Learning from the Uighurs:
Correcting Inadequate Due Process in Terrorist Financing Sanction Regimes

By
Jessica Elizabeth Pulsifer
B.A, May 2007, The University of Georgia
J.D., May 2010, The Florida State University College of Law

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Dinah L. Shelton
Manatt/Ahn Professor of International Law

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Abstract

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Terrorist blacklists constitute an invaluable piece of an effective counterterrorism policy, but like so many legal frameworks that rely on classified information and the word of government officials, they are ripe for abuse. Through a case study this paper examines how one such incident of abuse—the listing of the Eastern Turkestan Islamic Movement (ETIM), a Uighur nationalist group, on the United States' terrorist sanctions list under Executive Order 13224—contributed to the decade long erroneous detention of twenty-two Uighurs in Guantanamo Bay Naval Base, and how it could have been prevented with adequate due process protections in place. This incident illustrates that while terrorist sanctions are considered preventive measures rather than criminal punishment, the consequences of listing can be severe and should trigger due process.

Due process safeguards are not incompatible with terrorist sanctioning regimes, and incorporating reasonable human rights guarantees will make sanctioning regimes more credible and effective. One existing terrorist blacklist, 8 U.S.C. §1189, properly balances minimum due process protections with national security interests. This statute—which includes notice, an impartial hearing, presentation of evidence, and the availability of appeal—should be the model of minimum due process required of all blacklisting legislation to eliminate existing loopholes and ensure proper human rights protection in counterterrorism measures.

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"Whatever human endeavor is made . . . mistakes will be made. If we don't admit our mistakes and we don't try to correct them, we are adding on to what was a mistake."
—Congressman Dana Rohrabacher[1]

I. Introduction

In January 2002, Guantanamo Bay Naval Base (GITMO) began accepting detainees of the War on Terror—prisoners who were presumably "the most dangerous, best-trained, vicious killers on the face of the earth."[2] Though all of the detainees who made their way through GITMO following 9/11 were trumpeted as the "worst of the worst"[3] of al Qaeda and the Taliban, some of the men who spent years in detention had no connection to these terrorist organizations whatsoever. One such category of detainees was a group of twenty-two Uighurs, a little known ethnic minority from a far Western province in China, who were captured in Pakistan after they fled persecution from the Chinese government.[4] That these men were improperly detained for almost a decade is not in contention—this fact has been recognized by the United States Government and by

[1] *The Uighurs: A History of Persecution: Hearing Before the Subcomm. on International Organizations, Human Rights and Oversight of the Comm. on Foreign Affairs*, 111th Cong. 7 (2009) [hereinafter *June 10 Uighur Hearing*] (statement of Rep. Rohrabacher, Member, House Comm. on Foreign Affairs).

[2] Secretary of Defense Donald H. Rumsfeld, *Secretary Rumsfeld Media Availability en route to Guantanamo Bay, Cuba*, U.S. DEPT. OF DEFENSE NEWS (Jan. 27, 2002), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2320 (last visited Apr. 1, 2012).

[3] MARK DENBEAUX AND JOSHUA DENBAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 4 (quoting Donald Rumsfeld).

[4] Though the Uighurs are the sole case subject of this paper, they are by no means the only detainees to have been erroneously held in GITMO.

federal courts.[5] But even though a proper tribunal determination eventually cleared the Uighurs' of their enemy combatant status, it neither erased the stigma nor immediately gave them their freedom.[6] Because of the principle of non-refoulement, an obligation codified by the Convention Against Torture, the United States could not send the Uighurs back to China, where they would assuredly be tortured or killed.[7] Current U.S. immigration law, coupled with powerful political pressure wielded by anti-immigration voters, blocked the entry of the Uighurs into the United States; and other countries were hesitant to accept the former enemy combatants when the United States refused to admit them.[8] Any remaining countries that expressed a willingness to take former detainees

[5] Carol Leonnig, *Chinese Detainees' Lawyers Will Take Case to High Court*, WASH. POST. Jan. 17, 2006, at A3 ("The government acknowledges that the Uighurs were imprisoned by mistake in 2002. Military officials determined in 2004 that they were not enemy combatants and should be released."). *See also* In Re: Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33 (2008) ("Because the Constitution prohibits indefinite detentions without cause, the continued detention [of the Uighurs] is unlawful.").

[6] In 2006, five of the Uighurs were resettled in Albania. In 2009, four were resettled in Bermuda, and six were resettled in Palau. In 2010 two were resettled in Switzerland. Five Uighurs remain in detention in Guantanamo Bay. Janet Munro-Nelson, *Uighurs in Guantanamo Bay Prison: Terrorists or Innocents?*, THE BEACON, Sept. 2010, at 8.

[7] The principle of non-refoulement prohibits the forced return of a person to a country where he is likely to face persecution or torture. American Society of International Law and International Judicial Academy, *General Principles of International Law: Non-Refoulement*, INTERNATIONAL JUDICIAL MONITOR Vol. 1 (Mar. 2006). *Also see* Convention Against Torture art. 3 ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

[8] In May 2009, Germany was prepared to accept nine Uighurs remaining in GITMO. However, because the United States barred them from any travel to the U.S., Germany backed down on its offer saying, "If the U.S. says they should come here, but they cannot travel to the U.S., we would have to ask why not? Does that mean they are dangerous?" *See* Munroe-Nelson, *supra* note 6, at 8 (quoting Craig Whitlock and Karen DeYoung, *Europe Objects Anew to Detainees*, THE WASHINGTON POST, May 29, 2009.).

were strong-armed by China to reconsider. The United States eventually managed to convince four countries—Albania, Bermuda, Palau, and Switzerland—to take seventeen of the twenty-two Uighurs originally detained in GITMO. However even now, five men still remain in detention. With such high stakes—the possibility of de facto indefinite detention of innocent men—it is imperative that those detained during the War on Terror be legitimately affiliated with those entities included in the scope granted by congressional authorization.[9] After years of legal and scholastic debate, the Supreme Court determined minimum review procedures the military must implement in order to unearth and correct any potential erroneous enemy combatant determinations.[10] However, as illustrated by the case of the Uighurs, sometimes removing an enemy combatant determination years later is too little too late, and simply not sufficient to fully mitigate

[9] Congress passed the Authorization for Use of Military Force Against Terrorists (AUMF) on September 18, 2001, to establish the scope of the detention power for the War on Terror. It authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 (Supp. III 2003)) [hereinafter AUMF]. *Also see* David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, LEGAL WORKSHOP (2011), *available at* http://legalworkshop.org/2011/01/10/4163 (last visited Apr. 1, 2012) (The AUMF includes members of Al Qaeda and the Taliban, as well as organizations and individuals associated with these entities.).

[10] Hamdi v. Rumsfeld, 542 U.S. 507, 550 (2004) (finding that fact finding tribunals should be similar to those used to determine POW status, which allow the detainee to have notice of charges and an opportunity to be heard). *Also see* Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (Jul. 7, 2004) [hereinafter Order Establishing CSRT], *available at* http://defense.gov/news/Jul2004/d20040707review.pdf (last visited Apr. 1, 2012) (establishing CSRTs as an adequate alternative to federal review pursuant to the Hamdi decision). The sufficiency of CSRT proceedings is beyond the scope of this paper. For an argument that they are inadequate and designed to produce a guilty verdict *see* Reply Brief of Petitioner, Affidavit of Stephen Abraham, Khaled Odah v. United States, No. 06-1196 (June 12, 2008).

the damage. Instead, vigorous protections must be in place to prevent an incorrect determination from ever being made.

The international community as a whole, and the United States unilaterally, have fashioned a counterterrorism tool to label organizations and individuals that have ties to international terrorism, or more specifically to al Qaeda and Bin Laden. This labeling technique uses a reporting structure to name organizations to a terrorist "blacklist," a designation that has financial, immigration, and stigmatization repercussions. The United States has developed a number of terrorist lists, each with a slightly different function or consequence, but all with the same aim—to undercut international terrorism through impeding a terrorist organization's ability to control its finances, travel, and reputation. The Uighurs were brought to GITMO because of their alleged affiliation with the Eastern Turkestan Islamic Movement (ETIM), a Uighur nationalist group that was labeled by the US State Department as a foreign terrorist organization having ties to al Qaeda and Bin Laden. However, as this paper will discuss, the blacklisting of the ETIM was mistaken, and it contributed to the improper detention of the Uighurs in a much larger capacity than generally acknowledged. Furthermore, the erroneous blacklisting of the ETIM could have been avoided with minimal oversight. In order to prevent the repetition of the unfortunate case of the Uighurs, stronger due process protections need to be put in place when listing a group as a terrorist organization.

Terrorist financing blacklists constitute an invaluable piece of an effective, holistic counterterrorism policy, but like many legal frameworks that rely on classified information and the word of government officials—they are ripe for abuse. Through a case study this paper examines how one such incident of abuse—the listing of the ETIM

on the United States' terrorist sanctions list under Executive Order (EO) 13224—contributed to the decade long detention of twenty-two Uighurs in Guantanamo Bay, and how it could have been avoided had EO 13224 included sufficient due process procedures. Part I explains the background of due process protections required by international and United States law, gives an overview of three prominent terrorist blacklists, and discusses how courts have interpreted the adequacy of current due process protections in terrorist financing sanction regimes. Part II analyzes the listing of the ETIM under EO 13224, and concludes that the ETIM was incorrectly designated a terrorist organization by the US State Department in 2002, and that the designation contributed to the erroneous detention of the Uighurs in Guantanamo Bay. It further explores how specific due process protections included in the listing procedures of EO 13224 might have prevented this catastrophe from occurring. Part III uses 8 U.S.C. §1189 as a model to propose specific minimum due process protections that should be included in all terrorist sanctioning regimes in order to balance an individual's human rights interests with a state's counterterrorism interests, and that will bring EO 13224 in line with acceptable due process standards.

II. Background

The concept of due process was designed to protect an individual from an overreaching and intrusive government.[11] To this end, due process is a series of defenses that ensures the government respects accepted human rights norms. Terrorist sanctioning

[11] Grant Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. INT'L L. 673, 714 (2011).

blacklists are considered preventive rather than punitive, and thus have been developed with lower due process standards than those traditionally required of measures that result in loss of liberty. Courts have just begun examining the adequacy of due process measures currently employed in terrorist blacklisting framework, but it appears that courts are suspicious that current protections may not be sufficient.

a. Legal background of procedural due process

i. Due process requirements in US law

In the United States the due process requirement is stated in the Fifth Amendment to the Constitution, "No person shall be . . . deprived of life, liberty, or property without due process of law."[12] This safeguard was developed due to the historical notion that personal freedom is only secure when there is a proper check to protect against arbitrary government action.[13] Traditional procedural due process at a fundamental level includes the requirement that the government provide adequate notice and a fair hearing before taking a particular action.[14] Some elements included in the notice and hearing requirement are the provision of an impartial tribunal, allowance for the confrontation and cross-examination of evidence, the use of appropriate standards of proof, and the requirement for a decision on the record.[15]

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[12] U.S. CONST. amend V. This requirement is imposed on the states through the Fourteenth Amendment.

