and Turkey further supports the claim that the designations are simply tools being used to battle political Islam, and not terrorism.

If the United States is to regain its moral standing in the Eastern world it must start by heeding the advice of Condoleezza Rice and treat all those it designates as terrorists in the same manner. If this means it must un-designate certain groups, then it should do so and live with the consequences. It would not come as a surprise if in the coming years the MEK is removed from the FTO list despite their history of terrorism. As the United States relationship with the MEK
continues to grow based on their combined animus towards the Islamic Republic of Iran, we may see more comments like those of Rep. Tancredo coming from Washington DC. It would however behoove the State Department to keep the MEK designated, as their removal from the list would strengthen the view that the FTO and SDGT designations are simply tools being used against those the United States views as its enemies, and not actually against all terrorists.

The process of designating Foreign Terrorist Organizations and Specially Designated Global Terrorists in a key tool used by the United States in the post September 11th world to curb terrorist activity. The international funding of al-Qaeda and similar groups has been curbed and pressure has been exerted on numerous organizations through the designations. However the inconsistent application of the designation and the preferential treatment of certain FTOs weaken the United States claim that the purpose of the designation is to curb terrorist activity. Furthermore these inconsistencies send mixed messages to the rest of the world in regards to what the United States’ actual stance towards terrorism is.

The FTO and SDGT designations also appear to be over inclusive. Organizations which are far more diverse, complex, and pragmatic than al-Qaeda are lumped together in one broad category. Furthermore, most of those designated seem to have ideological ties to political Islam. This type of designation regime over-simplifies the complexity of the political realities the United States faces in the 21st century. If the policy recommendations outlined above are instituted, the United States could begin to update the designation process in a manner which would better equip them to face legitimate terrorist and criminal threats.
IIa.) Overview: Providing Material Support to an FTO

As part of its “War on Terror” the United States has enacted statutes which are aimed at those aiding terrorist organizations rather than the terrorist organizations themselves.\(^1\) To conclude our analysis of foreign terrorist organizations, it is important to understand the material support statute so it becomes clear why the designation process is important. The statute making illegal the material support of FTOs is codified in 18 U.S.C. § 2339(B).\(^2\) The statute states that whoever “knowingly provide 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…”\(^3\) Notice the mens rea requirement. Some scholars have purported that demanding the stricter requirement of “knowingly” rather than “intentionally” creates a high risk of punishing individuals engaged in constitutionally protected forms of expression.\(^4\)

To violate this statute, the person must simply have knowledge that the organization is a designated a terrorist organization or that it engages in terrorism.\(^5\) The term “material support” is defined as:

“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, transportation, and other physical assets, except medicine or religious materials.”

Some courts have ruled that the definitions of material support are impermissibly vague,\(^6\) while other courts have found the opposite to be the case.\(^7\) Regardless of these rulings, the impact of

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\(^2\) 18 U.S.C. § 2339(B)

\(^3\) Id.

\(^4\) See *Aziz supra* note 29 at 79

\(^5\) Id.

\(^6\) *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007)
the material support statute has been felt by many Americans in recent years, and has raised a variety of legal questions. Among these questions are those which are based on First Amendment rights of freedom of speech, expression, and association. For example, a Staten Island businessman recently pleaded guilty for providing material support to an FTO when he provided satellite television services to the American public by showing the Al Manar channel of Hizbullah. The defendant argued that his first amendment rights were being infringed. However his appeal was rejected as the content of his speech was not being curtailed, rather it was his conduct. The distinction between protected rights and illegal conduct has been the focus of much of the litigation in this area and demands our attention.

b.) Analysis: Protected rights vs. Illegal conduct

Although the material support statute has been codified since 1996, it was used sparingly prior to 9/11. Since that time however its enforcement has increased ten-fold. While the government praises the statute as a preventive tool to fight terrorism, critics oppose the material support restrictions because of what they see as First Amendment violations. Even the 9th Circuit has shot down a claim that the statute is an unconstitutional limitation on First Amendment rights, by distinguishing monetary contributions from pure free speech. Nor have associational rights of Americans been enough to limit the material support statute. In U.S. v. Sattar it was

136 Id.
137 Id.
139 Id.
140 U.S. v. Afshari, 426 F. 3d 1150 (9th Cir. 2005)
held that the material support restriction was not aimed at interfering with the expressive component of the defendant’s conduct, but rather at stopping aid to terrorist groups.

Courts have dealt with the First Amendment challenges in a variety of manners. In Humanitarian Law Project v. Reno the PKK and the Tamil Tigers argued that the material support provisions imposed guilt by association in violate of their First Amendment rights. The court ruled that due to the content neutrality of the criminal sanctions (which do not distinguish between favored and disfavored speech), intermediate rather than strict scrutiny should apply. Using the O’Brien test, the court then ruled that the government’s compelling interest in preventing terrorism trumped the freedom of association rights of the plaintiff. These types of rulings under the material support statute place a tremendous and perhaps unreasonable burden on individuals in regards to their financial transactions and charity. More importantly, it creates a culture of fear and paranoia amongst law abiding Americans doing business or providing aid in areas of the world where an FTO may reside.

c.) Material Support: Conclusions & Policy Recommendations

Even our brief dive into the world of “material support” has displayed that there are a variety of compelling legal arguments against the statute when looked at from a First Amendment perspective. There are equally compelling legal arguments based on due process concerns, & vagueness. However attempting to solve the problems of the FTO process may be difficult at the material support level. Rather than focus on the many changes which could be

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142 Humanitarian Law Project 509 F.3d at 1122
143 See Aziz supra note 29 at 81
145 Humanitarian Law Project, 509 F.3d at 1192
made to the material support statute to distinguish actual support of terrorist organizations from simply humanitarian or incidental support, I propose we turn to the root of the problem.

The real policy change which must be made is in the FTO designation process. As this paper has purported, the current process of designating foreign terrorists is ripe with inconsistencies and double standards. Once the designation process is consistently applied and enforced for legitimate terrorism prevention, the material support provisions become less problematic. However if the designation continues to be used as a tool against ideological opponents, the problems within the material support statute are pronounced.