[13] Bardo Fassenbender, *Targeted Sanctions and Due Process*, Humboldt University Berlin (March 2006) at 9.

[14] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545 (3d ed. 2006).

[15] *Id*. at 580.

The primary test to determine proper due process application was developed by the Supreme Court in *Mathews v. Eldridge*.[16] The Court determined that when there is a deprivation of life, liberty, or property, certain considerations should be evaluated to establish what process is due. The Court will look at the private interest affected by the action, the risk of erroneous deprivation of the private interest, the value of additional safeguards, and the administrative cost of such additional safeguards.[17] In applying the *Mathews v. Eldridge* test the court will analyze five issues—type of notice required, when the hearing must be provided, type of hearing required, the burden and standard of proof, and who the decision maker should be.[18] The balancing test typically employed by the court leaves enormous discretion to judges to evaluate the context of the action and determine the proper balance of additional procedures in order to guarantee accurate fact-finding and maximize administrative efficiency.[19]

ii. Due process requirements in international law

Originally due process standards were only addressed in domestic law, as they were by definition protections from governmental bodies. However as the influence of international organizations increased, and "supranatural" lawmaking began to have a direct effect on individuals, international law has widened its scope to include due process obligations for international organizations.[20] Customary international law

[16] Mathews v. Eldridge, 424 U.S. 319 (1976).

[17] *Id*. at 335.

[18] CHEMERINSKY, *supra* note 14, at 583.

[19] *Id*. at 604.

[20] Fassenbender, *supra* note 13, at 6.

generally recognizes due process to include the right of a person to be heard before a measure that would adversely affect him is taken, and the right to an effective remedy before an impartial tribunal if the person claims a violation of his rights.[21] Not only do these obligations mirror basic due process requirements already established in the United States and many other countries, but they are also reflected in international instruments, including the UN Declaration of Human Rights, the UN Charter, and the International Covenant on Civil and Political Rights (ICCPR).[22]

The right to a fair trial is the cornerstone of due process in both civil and criminal matters.[23] Due process was first internationally acknowledged in 1948 when the UN Declaration of Human Rights included the right to "a fair and public hearing by an independent and impartial tribunal," and the right to "an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[24] The United Nations Charter vaguely requires "fair and clear procedures."[25] However, article 14 of the ICCPR goes much further to require for any criminal charge the presumption of innocence, prompt detailed notice in an understood

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[21] *Id*.

[22] Due process requirements are also discussed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention, and the African Charter, among others.

[23] IAIN CAMERON, REPORT: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, DUE PROCESS AND UNITED NATIONS SECURITY COUNCIL COUNTER-TERRORISM SANCTIONS 8 (June 2, 2006).

[24] Universal Declaration of Human Rights, G.A. Res. 217A, at arts. 8, 10, U.N. GAOR, 3d Sess., 1st plen.mtg., U.N. Doc. A/810 (Dec. 12, 1948).

[25] U.N. Charter art 25.

language, adequate time for preparation of defense with counsel, allowance for examination of witnesses, and a fair and public hearing by a competent, independent, and impartial tribunal established by law.[26] In its interpretation of article 14, the Human Rights Committee remarked that even "measures taken to fight terrorist activities" must adhere to the requirements in the article.[27]

Based on these standards set out in international law norms that aim to guarantee the right to notice and the right to an effective remedy, the legal principles that should be required for blacklisting procedures include clear criteria for listing that is publicly available, time limited listings subject to regular review, sufficient notice prior to listing, opportunities to correct errors, process to contest listing, and independent review.[28]

iii. The difference between criminal and civil proceedings and required due process

The United States Supreme Court has said, "the most elemental of liberty interests [is] the interest in being free from physical detention by one's own government."[29] A stronger level of due process protection is typically required in criminal matters, because unlike civil proceedings, criminal prosecutions often put liberty at stake.[30] Because of the

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[26] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

[27] Human Rights Committee, *General Comment No. 32: Article 14*, CCPR/C/GC/32 (Aug. 23, 2007).

[28] REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, ASSESSING DAMAGE, URGING ACTION (2009).

[29] Hamdi, 542 U.S. at 507.

[30] CHEMERINSKY, *supra* note 14, at 566 (stronger due process for criminal matters might include a higher standard of proof, a shift in the burden of proof, or different evidentiary standards).

increased significance of criminal cases, international standards tend to focus on the criminal context when discussing due process requirements.[31] However, this does not mean that due process does not need to be secured in other proceedings as well. Due process is required anytime there is a dispute between a citizen and state, or when civil rights and obligations are decided.[32] Furthermore, in the rare case in which liberty is at stake in civil proceedings—for instance with civil commitments—heightened due process protection is required.[33] Thus the turning point for the decision of what due process is required is not the label of the proceeding, but the consequence that can result.[34]

b. Countering terrorism through sanctions: Three prominent terrorist blacklists

A successful counterterrorism policy strikes at terrorist organizations from a number of different angles, including one of the most important aspects allowing them to function—finances.[35] International and domestic "terrorists lists" are a legislative tool

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[31] Fassenbender, *supra* note 13, at 9.

[32] *Id*.

[33] Addington v. Texas, 441 U.S. 418, 425 (1979).

[34] Note that loss of physical liberty is not the only trigger for due process. Courts have examined other issues, such as reputational damage as a liberty interest and liberty interests of prisoners, who by definition have already lost their liberty. *See* CHEMERINSKY, *supra* note 14, at 570-78. However, this paper only focuses on the possible loss of physical liberty resulting from terrorist blacklists.

[35] Sina Lehmkuhler, *Countering Terrorist Financing: We Need a Long-Term Prioritizing Strategy,* Apr. 2003, *available at* http://www.homelandsecurity.org/journal/articles/lehmkuhler.html (quoting Statement of President George W. Bush (Sept. 24, 2001) ("We will direct every resource at our command to win the war against terrorists, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence. We will starve the terrorists of funding.")).

that allow countries to "designate" certain organizations and individuals as affiliated with terrorism, which simultaneously draws attention to their illegal activities making it more difficult for them to function effectively, and cuts off their funding through the imposition of sanctions and criminal prosecution of funders. These lists overlap in some respects, and because there are so many they are often confused, but each is slightly unique in implementation and scope.[36]

Though the consequence of designation to any one of these lists is primarily financial, the corollary repercussions are much more significant. Calling a group "terrorist" is a rhetorical ploy, but designation of an organization as a terrorist group on a sanctioned blacklist is an act of national policy that carries both practical and political significance.[37] This paper will address three of the most high profile and commonly used terrorist lists—the al Qaeda Sanctions list created by United Nations (UN) Resolution 1267, the Specially Designated Global Terrorist List created by Executive Order 13224, and the Foreign Terrorist Organization List created by §219 of the Immigration and Nationality Act.

i. UN Resolution 1267/1989: The al Qaeda Sanctions List

Because of the difficulty in finding international consensus regarding the definition of the term "terrorism," until the late 20th century states settled for prohibiting

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[36] This paper does not address terrorist "watch lists," which identify known or suspected terrorists trying to obtain visas or board aircraft. These watch lists, formerly administered by several different agencies, have been consolidated into the Terrorist Screening Center (TSC), a single database run by the FBI. *See* FBI, Terrorist Screening Center, http://www.fbi.gov/about-us/nsb/tsc (last visited Apr. 1, 2012).

[37] J. TODD REED AND DIANA RASCHKE, THE ETIM: CHINA'S ISLAMIC MILITANTS AND THE GLOBAL TERRORIST THREAT 103 (2010).

and punishing certain individual acts, rather than defining and outlawing terrorism as a whole.[38] However, in 1999 the UN general assembly adopted the International Convention for the Suppression of the Financing of Terrorism, which included the first definition of terrorism in an international treaty, and required party states to take steps to prevent and counteract the financing of terrorism—regardless of the extraneous charitable, social, or cultural goals the organization might have.[39]

In 1999, using Chapter VII power granted by the UN Charter, the Security Council passed resolution 1267 to implement sanctions on individuals and entities associated with al Qaeda, Osama bin Laden, or the Taliban.[40] In June 2011, resolution 1267 was recalled and replaced by Resolutions 1988 and 1989, which authorize the same sanctions under Chapter VII of the United Nations Charter, but divide the sanction responsibility between two committees. Resolution 1988 governs sanctions on

[38] Henry Steiner, Philip Alston, and Ryan Goodman, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 376 (3d ed. 2007).

[39] International Convention for the Suppression of the Financing of Terrorism, U.N. Doc. A/RES/54/109, 39 I.L.M. 270 (Dec. 9, 1999) (Defining terrorism as, "Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities of a situation of armed conflict, when the purpose of such act, but its nature or context, is to intimidate a population, or compel a government or international organization to do or to abstain from doing any act.").

[40] Al Qaeda Sanctions Committee, S/RES/1267 (Oct. 15, 1999). Chapter VII of the UN Charter allows for enforcement measures to maintain or restore international peace and security. Economic sanctions are intended to apply pressure on a state or entity to comply with the Security Council's objectives, without having to resort to the use of force. *See* U.N. Charter, art. 40; *also see* Security Council Sanctions Committees: An Overview, http://www.un.org/sc/committees/ (last visited Apr. 1, 2012).

organizations affiliated with the Taliban, and Resolution 1989 governs sanctions on organizations affiliated with al Qaeda.[41]

1. Designation procedure

Resolution 1267 created the al Qaeda Sanctions Committee, which manages the list of entities subject to the sanctions measures. Listing is made based on a member government's word that a group is a terrorist threat connected to al Qaeda or the Taliban—no specific evidence is required to add an organization to the UN terrorist sanctions list.[42]

There was no right to appeal listing until 2006, when a focal point mechanism was created through resolution 1730 providing for a delisting procedure.[43] This delisting mechanism for the al Qaeda Sanctions List was transferred to the Ombudsperson in resolution 1989. Similar to the vague elements required for listing an organization on the sanctions list, "there is no prescribed format for the request" to delist.[44] The new resolutions also expand the power of the Ombudsperson to reject requests made by state parties for additions to the sanctions list.[45]

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[41] S/RES/1988 (June 17, 2011); S/RES/1989 (June 17, 2011).

[42] James Bovard, *China: From Brutal Oppressor to Terrorist Victim*, FREEDOM DAILY (Dec. 2003). *See also* General Information on the Work of the Committee, http://www.un.org/sc/committees/1267/information.shtml ("Any State may request the Committee to add names to the Al-Qaeda Sanctions List.").

[43] S/RES/1730 (Dec. 19, 2006).

[44] Application for Delisting, http://www.un.org/en/sc/ombudsperson/application.shtml (last visited Apr. 1, 2012).

[45] *See* Office of the Office of the Obmbudsperson of the Security Council's 1267 Committee, http://www.un.org/en/sc/ombudsperson/ (last visited Apr. 1, 2012).

A listed person or organization has no right of access to courts to review the listing, the blacklisting committee and Ombudsperson acts as its own quasi-judicial body in "review" of the listing.[46] Because the listing is considered preventive rather than punitive, the individual or organization is not a "party" to the proceedings and thus has no right of appearance, representation, or evaluation of evidence.[47] Because national security concerns govern, allowing for countries to refuse providing the committee with evidentiary support for its blacklisting, the committee rarely examines any evidence showing that a person is involved in activity threatening to international peace.[48]

2. Effects of designation

The sanction scheme under Resolution 1267/1989 is three fold—it requires member states to freeze financial assets and economic resources of designated individuals and organizations, it prevents the transit through member countries of designated individuals by imposing a travel ban, and it precludes the supply or sale of arms and related material by member states through an arms embargo.[49]

ii. EO 13224: Specially Designated Global Terrorists List

Following 9/11 President Bush used the power granted to him in the International Emergency Economic Powers Act to pass Executive Order 13224, to block "all property and interests in property" of certain designated terrorist organizations and individuals

[46] CAMERON, *supra* note 23, at 2.

[47] *Id.*

[48] *Id*.

[49] Resolution 1267, *supra* note 40.

who support them.[50] The order vastly expanded U.S. authority to block and freeze U.S. assets in foreign banks, and deny foreign banks access to the U.S. market should they refuse to cooperate with the request to freeze terrorist assets.[51] According to the text of the Order, the increased authority to levy financial sanctions was appropriate due to the "pervasiveness and expansiveness of the financial foundation of foreign terrorists."[52] The order provided that the annexed organizations and individuals be immediately affected, as well as any additional designated entity determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General.[53]

1. Designation procedure

The SDGT blacklist is maintained by the Treasury Department's Office of Foreign Assets Control, with the aid of the State Department.[54] However, designation can be initiated by either the Treasury Department or the State Department.[55] Designation is appropriate for an organization that has committed, or poses a significant risk of committing, acts of terrorism that threaten the security of the United States or U.S.

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[50] International Emergency Economic Powers Act, Pub. L. 95-223, 91 Stat. 1626 (1977); Exec. Order No. 13,224, 31 C.F.R. Chap. 5 (2001).

[51] Lehmkhuler, *supra* note 35.

[52] Exec. Order No. 13,224, *supra* note 50.

[53] *Id*.

[54] Audrey Cronin, *The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations*, CRS REPORT FOR CONGRESS (Oct. 21, 2003).

[55] Department of State Terrorism Designation Press Releases, Executive Order 13224, http://www.state.gov/s/ct/rls/other/des/122570.htm (last visited Dec. 20, 2011) [hereinafter Executive Order 13,224 Press Release].

nationals.[56] Notice of the designation takes place in the federal register, but no specific showing of the findings of fact is required to Congress or in writing in order to complete designation.[57] The original annex included 27 organizations and individuals, but the current list of designated terrorist organizations under Executive Order 13224 has expanded to include 94 entities.[58]

2. Effects of designation

Designation on the SDGT list allows for Treasury Department to take immediate possession of any property or interests of designated entities within the United States.[59] Any transaction made related to the blocked property or interests is prohibited, including any contribution of goods, funds, or services.[60] Violations are punishable by civil penalties and criminal prosecution.[61] The combination of blocking the organization's assets and punishing any further contribution to the entity disrupts the organization's ability to function effectively and encourages the organization not to engage in terrorist activity. Furthermore, it alerts other governments that the United States is concerned about this organization's practices, and encourages the international community to avoid any dealings with the entity.[62]

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[56] Exec. Order 13,224, *supra* note 50, at §1(a)-(c).

[57] Executive Order 13,224 Press Release, *supra* note 55.

[58] *Id*.

[59] *Id.;* Exec. Order No. 13,224, *supra* note 50.

[60] Executive Order 13,224 Press Release, *supra* note 55.

[61] *Id*.

[62] *Id*.

iii. 8 U.S.C. §1189: The FTO List

In 1996, Congress amended the Immigration and Nationality Act of 1952 (INA) by passing the Antiterrorism and Effective Death Penalty Act (AEDPA).[63] Section 219 of the INA, which provides for the designation of foreign terrorist organizations (FTOs), was added in response to a growing concern that groups and individuals living within the United States were raising large amounts of money to send to terrorist organizations abroad.[64] The FTO list is arguably the most high profile terrorist list within the United States, and the legal framework is certainly the most defined and specific.

1. Designation procedure

The Secretary of State is authorized to designate a foreign terrorist organization if the organization is foreign, engages in terrorist activity or terrorism (or retains the capability and intent to engage in terrorist activity or terrorism), and the terrorist activity or terrorism threatens the national security of the United States or United States nationals.[65] The State Department's Office of the Coordinator for Counterterrorism

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[63] Dawn Marie Johnson, *Legislative Reform: The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477 (2001).

[64] Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214, § 301 (1996). Note that the term "foreign terrorist organization" is often used generically to describe an organization found on any sanction blacklist. However, the term "FTO" specifically refers to an organization listed by the Secretary of State under §1189.

[65] *Id*. Terrorist activity is defined in 8 U.S.C. §1182 as any activity unlawful under the laws of the place where it is committed and involves any of the following—the hijacking or sabotage of a conveyance; the seizing or detaining and threatening to kill, injure, or continue to detain another individual in order to compel a third person to do or abstain from doing an act; a violent attack on an internationally protected person; an assassination; the use of any biological agent, chemical agent, nuclear weapon, explosive, firearm or other dangerous device with intent to endanger the safety of one more individuals or cause substantial damage to property, other than for mere personal

(S/CT) monitors terrorist activity around the globe to identify potential targets for FTO designation.[66] This frequently involves the intelligence community and interagency cooperation.[67] The S/CT can act in consultation with or on the recommendation of the Attorney General or the Secretary of Homeland Security to identify prospective terrorist organizations.[68] Once a potential target has been identified, S/CT prepares a compilation of detailed information about the group into an "administrative record" showing that the statutory requirements of §219 have been met.[69] The Secretary of State may consider classified information when determining designation, which is not subject to disclosure for as long as it remains classified.[70] The classified information may be disclosed to a court ex parte and in camera for purposes of judicial review. However, it is not available to Congress.[71] The DC Court of Appeals has found that a designation's dependence on secret evidence, including classified information that the State Department refused to

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monetary gain. Terrorism is defined in 22 U.S.C. §2656f(d)(2) as premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.

[66] Foreign Terrorist Organizations, http://www.state.gov/s/ct/rls/other/des/123085.htm (last visited Apr. 1, 2012).

[67] Cronin, *supra* note 54, at 2.

[68] Lexis Expert Commentaries, *Explanation of Various Terrorist Lists*, 2008 Lexis Emerging Issues 1545, at 3.

[69] Foreign Terrorist Organizations, *supra* note 66.

[70] 8 U.S.C. §1189(a)(3)(B)(2006).

[71] *Id*.

disclose and thus against which the organization could not properly defend, does not amount to a Due Process violation of the Fifth Amendment.[72]

The statute requires the Secretary of State to notify Congressional leaders seven days prior to listing an organization as an FTO, at which point the Secretary must provide the administrative record showing the factual basis for her findings.[73] If Congress does not object to the listing within seven days, the FTO designation is published in the Federal Register giving it legal effect.[74]

The FTO designation remains effective until it is revoked or set aside. Revocation generally happens either upon petition by the organization, or after a five year unilateral review of the organization by the Secretary. Under the first scenario, the designated organization has the opportunity to file a petition for revocation within two years of designation by providing evidence that the circumstances are "sufficiently different" from those used as the basis for designation by the Secretary.[75] Within 180 days the Secretary makes a determination in response to the petition for revocation, which is published in the Federal Register.[76] However, if there has been no review of designation based on a petition for revocation, after five years the Secretary shall review the designation to

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[72] People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003).

[73] 8 U.S.C. §1189(a)(2)(A)(i)(2006). The Secretary must notify in writing the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader and Minority Leader of the Senate, and the members of relevant committees of the House of Representatives and the Senate.

[74] 8 U.S.C. §1189(a)(2)(A)(ii) (2006).

[75] 8 U.S.C. §1189(a)(4)(B)(iii) (2006).

[76] 8 U.S.C. §1189(a)(4)(B)(iv) (2006).

determine if it should be revoked.[77] This determination is final, and not reviewable by any court. The Secretary may revoke a designation at any time if the Secretary finds that the circumstances that were the basis for the designation have changed in such a manner to warrant revocation, or that the national security of the United States warrants a revocation.[78]

An organization may seek judicial review of designation in the United States Court of Appeals for the District of Columbia, not later than 30 days after publication in the Federal Register.[79] The review is based solely on the administrative record, with the exception of classified information used in designation that may be submitted by the Government for ex parte and in camera review.[80] The standard used by the court to determine the legality of designation places heavy deference on the judgment of the government. The court may set aside a designation if the court finds it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitation; lacking substantial support in the administrative record taken as a whole; or not in accord with the procedures required by law.[81]

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[77] 8 U.S.C. §1189(a)(4)(C) (2006).

[78] 8 U.S.C. §1189 (a)(6)(A) (2006).

[79] 8 U.S.C. § 1189(c) (2006).

[80] 8 U.S.C. §1189(c)(2) (2006).

[81] 8 U.S.C. §1189(c)(3)(A)-(E) (2006).

2. Effects of designation

Like the terrorist lists created through UN Resolution 1267 and Executive Order 13224, the primary legal ramifications of FTO designation are financial. Upon notification the Secretary of the Treasury may require US financial institutions possessing or controlling assets of an organization that has been listed as an FTO to block all financial transactions involving those assets.[82] However, an organization that has been designated as an FTO is also subject to immigration sanctions, including the refusal of visas and the deportation of members.[83] Section 219 makes it unlawful for any person subject to the jurisdiction of the United States to knowingly provide material support or resources to a designated FTO.[84] These supporters can be criminally prosecuted.[85] There are also corollary effects of designation. Designation stigmatizes and isolates designated terrorist organizations internationally, heightens public awareness and knowledge of terrorist organizations, and signals to other governments US concern about named organizations.[86] Furthermore, representatives and members of a designated FTO are inadmissible and in certain circumstances removable from the United States.[87]

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[82] 8 U.S.C. §1189(a)(2)(C) (2006).

[83] Cronin, *supra* note 54.

[84] *See* 18 U.S.C §2339A(b)(1). Material support or resources is defined as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."

[85] Cronin, *supra* note 54.

[86] Department of State, Current List of Designated Foreign Terrorist Organizations, http://www.state.gov/s/ct/rls/other/des/123085.htm (last visited Apr. 1, 2012).

iv. Additional Terrorist Lists

Two other well-known terrorist lists, not specifically focused on terrorist financing, are the State-Sponsors of Terrorism List, and the Terrorist Exclusion List. The State-Sponsors list was developed through the Export Administration Act of 1979, which provides Congress with countries that have "repeatedly provided support for acts of international terrorism."[88] This list has remained the same since its initiation in 1979—with the exception of the removal of South Yemen when it ceased to exist in 1990, the removal of Iraq when it allied with the United Sates in 1982, and later the re-addition of Iraq in 1990 after it invaded Kuwait.[89] The Terrorist Exclusion List (TEL) was created through §411 of the Patriot Act following 9/11.[90] It authorizes the Secretary of State to designate terrorist organizations for immigration purposes, effectively preventing associated individuals from entering the United States.[91] Like the terrorist list administered by the Treasury Department pursuant to Executive Order 13224, the TEL has a much less detailed administrative procedure than the FTO, and does not require any specific finding of fact to Congress.[92]

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[87] 8 U.S.C. §§1182(a)(3)(B)(i)(IV)-(V); 8 U.S.C. §1227(a)(1)(A).

[88] Export Administration Act of 1979, Pub. L. 96-72, 50 U.S.C. 2405(j) (1979).

[89] Cronin, *supra* note 54.

[90] USA PATRIOT Act of 2001, Pub. L. 107-56, U.S.C. 1182, §411 (2001).

[91] Cronin, *supra* note 54.

[92] *Id*.

Terrorist blacklists are one counterterrorism tool among many utilized in the War on Terror. Because financial support is imperative to a functioning terrorist organization, it is crucial that the Government have the ability to prevent sources from funding organizations that engage in terrorism. However, while the Government needs to be able to curtail the financing of terrorism, it also must abide by international standards and human rights norms.

c. Judicial interpretation of due process adequacy in terrorist blacklists

Courts have not done much in the way of examining the adequacy of due process in terrorist blacklisting procedures. Only a handful have addressed the issue at all, and because blacklists do not fit the traditional pattern of due process most courts seem hesitant to stray too far from the extreme deference generally shown to the executive in national security issues. However, even though blacklists are a "preventive" measure rather than a civil or criminal sanction, recent developments in the European Union suggest that courts may have reached a limit in their willingness to turn a blind eye to protectionless sanctions.[93]

i. The Mojahedin case

In 2003, the D.C. Court of Appeals reviewed an FTO designation by the Secretary of State of the People's Mojahedin Organization of Iran (PMOI) and found no constitutional violation in the procedural or substantive portions of the designation.[94] The PMOI was designated as a foreign terrorist organization three successive times, which the

[93] CAMERON, *supra* note 23.

[94] People's Mojahedin Org. of Iran, 327 F. 3d at 1238.

PMOI argued was a violation of the due process clause of the Fifth Amendment.[95] However the court disagreed and found that not only is it constitutional for the statute to allow for the use of "secret" evidence in designation, but furthermore there was substantial evidence on the record of terrorist activity notwithstanding the classified evidence.[96] The court found that in order to set aside a designation, it must have been arbitrary, capricious or an abuse of discretion, or lacking in substantial support in the administrative record.[97] The court reiterated the requirement that the Secretary must afford the designee an opportunity to be heard in a meaningful manner.[98] The PMOI decision illustrates that impartial judicial oversight is possible in a blacklisting scheme. The court was able to simultaneously provide human rights protection by ensuring the executive maintained constitutional standards, but also allow for national security concerns through the use of classified evidence and deference.

ii. The Kadi judgment

More recently, the European Court of Justice (ECJ) evaluated the adequacy of protection contained in EU Council Regulation 881/2002, which implemented the sanctions mandated by UN Resolution 1267.[99] In the *Kadi* case, the ECJ determined that

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[95] *Id*.

[96] *Id*.

[97] *Id*.

[98] *Id*.

[99] Albert Posch, *The Kadi Case: Rethinking the Relationship Between EU Law and International Law*, THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE, vol. 15 (2009). Much of the *Kadi* decision revolved around jurisdictional issues, such as the lawfulness

due process, specifically the right to be heard and the right to effective judicial review were "patently not respected."[100] The court was concerned that the appellants never heard the evidence used against them to justify the measures.[101] However, unlike the FTO statute analyzed in the PMOI case, the EU regulation in question did not allow for an impartial review of evidence or the opportunity for the potential designee to be heard.

In following the ruling of the ECJ in the *Kadi* case, the European Union General Court (EGC) noted in *Kadi II* that "the classification of the measures in question as [preventive] or punitive, protective or confiscatory, civil or criminal seems now to be an open one."[102] The court seemed unwilling to put aside a full review when the sanctions, regardless of their legal classification, rose to their level of severity.

iii. Emerging consensus

From monitoring bodies and the few court decisions that have addressed the issue of due process and sanctions, there seems to be a growing agreement that regardless of the "preventive" nature of blacklist sanctions, minimal due process is required. The UN Security Council passed two resolutions calling for stronger review mechanisms during

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of review. However only the portion relevant to due process protections will be discussed here.

[100] *Id*.; *also see* Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union, 3 C.M.L.R. 41 (2008). Kadi was accused in Swiss courts of financing 9/11 attacks, but later was cleared of all charges and any connection to the attacks. However, he remains listed on the UN al Qaeda sanctions list. Charity and Security, *Overdue Process: Protecting Human Rights while Sanctioning Alleged Terrorists*, Aug. 17, 2009, *available at* http://www.charityandsecurity.org/print/193 (last visited Apr. 26, 2012) [hereinafter *Overdue Process*].

[101] Posch, *supra* note 99, at 3.

[102] Case T-85/09, *Yassin Abdullah Kadi v European Commission*, General Court of the European Union, 30 Sept. 2010, para. 150.

the listing process, better notice procedures, and a mandatory public statement that includes a narrative summary explaining the rationale for the listing.[103] However, in general, the minimum due process standards seem to be notice to the listed party of the case against him, an opportunity to be heard and to challenge the listing, and the availability of appeal to an independent tribunal that has access to the evidentiary record.[104]

d. Designation of the ETIM

The ETIM was designated as a terrorist organization on the SDGT List under Executive Order 13224 on September 3, 2002.[105] On September 11, 2002, the UN added the ETIM to its Resolution 1267 al Qaeda Sanctions List at the urging of the United States and China.[106] On April 29, 2004, the U.S. Department of State designated the ETIM on the Terrorist Exclusion List.[107] However, the ETIM was never designated as an FTO, a designation that requires a specific finding of fact to Congress. Because the ETIM was not believed to have any significant financial presence in the United States, the

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[103] *Overdue Process*, *supra* note 100.

[104] OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, COMBATING THE FINANCING OF TERRORISM WHILE PROTECTING HUMAN RIGHTS: A DILEMMA? Oct. 2008 [hereinafter ODIHR DILEMMA].

[105] U.S. Department of State, Individuals and Entities Designated by the State Department Under EO 13224, http://www.state.gov/s/ct/rls/other/des/143210.htm (last visited Dec. 20, 2011).

[106] Security Council Committee Pursuant to Resolution 1267, Eastern Turkestan Islamic Movement, http://www.un.org/sc/committees/1267/NSQE08802E.shtml (last visited Apr. 1, 2012).

[107] U.S. Department of State, Terrorist Exclusion List, http://www.state.gov/s/ct/rls/other/des/123086.htm (last visited Dec. 20, 2011).

designation of ETIM as a terrorist organization was believed to be purely a symbolic gesture, made to appease political pressure from China.[108] However, the designation ended having much more significance, perhaps even than intended, when it contributed to the erroneous detention of the Uighurs in Guantanamo Bay through its use as evidence in CSRT determinations to tie the captured Uighurs to al Qaeda.

III. The improper designation of the ETIM as a foreign terrorist organization contributed to the erroneous detention of twenty-two Uighurs in GITMO, and could have been avoided with suitable due process protections ensuring proper fact finding and oversight; thus steps must be taken so that this type of travesty does not occur again in the future

a. The ETIM was improperly designated as a foreign terrorist organization under Executive Order 13224

In September 2002, the ETIM was improperly designated as a terrorist organization under Executive Order 13224 by the US State Department. In order to designate an organization as a foreign terrorist organization, the Secretary of State must determine that the organization is actively engaged in terrorist activity that threatens the security of the United States or United States nationals.[109] The factual record of the ETIM does not support these required elements. At most the ETIM is a small, local, unorganized separatist group interested in expressing dissent in response to repressive Chinese policies. When the State Department announced its listing decision, the primary

[108] REED AND RASCHKE, *supra* note 37, at 103.

[109] Executive Order 13,224, *supra* note 50, at section 1(b).

reaction in the media was confusion.[110] Even scholars specializing in Uighur culture and politics had not heard of the group. Moreover, upon closer inspection it is clear that the evidence the State Department used to support its findings of the ETIM's ties to international terrorism was entirely dependent on uncorroborated and factually inconsistent intelligence provided by the Chinese government, which had a vested interest in silencing a minority group that had proven to be a political annoyance for decades. There is strong circumstantial evidence that the United States accepted this Chinese intelligence as support for a terrorist designation of the ETIM as part of a quid pro quo arrangement with China to ensure Security Council support for the U.S. led invasion of Iraq. However, even if the designation was not nefarious political pandering, at the very least it was made with too heavy a reliance on one source of biased foreign intelligence—which the US State Department agrees, turned out to be erroneous.[111]

i. The Uighurs are a peaceful minority group that have an extensive history of repression by the Chinese Government

The Uighurs are a group of Turkish speaking Muslims from the northwest Xinjiang Uighur Autonomous Region (Xinjiang or XUAR) in China, who have suffered under the religious and cultural oppression of the Chinese government for centuries.[112]

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[110] Erkin Dolat, *Washington Betrays China's Uighurs*, ASIA TIMES (Sept. 5, 2002), *available at* http://www.atimes.com/atimes/China/DI05Ad03.html ("[The ETIM is] an obscure group even most Uighurs know nothing about.").

[111] The State Department removed the ETIM from the list of foreign terrorist organizations under 13224 in 2010.

[112] The Uighurs are one of the PRC's 55 officially recognized ethnic minorities. REED AND RASCHKE, *supra* note 37, at 6. *See also* HUMAN RIGHTS WATCH, DEVASTATING BLOWS (Apr. 2005) [hereinafter DEVASTATING BLOWS] (The population of Xinjiang is approximately 22 million. The non-Chinese population of Xinjiang is approximately 9

The Uighurs have their own culture, language, and tradition—more akin to Turkish countries of Central Asia than the rest of mainland China.[113] For economic and symbolic reasons, as well as for diplomatic purposes, China has been fiercely protective of its claim over the province. The region is highly desirable to the Chinese government due to its abundance of natural resources, including oil, natural gas, coal, copper and gold.[114] As well, Xinjiang has been called the "Pivot of Asia," because it borders countries and regions whose stability greatly impacts international security.[115] For these reasons, the Chinese government has struggled for centuries to keep the Uighur people and their valuable Xinjiang region within its control.

The history of the Xinjiang region is contentious. To this day the indigenous people refer to it as "East Turkestan," however in China's opinion, the Xinjiang region has always been inseparable from China.[116] The area was first formally incorporated into the Chinese empire in 1884, and had varying degrees of autonomy and independence

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million, which is almost entirely Muslim. Uighurs make up approximately 8 of this 9 million.).

[113] Council on Foreign Relations, Uighurs and China's Xinjiang Region, http://www.cfr.org/china/uighurs-chinas-xinjiang-region/p16870 (last visited Dec. 20, 2011) [hereinafter CFR Uighurs].

[114] Munro-Nelson, *supra* note 6, at 2. *See also* REED AND RASCHKE, *supra* note 37, at 10.

[115] REED AND RASCHKE, *supra* note 37, at 8-9 (Xinjiang borders eight countries: Mongolia, Russia, Kazakhstan, Kyrgyzstan, Tajikistan, Afghanistan, Pakistan, and India.).

[116] *See* CFR Uighurs, *supra* note 113 (Uighurs say that Xinjiang was colonized in 1949. However China's first white paper on Xinjiang states that the Xinjiang region has been an "inseparable part of the unitary multi-ethnic Chinese nation" since the Western Han Dynasty of 206 BC.).

over the next sixty years.[117] In 1933, Turkish rebels declared independence from China as the "The Islamic Republic of East Turkestan," which lasted only one year before China reclaimed the territory.[118] An attempt at independence backed by the Soviets was similarly short lived in 1944.[119] Following the Chinese civil war, the new People's Republic of China (PRC) declared the region a Chinese province, and Xinjiang was classified as an autonomous region of the People's Republic of China.[120] The PRC immediately began a policy of encouraging large scale migration to the region of Han Chinese, causing the proportion of ethnic Chinese in the region to increase from 6 percent to 41.5 percent in just under 25 years.[121] After Mao's death in 1976, a more liberal policy toward Xinjiang allowed for the restoration of mosques, increased tolerance of cultural and religious activities, and a decrease in ethnic Chinese in the area.[122] However, this period of greater autonomy was short lived, and was followed in the 1990s by more

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[117] Munro-Nelson, *supra* note 6, at 1. *See also* DEVASTATING BLOWS, *supra* note 112, at 5 (The Qing empire annexed Xinjiang in 1759, however it did not have effective control. There were numerous uprisings, and for over a decade the area was under the rule of a Kashgar-based warlord Yakub Beg. Eventually the Qing reconquered the region, and formally integrated it into the empire as "Xinjiang" in 1884.).

[118] Munro-Nelson, *supra* note 6, at 2.

[119] Munro-Nelson, *supra* note 6, at 2. *See also* DEVASTATING BLOWS, *supra* note 112 (When Chinese Communists began to dominate the Chinese civil war, Stalin encouraged negotiations between Xinjiang nationalist leaders and the Chinese government. However, a plane carrying the nationalist leaders mysteriously crashed on the way to the negotiations. With local leaders no longer present to lead the protest, Xinjiang was incorporated into the newly established PRC.).

[120] CFR Uighurs, *supra* note 113.

[121] DEVASTATING BLOWS, *supra* note 112, at 5.

[122] *Id*.

intensive restrictions on religious and cultural liberty by the government in Beijing, and a return to powerful economic incentives encouraging the migration of Han Chinese to the region in order to dilute the Uighur society.[123]

These discriminatory policies continue today. Beijing provides economic and landownership incentives for Han migration to Xinjiang, including the reservation of higher salaries and more jobs for Han Chinese.[124] There is a distinct socio-economic gap between Han and Uighur, which is reflected in both household income and lower life expectancy of Uighurs compared to both the Han population and the Chinese population overall.[125] According to a human rights report in 2006, the rapid population growth, thanks in large part to the successful incentive programs such as "Open up the West" and

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[123] DEVASTATING BLOWS, *supra* note 112, at 5. *See also* CFR Uighurs, *supra* note 113, http://www.cfr.org/china/uighurs-chinas-xinjiang-region/p16870 ("[T]he Communist Party says its policies in Xinjiang are designed to promote economic development, not demographic change.").

[124] James Park, *Effectuating Principles of Justice in Ending Indefinite Detention: Historical Repetition and the Case of the Uyghurs*, 31 WHITTIER L. REV. 785, 797-98 (2010); Munro-Nelson, *supra* note 6, at 4. *See also* U.S. Congressional-Executive Commission on China reporting to U.S. Congress 2007 Annual Report (Oct. 10, 2007), *available at* http://www.cecc.gov/pages/annualRpt/annualRpt07/CECCannRpt2007.pdf (In 2006 the Xinjiang Production and Construction Corps reserved 800 of 840 civil servant job openings for Han Chinese.)

[125] DEVASTATING BLOWS, *supra* note 112, at 5 (citing *The Quality and Labor Situation of the Population from Xinjiang Ethnic Minorities*, J. OF XINJIANG UNIV., vol. 7, no. 3 Sept. 1999) (life expectancy of Uighurs is 61.62 compared to 71.4 for the Han population and 70 for China overall). *See also* Tun Lin, Juzhong Zhuang, Damaris Yarcia & Fen Lin, *Income Inequality in the PRC and its Decomposition: 1990-2004*, ASIAN DEVELOPMENT REVIEW, vol. 25 nos. 1 and 2, pp. 119-36, 129 (stating that for all four years indexed—1990, 1995, 2000, and 2004—Xinjiang had the highest level of income inequality within the province of every province in China).

"Go West," has led to "reduced human access to clean water and fertile soil for drinking, irrigation and agriculture . . . [and] has destabilized livelihoods and society."[126]

The Chinese government has attempted to suppress any semblance of Uighur identity through concentrated repression of Uighur culture and religion. Legislation has eliminated the use of Uighur language in schools and placed bans on Uighur literature.[127] Thousands of Uighurs have been jailed for "advocating separatism," an offense which includes simply writing in Uighur.[128] Furthermore, as Islam is perceived as central to the ethnic Uighur identity, the Chinese government has maintained tight constraints on religious practice in order to control the Uighurs.[129] Uighurs practice a traditional form of Sunni Islam, which is moderate and notably tolerant.[130] The Uighurs' version of the

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[126] Elizabeth Willmott, *Common Cause: China's State-Society Response to Environmental Crisis*, THE DELICATE BALANCE—CHINA RIGHTS FORUM No.1 (2006) at 18, *available at* http://hrichina.org/sites/default/files/oldsite/PDFs/CRF.1.2006/CRF-2006-1_Common.pdf; *also see* Council on Foreign Relations, Uighurs and China's Xinjiang Region.

[127] Munro-Nelson, *supra* note 6, at 3. *See also* Bovard, *supra* note 42 (Chinese government agents have burned Uighur books and closed down Uighur magazines. One Western expatriate living in the area observed, 'Uighur literature is defined as distorted history and accused of inciting national separatism.'").

[128] Bovard, *supra* note 42. *See also* DEVASTATING BLOWS, *supra* note 112 (Tursunjan Emet, a Uighur poet, recited a poem in January 2002 at the end of a concert at the Xinjiang's People Hall in Urumqi. The recitation was deemed "an ethnic separatist crime in the area of the ideological front," he was arrested and detained. He was released weeks later, but Chinese government denies he was ever detained.).

[129] *See* DEVASTATING BLOWS, *supra* note 112 ("Islam is perceived as feeding Uighur ethnic identity, and so the subordination of Islam to the state is used as a means to ensure the subordination of Uighurs as well.")

[130] *Id*. *See also* BOVARD, *supra* note 42 ("Xinjiang specialists consider the Uighurs among the most liberal and pro-U.S. Muslims in the world, and in Kashgar women interact freely with men, run businesses and hold political office.").

Muslim faith places emphasis on literature, science, and music—as well as equality.[131] The Chinese government, however, has equated any independent religious activity to a breach of state security.[132] Authorities interfere with the appointment of local imams,[133] antagonistically place police both inside and outside mosques, and generally monitor all religious activities.[134] There are regulations and restrictions on praying in public and worshipping in mosques; for instance, children under the age of 18 may not enter mosques or receive any religious education.[135] Passports have been confiscated in order to prevent Uighur travel to Mecca, and the government forbids celebration of Muslim religious holidays and practicing religious custom through outward appearance.[136] There is "fierce repression of religious expression [and] intolerance for any expression of discontent."[137]

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[131] DEVASTATING BLOWS, *supra* note 112 ("Nineteenth century travellers noted that women in this region enjoyed many freedoms, including the right to run their own businesses and initiate divorce.")

[132] DEVASTATING BLOWS, *supra* note 112.

[133] The imam is the highly revered traditional mediator in Muslim communities who performs both religious and social functions. *Id*.

[134] *Chinese Interrogation vs. Congressional Oversight: The Uighurs and Guantanamo: Hearing Before the Subcomm. on International Organizations, Human Rights and Oversight of the Comm. on Foreign Affairs*, 111th Cong. 7 (2009) [hereinafter *July 16 Uighur Hearing*] (statement of Tom Parker).

[135] *Id*.

[136] Park, *supra* note 124, at 797; Munro-Nelson, *supra* note 6, at 4.

[137] Rebiya Kadeer, *Not the Torch of Liberty*, WASHINGTON POST, Apr. 1, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/03/31/AR2008033102156.html.

Treatment of the Uighurs has not only been marked by religious and cultural subjugation, but also by violence and abuse. The Chinese government has treated peaceful protests as violent revolts deserving of harsh and brutal crackdowns.[138] There are widely documented reports of imprisonment, torture, and forced disappearances.[139] Forced abortions routinely occur, along with banishment of educated Uighurs to remote places, and the continued use of China's highly criticized "Reeducation Through Labor" program.[140] As early as the late 1990s, human rights organizations began showing extreme concern for the welfare of the Uighurs in Xinjiang, and reports of the alarming treatment of the Uighurs by the Chinese government continued through the next two

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[138] One infamous example is the Ghulja Massacre, which occurred in February 1997. When Uighurs peacefully protested Chinese policies in Xinjiang. Uighurs marched to the Ghulja Municipal Government offices demanding equal treatment and religious freedom. Security forces gunned down a number of unarmed demonstrators by firing indiscriminately into the crowd, killing several dozen and injuring over a hundred Uighurs. Riots ensued, and the Chinese authorities responded by arresting thousands of Uighurs and closing down Uighur schools and mosques. Family members of demonstrators were detained, and dozens of participating Uighurs were executed or simply disappeared. UYGHUR AMERICAN ASSOCIATION, INFORMATION FOR THE PRESS ON THE GUANTANAMO UYGHURS 2-3 (2008), *available at* http://docs.uyghuramerican.org/Information_for_the_Press_on_the_Guantanamo_Uyghurs.pdf (last visited Dec. 20, 2011). *See also* DEVASTATING BLOWS, *supra* note 112. *See generally* AMNESTY INTERNATIONAL, CHINA: GROSS VIOLATIONS OF HUMAN RIGHTS IN THE XINJIANG UIGHUR AUTONOMOUS REGION (1999), *available at* http://www.amnesty.org/en/library/asset/ASA17/018/1999/en/6eb116ed-e285-11dd-abce-695d390cceae/asa170181999en.html (last visited Dec. 20, 2011).

[139] DEVASTATING BLOWS, *supra* note 112 (One example is Rebiya Kadeer, a human rights advocate who criticized the government's policies in Xinjiang in a speech before parliament, causing her removal from the National People's Consultative Conference and revocation of her passport. She was detained and convicted to two years of solitary confinement in 2000 for "leaking state secrets" by sending her husband exiled in the United States newspaper clippings on conditions in the Uighur community. At the urging of the United States and other international bodies, she was released in 2004.).

[140] Park, *supra* note 124, at 799 (quoting Parhat v. Gates, 532 F. 3d 834, 837 (D.C. Circuit 2008)). *Also see* DEVASTATING BLOWS, *supra* note 112.

decades. However after 9/11, China no longer denied its abuse of the Uighurs, it justified it as part of a legitimate counterterrorism regime.

ii. China's abysmal human rights record regarding the Uighurs, combined with the factual inconsistency and suspicious timing of China's claims, supports the proposition that China abused the post 9/11 environment and international counterterrorism framework in order to target a politically undesirable group

Considering China's historically abysmal human rights record,[141] the documented systematic and harsh attempts to wipe out Uighur culture and silence all forms of Uighur dissent, the factual inconsistency of China's claims of a threat of extensive Uighur terrorism, and the opportune timing of China's plea for counterterrorism support—China's recent effort to justify its Uighur policy as part of a legitimate counterterrorism regime is unpersuasive. According to the current Chinese government, Xinjiang poses a political threat comparable to that of Tibet and Taiwan.[142] Because of the large number of ethnic minorities in the country, Chinese policy considers the demand for autonomy a threat to the Chinese state as a whole and thus equates any dissent from the Party line to a severe detriment to state security.[143] However, the Chinese government has given the Uighurs many labels over the past few decades, each mirroring the political atmosphere of the time—including, "ethnic nationalists" in the 1950s and 1960s, "counterrevolutionaries" in the 1970s and 1980s, "separatists" in the 1990s, and since

[141] H.R. 1370, 112th Cong. (2008) (documenting gross human rights violations in China and calling on the PRC to immediately end the abuses).

[142] DEVASTATING BLOWS, *supra* note 112.

[143] *Id*.

9/11, "terrorists."[144] The baseless accusations of prevalent terrorism in the Uighur community viewed in light of the history of severe repression confirms that China continued this trend of taking advantage of current events, in this case the international war on terror, in order to pursue a relentless campaign against a politically undesirable minority.[145] The war on terror provided a convenient platform for the Chinese government to renew a campaign of abuse and repression under the guise of international cooperation.[146]

China's factual allegations supporting its claim that the Uighurs posed a perilous terrorist threat were extraordinarily inconsistent, and suspiciously timed with international events—making their credibility questionable. In early September 2001, the Chinese government boasted that Xinjiang did not experience violence or terrorist activities very often, and that the situation there was "better than ever in history."[147] China was anxious to continue its ambitious development scheme in Xinjiang, and thus assured international investors that "society is stable and people are living and working in peace and contentment."[148] The Patterns of Global Terrorism report published by the US

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[144] DEVASTATING BLOWS, *supra* note 112.

[145] *June 10 Uighur Hearing*, *supra* note 1 (testimony of Rebiya Kadeer) ("It is in the national interest of China to have a radicalized Uighur group . . . to justify the sever persecution it carries out against the Uyghur people.").

[146] *Id*. ("In the pre-Olympics period . . . China authorities launched a crackdown in which 25 Uyghurs were killed in alleged 'terror raids', 76 Uyghurs were convicted on terror related charges – 20 of them sentenced to death, and 2 Uyghur 'terrorists' were executed at a mass sentencing rally.").

[147] DEVASTATING BLOWS, *supra* note 112. (quoting Bao Lisheng, *Chinese Officials Say Not Much Terrorism in Xinjiang*, TA KUNG PAO, Sept. 2, 2001).

[148] JAMES MILLWARD, EURASIAN CROSSROADS: A HISTORY OF XINJIANG 339 (2007).

State Department in April 2001 did not have a single mention of Xinjiang, the Uighurs, or the ETIM.[149] However, just weeks later, immediately following 9/11, China claimed the Uighur separatists was connected to international terrorism, had ties to Osama bin Laden and the Taliban regime in Afghanistan, and posed a distinct threat to safety of China and the international community.[150]

A distinct revision in the rhetorical approach to dealing with the problem of Uighur separatism in Xinjiang became evident following 9/11.[151] By November China had lobbied the United Nations to curb international terrorism by supporting China's efforts to impede "East Turkestan terrorist forces."[152] The use of the terms "terrorism" and "East Turkestan" was a distinct departure from traditional Chinese practice when discussing separatism issues.[153] Because China had never recognized the existence of any such entity as East Turkestan, generally Uighur separatists in Xinjiang were referred to only as "national separatists" or the "enemy."[154] However, from this point forward the

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[149] Office of the Coordinator for Counterterrorism, Patterns of Global Terrorism 2000 (Apr. 30, 2001), *available at* http://www.state.gov/s/ct/rls/crt/2000/2432.htm (last visited Dec. 20, 2011).

[150] DEVASTATING BLOWS, *supra* note 112. (citing PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UN, TERRORIST ACTIVITIES PERPETRATED BY 'EASTERN TURKESTAN' ORGANIZATIONS AND THEIR LINKS WITH OSAMA BIN LADEN AND THE TALIBAN, Nov. 21, 2001, *available at* http://www.china-un.org/eng/zt/fk/t28937.htm (last visited Dec. 20, 2011).

[151] MILLWARD, *supra* note 148, at 339.

[152] DEVASTATING BLOWS, *supra* note 112.

[153] MILLWARD, *supra* note 148, at 339.

[154] *Id*. at 339-340.

label "East Turkestan terrorist forces" was used indiscriminately in official documents by the Chinese government to refer to any political advocacy by Uighurs—regardless of its peaceful nature.[155]

In January 2002, China's State Council published a report entitled "'East Turkestan' Terrorist Forces Cannot Get Away with Impunity," which traced the concept of "East Turkestan" to ideology of the "old colonists with the aim of dismembering China."[156] It claimed that Uighur separatists were responsible for the deaths of 162 people in over 200 terrorist incidents in Xinjiang from 1990 to 2001.[157] A careful reading of the report uncovers the names of eight organizations purportedly responsible for the collection of alleged terrorist actions,[158] but the suggestive use of the phrase "East Turkestan terrorist forces" powerfully implied that the entirety of the 200 incidences of violence over the past decade was the work of a solitary, unified entity—and that this

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[155] DEVASTATING BLOWS, *supra* note 112.

[156] MILLWARD, *supra* note 148, at 339.

[157] Erik Eckholm, U.S. Labeling of Group in China as Terrorist is Criticized, N.Y. TIMES (Sept. 2002), *available at* ttp://www.nytimes.com/2002/09/13/world/us-labeling-of-group-in-china-as-terrorist-is-criticized.html?pagewanted=all&src=pm (last visited October 18, 2011) (Many of the incidents were never claimed by any of the separatist groups. Moreover, the ETIM was connected to any specific violent incidence.). *See also* China Information Office of State Council, "EAST TURKESTAN" TERRORIST FORCES CANNOT GET AWAY WITH IMPUNITY (Jan. 21, 2002), *available at* http://www.china-un.ch/eng/zgbd/smwx/t85792.htm (last visited Dec. 20, 2011) [hereinafter IMPUNITY REPORT].

[158] *Id*. (Groups named in the report include East Turkestan Liberation Organization, "Shock Brigade" of the Islamic Reformist Party, East Turkestan Islamic Party, East Turkestan Opposition Party, East Turkestan Islamic Party of Allah, Uighur Liberation Organization, Islamic Holy Warriors, and East Turkestan International Committee.).

entity was heavily tied to al Qaeda.[159] This report later provided the primary source of data for the State Department in linking the ETIM to international terrorism.

Furthermore, there is factual inconsistency in the reporting of incidences of unrest in Xinjiang, which further calls in to question the accuracy of China's claims. The report documenting terrorist attacks of "Eastern Turkestan forces" alleged that there had been 162 killed and 400 injured, however the report only accounts for 57 deaths, all of which occurred in small-scale confrontations.[160] The report also describes events that did not result in any deaths, which makes it more curious why such a comprehensive report on terrorist acts in East Turkestan should not include the acts leading to the remaining 105 deaths.[161] None of the facts were not corroborated with any other sources. Moreover, some of the incidences that were listed in this report were arguably no more than casual violence, rather than terrorism.[162]

Eventually, the United States recognized that China did, in fact, use the international war on terror as a justification to crack down on Uighur separatists

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[159] MILLWARD, *supra* note 148, at 340. *China Links Separatists to bin Laden*, CNN WORLD, (Jan. 21, 2002), *available at* http://articles.cnn.com/2002-01-21/world/gen.china.xinjaing_1_bin-east-turkestan-islamic-movement-separatists?_s=PM:asiapcf (quoting China's cabinet as saying, "[t]he 'East Turkestan' terrorist organization based in South Asia has the unstinting support of Osama bin Laden and is an important part of his terrorist forces").

[160] DEVASTATING BLOWS, *supra* note 112. (citing JAMES MILLWARD, VIOLENT SEPARATISM IN XINJIANG: A CRITICAL ASSESSMENT (2004)).

[161] *Id.*

[162] For more on this distinction *see* Sean Roberts, *Imaginary Terrorism? The Global War on Terror and the Narrative of the Uyghur Terrorist Threat* 11-12 (Ponars Eurasia Working Paper, Nov. 2011).

expressing peaceful dissent.[163] A State Department report stated, "China does not always distinguish between legitimate political dissent and the advocacy of violence to overthrow the government, and has used terrorism as a pretext to suppress the Uighurs."[164] The House of Representatives passed a resolution finding that China "manipulated the strategic objectives of the international war on terror to increase their cultural and religious oppression of the Muslim population residing in Xinjiang."[165] The Court of Appeals for the District of Columbia accepted the argument that "Chinese reporting on the subject of the Uighurs cannot be regarded as objective."[166] These findings are not surprising, in light of China's history of abhorrent treatment of the Uighurs, the inconsistency in China's allegations against the ETIM, and the useful platform the war on terror provided for the PRC to bring Xinjiang separatism onto the international stage. However, the unreliability of Chinese factual reporting is not alone in casting doubt on the accuracy of the link between the ETIM and international terrorism; independent evidence points to the likelihood that the ETIM is nothing but a small, poorly organized separatist group with no ties to Bin Laden or al Qaeda.

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[163] U.S. STATE DEPARTMENT, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES IN CHINA, (Feb 25, 2004). The report concluded that China's human rights record remained poor, many serious abuses continued, and that legal reforms were accompanied by "backsliding" on human rights. A nationwide "strike hard" campaign against crime was implemented particularly harshly in Xinjiang.

[164] Office of the Coordinator for Counterterrorism, Department of State, Country Reports on Terrorism 2010 (Aug. 2011), *available at* http://www.state.gov/documents/organization/170479.pdf (last visited Dec. 18, 2011).

[165] H.R. 497, 111th Cong. (2009).

[166] Parhat, 532 F.3d at 845.

iii. Independent evidence shows that the ETIM is nothing more than a small, poorly organized separatist group with no outside support or ties to al Qaeda

Naturally there have been some calls for independence due to the extreme persecution suffered by the Uighurs at the hands of the Chinese government for decades;[167] however with the exception of a few Uighur extremists, Uighur advocates have not encouraged violent overthrow of the Chinese government.[168] In the 1990's, a number of Uighur political groups sprang up to vocalize the concerns of the Uighurs in Xinjiang.[169] China argues that the ETIM is one of the most deadly of these separatist groups, and moreover the most well connected to al Qaeda. The factual record does not support this proposition. All evidence supports the idea that the ETIM is a poorly organized separatist group with no outside support or ties to international terrorism.

Though the Chinese authorities quickly labeled the ETIM an international terrorist organization after 9/11, some experts were not convinced that the group existed at all, much less to the degree put forth by the Chinese government. Prior to the terrorist listing, even scholars whose studies focused on the Uighur people and the Xinjiang region had

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[167] These calls for independence come from both within and outside of China. After a bloody clash between the Han and Uighurs in 2009, protestors in Kazakhstan marched for Xinjiang's independence. One demonstrator said that this was a "century-long fight for independence" as the current autonomy of Xinjiang is insufficient and must be remedied. *See Uighurs Call for Independence in Kazakhstan Mourning*, WORLD BULLETIN, Aug. 13, 2009, *available at* http://www.worldbulletin.net/index.php?aType=haberArchive&ArticleID=45921.

[168] DEVASTATING BLOWS, *supra* note 112.

[169] *Exploring the Nature of Uighur Nationalism: Freedom Fighters or Terrorists?: Hearing Before the Subcomm. on International Organizations, Human Rights and Oversight of the Comm. on Foreign* Affairs, 111th Cong. 17 (2009) [hereinafter *June 16 Uighur Hearing*] (testimony of Sean Roberts).

not heard of the group.[170] One scholar conjectured that preexisting stereotypes about radical Islam, the scarcity of information about this particular group, and the confidence with which the Chinese government spouted counterterrorism propaganda regarding the Uighurs led to an acceptance of the term "ETIM" as a reference to possible al Qaeda type jihadists in Xinjiang, although no credible evidence of specific acts had been attributed to any one particular group.[171] Independent investigation of the organization revealed little additional information about the group, and confirmed that if in existence at any meaningful level, the ETIM was small and certainly not representative of the Uighur community as a whole.[172] The predominant conclusion of the academic and human rights communities is that the ETIM, assuming it is an organization existing to a degree that

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[170] *June 16 Uighur Hearing*, *supra* note 169 (testimony of Sean Roberts) ("I, for example, spent much of the second half of the 1990s living among the Uyghur communities in Kazahkstan, but I had not heard of the group prior to its classification as a terrorist organization by the United States. This was particularly puzzling to me since I had become personally acquainted with most of the major Uyghur diaspora political groups in the course of my research, participating as an observer at many of the meetings organized by transnational Uyghur political organizations in the second half of the 1990s."). *See also June 10 Uighur Hearing*, *supra* note 1 (testimony of Rebiya Kadeer) ("The first time I heard about the ETIM was after my release into the United States. . . We have some 51 organizations in the diaspora. We know all of them. We have close working relationships with them. All of those organizations, none of them knew who these people are or what is ETIM."). *See also June 10 Uighur Hearing*, *supra* note 1 (testimony of Nury Turkel) ("I never heard of this organization. My friend [an official at the Beijing U.S. embassy] did not believe me because he thinks that I know every single Uighur organization around the world. . . That response was pretty common for vast majority of the Uighurs when Deputy Secretary of State Armitage made that announcement in summer of 2002.").

[171] James Mlllward, *Regarding the Guantanamo Uyghurs* (Feb. 2009), *available at* http://thechinabeat.blogspot.com/2009/02/on-free-uyghurs.html ("Because every 'movement' needs an acronym, concerns crystallized around ETIM.").

[172] AMNESTY INTERNATIONAL, UIGHURS FLEEING PERSECUTION AS CHINA WAGES ITS "WAR ON TERROR" (July 2004).

sufficiently warrants consideration as a single entity, is interested in expression of legitimate economic and social concerns of the region that should never have been considered terrorist in nature, and should have been resolved politically rather than through counterterrorism methods.[173]

Even if the ETIM did at one time or does still exist to some degree, the proposition that neither al Qaeda nor the Taliban ever supported the ETIM is reinforced by the fact that the affiliation between the organizations has been flatly denied by leaders and members of all three organizations. Because al Qaeda and its affiliates typically boast of their association, it is particularly significant that leaders of both the ETIM and al Qaeda repudiated any affiliation between the groups.[174] In 2002, a western journalist conducted an interview with Hahsan Mahsum, a man since labeled as ETIM's former leader, who emphatically stated that the ETIM had never received aid from al Qaeda, and that the ETIM had no interest in targeting the United States or Americans.[175] Of the twenty-two Uighurs interrogated in Guantanamo Bay, only one reported that he was aware of any involvement between ETIM and Taliban forces, and even this testimony

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[173] James Bovard, *China: From Brutal Oppressor to Terrorist Victim*, FREEDOM DAILY (Dec. 2003), http://www.fff.org/freedom/fd0312c.asp (quoting Francis Taylor, U.S. State Department Chief Counterterrorism Official, Dec. 2011).

[174] Chris Zambelis, *Uighur Dissent and Militancy in China's Xinjiang Province*, COMBATING TERRRORISM CENTER 18 available at http://www.ctc.usma.edu/posts/uighur-dissent-and-militancy-in-china's-xinjiang-province (last visited Dec. 20, 2011).

[175] *June 16 Uighur Hearing*, *supra* note 169 (testimony of Sean Roberts). *See also* Brian Fishman, *Al-Qaeda and the Rise of Chine: Jihadi Geopolitics in a Post-Hegemonic World*, THE WASHINGTON QUARTERLY 34:3 pp 47-62 at 50 (summer 2011) ("[ETIM had] absolutely no relationship with Usama Bin Ladin, and we have never received any help from him. All our activities are entirely directed at liberating East Turkestan territory from Chinese invaders, to drive the Chinese invaders out of that land.") (quoting Interview with Hassan Mahsum, *Radio Free Asia*, Jan. 22, 2002).

was later refuted by conflicting statements made by the same detainee.[176] The rest of the twenty-one Uighurs held as enemy combatants repeatedly denied any affiliation with the Taliban or al Qaeda.[177] Furthermore, Bin Laden himself disclaimed affiliation with the Uighurs in an interview by stating, "I often hear about Chinese Muslims, but since we have no direct connection with people in China and no member of our organization comes from China, I don't have any detailed knowledge about them."[178] The consistency of the statements from leaders of both organizations serves as persuasive evidence of the validity of the statements.

Furthermore, based on the political atmosphere of the time, it is not logical that the Taliban or al Qaeda would find it politically desirable to support ETIM. In the political climate of the late 1990s and early 2000s, it is reasonable to surmise that al Qaeda would have little interest in supporting a group bent on attaining independence from China.[179] China was one of the few countries that was willing to have diplomatic and commercial relations with the Taliban, and thus it logically follows that al Qaeda and the Taliban would not have wanted to upset their superpower ally.[180] One explanation of

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[176] Parhat, 532 F.3d at 845 (The government relied on the interview report of a single Uighur detainee Akhdar Basit, stating that he was told the camp "had been provided to the Uighurs by the Taliban in order that the Uighurs could train to fight the Chinese oppression." However, Basit later told interviewers that he had "no idea" who provided the camp to the Uighurs.).

[177] *Id*.

[178] Fishman, *supra* note 175, at 49 (quoting Abu Shiraz, May 1998 Interview with Bin Laden, Pakistan, Feb. 20, 1999).

[179] *June 16 Uighur Hearing*, *supra* note 169 (testimony of Sean Roberts).

[180] *Id*.

Taliban policy towards the ETIM written by a jihadist strategist stated that the Taliban ordered all East Turkestan advocates to avoid any violent resistance against China, because the Taliban wanted to ensure friendly relations with China as an additional counter against the United States.[181] Bin Laden's wrath was uniquely focused on the United States, and he followed the Taliban's hands off policy towards China closely.[182]

In light of the sheer dearth of information about the ETIM prior to its listing, even amongst scholars specializing in Uighur politics and culture, it is unlikely that the ETIM was anything more than a few young Uighurs aspiring to challenge oppressive Chinese policies in Xinjiang, but utterly lacking the resources and capability to do so.[183] Furthermore, assuming in arguendo that the ETIM existed as an organization resembling a single entity, it was likely small, localized in nature, and did not have any outside support from the Taliban or al Qaeda. Statements of the alleged leader of the ETIM denouncing the support of al Qaeda, as well as statements of Taliban strategists and Bin Laden himself refuting any connection with the Uighurs, support this conclusion.

iv. The US had an interest in appeasing China in order to gain support for US invasion of Iraq, and thus it relied solely on insufficient Chinese intelligence and chose to designate the ETIM a foreign terrorist organization

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[181] Fishman, *supra* note 175, at 49 (citing Abu Mus'ab al-Suri, The Call to Global Islamic Resistance 727).

[182] *Id*.

[183] *June 16 Uighur Hearing*, *supra* note 169 (testimony of Sean Roberts). *See also Is China Fraying?* THE ECONOMIST (July 2009) (noting that while the hallmark terrorist methodology of Islamic militants is generally suicide bombing, incidences blamed on ETIM "terrorists" use primitive weapons, are completely disorganized, and are often in direct response to ethnic violence lodged against Uighurs by the Han Chinese).

Despite the factual inconsistencies and clear bias existing in Chinese reports of separatist violence in Xinjiang, and notwithstanding the contrary evidence of independent scholars and human rights organizations that presents reasonable confirmation that Uighur separatists posed a negligible threat, the United States designated the ETIM a foreign terrorist organization under Executive Order 13224 on September 3, 2002.[184] Because the United States relied primarily on Chinese intelligence information to satisfy the required elements of designation, and the Chinese intelligence was inconsistent and uncorroborated, the United States erred in designating the ETIM a terrorist organization.[185] In order to compensate for the insufficient evidence provided by the Chinese, the United States further skewed the data contained in the 2002 white paper published by China's State Council when using the Chinese report to support its blacklisting determination. While China alluded to unity of "Eastern Turkestan terrorist forces" responsible for the combined 200 incidences of terrorism, 162 deaths, and 400 injuries, the United States went a step further and blatantly attributed the entirety of these same instances to one organization—the ETIM.[186] The State Department never formally defended this mischaracterization of the Chinese information, and for years stood by its decision to designate the ETIM as a terrorist organization.[187] The blatant way the data was skewed to present a more extreme and dangerous picture of the ETIM suggests that

[184] Executive Order 13224, *supra* note 50.

[185] Parhat, 532 F.3d at 845.

[186] Eckholm, *supra* note 157.

[187] The ETIM was "quietly removed" from the EO 13224 annex in 2010. Christopher Bodeen, *Experts Question if China Attacks Planned Abroad*, THE GUARDIAN, Aug. 5, 2011.

the supporting evidence in its pure form was not sufficient to label the ETIM a foreign terrorist organization, even under the low standard of EO 13224.

To be sure, there has been violence in the Xinjiang region, some of which may be attributable to individuals who associate themselves with the ETIM or Uighur nationalism, and none of which should be condoned regardless of the legitimate anger provoking it.[188] However, even assuming in arguendo that the ETIM is an existing foreign organization, and some of its individual members have been involved in some isolated incidences of violence—the alleged terrorist activity of the ETIM certainly did not "threaten the security of U.S. nationals or the national security, foreign policy, or economy of the U.S."[189] So the question that remains is why the United States would accept such factually unsettling data to guide its determination of a terrorist designation.

Those skeptical of the Chinese assertion that the ETIM was a deadly terrorist organization suggest that the U.S. terrorist designation of the ETIM was a "quid pro quo arrangement" between the PRC and the United States in order to secure Chinese support for the American led War on Terror.[190] This is a reasonable supposition based on the timeframe and dramatic nature of the change that occurred in U.S. policy regarding

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[188] *Id*. ("[R]ecent Xinjiang attacks have shown little sophistication, using knives and makeshift weapons such as hijacked trucks and gasoline bombs instead of high explosives or automatic rifles. Restaurants and shops are the usual targets rather than government or military installations or infrastructure such as railway lines.")

[189] Executive Order 13224, *supra* note 50.

[190] *June 16 Uighur Hearing*, *supra* note 169 (testimony of Sean Roberts). This supposition of a quid pro quo arrangement is discussed in more detail infra. *See also* Eckholm, *supra* note 157 (In the late 1990's the majority of the Uighur activists were rounded up by Pakistani forces and sent back to China. Thus the ETIM was a movement without any people.).

cooperation with China on counterterrorism issues, and in particular the ETIM. The United States had previously recognized the dangers of forging a cooperative relationship with China in counterterrorism efforts since China has a long record of questionable human rights practices.[191] The PRC's definition of terrorism has always been more expansive than that of the United States, sweeping into its scope any political expression of independence—regardless of its peaceful nature.[192] In the 2002 the State Department recognized the abuse of the Uighurs at the hands of the Chinese government, and refused to apply the FTO designation to ETIM.[193] However, only a couple months later, U.S. Deputy Secretary of State Richard Armitage announced that the United States was placing ETIM on its "list of terrorist groups."[194] This announcement came during a high profile visit to Beijing.[195] It appears the human rights perils of a counterterrorism arrangement with China were outweighed by the allure of support of a permanent member on the United Nations Security Council.[196]

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[191] *See* HR 1370, *supra* note 141.

[192] Kerry Dumbaugh, *China-U.S. Relations*, CONGRESSIONAL RESEARCH SERVICE (Nov. 21, 2002).

[193] *Chinese Interrogation vs. Congressional Oversight: The Uighurs at Guantanamo: Hearing Before the Subcomm. on International Organizations, Human Rights and Oversight of the Comm. on Foreign Affairs*, 111th Cong. 7 (2009) [hereinafter *July 16 Uighur Hearing*] (statement of Jason Pinney).

[194] Dumbaugh, *supra* note 192, at 15.

[195] Shirley Kan, *U.S.-China Counter-Terrorism Cooperation: Issues for U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE (May 12, 2005).

[196] Dumbaugh, *supra* note 192.

Extraordinary actions taken by the United States to garner Chinese support continued later in September 2002, when Communist Chinese agents were welcomed to GITMO to interrogate each of the 22 detained Uighurs for a period of 7 to 10 days.[197] United States Congressional representatives, the United Nations, human rights organizations, and the press were all refused access to the very same detainees.[198] The Department of Defense stated that many countries had been allowed access to the detainees, in order to see that the detainees were being treated humanely, and to provide insight and information about the detainees.[199] The irony of the assertion that China was invited to ensure humane treatment of members of a minority group it had been persecuting for decades was not lost on members in a congressional hearing held in 2009 to investigate the incident.[200] Furthermore, there are allegations by Uighur detainees that their treatment by the Chinese officials during that time was worse than the entirety of the rest of their stay in Guantanamo.[201] China was interested in names and information about the families of the detainees remaining in China, and the United States handed some of this over to the Chinese, much to the dismay of the Uighur detainees.[202] Just a month later, in October 2002, the Chinese President Jiang Zemin travelled to Texas to discuss

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[197] *July 16 Uighur Hearing*, *supra* note 193 (statement of Rep. Delahunt, Member, House Comm. on Foreign Affairs).

[198] *Id*. (testimony of Jason Pinney).

[199] *Id*. (testimony of Randall Schriver).

[200] *Id*.

[201] *Id*. (testimony of Jason Pinney).

[202] *Id*.

the Iraq war with then-President Bush.[203] That these actions were part of a grander scheme to cement Chinese support for the war on terror is confirmed in the following statement in an FBI report in December 2002—"U.S. officials are considering whether to return the Uighurs to the Chinese, possibly to gain support for the anticipated U.S action in the Middle East. The Uighur detainees at Guantanamo are convinced that they would be immediately executed if they are returned to China."[204]

It is impossible to know for certain whether the United States had enough independent evidence at the time of the designation to realize it was sacrificing a "small, oppressed minority in order to win the support of the Communist Chinese Government for [its] invasion of Iraq."[205] However, it must at least have recognized the feeble nature of the evidence supporting its decision, because it is significant that instead of listing the ETIM as an FTO under the INA, the United States listed the ETIM under Executive Order 13224 and later under §411 of the Patriot Act. As discussed earlier, the FTO statute has both financial and immigration implications and is the highest profile blacklist maintained by the United States. In comparison, Executive Order 13224 has solely financial repercussions and §411 has solely immigration consequences; together they create a punitive scheme similar to listing an organization as an FTO.[206] Procedurally the primary distinction between the FTO statute and both EO 13224 and §411 is that the latter lists have a lower standard of proof and are void of any oversight requirement.

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[203] *Id*.

[204] *Id*.

[205] *Id*.

[206] Cronin, *supra* note 54, at 9.

Because the United States chose a listing scheme that allowed for the political stigma, without requiring the congressional oversight, it was able to appease Chinese pressure with the small amount of information it had about the ETIM. Eventually the United States conceded that the ETIM was not the treacherous threat asserted by the Chinese, but it remained a listed foreign terrorist organization under EO 13224 for eight years. During that time, the designation that was erroneous from the start had enormous consequences in both China and the United States.

b. The designation of the ETIM as a terrorist organization contributed to the erroneous detention of the Uighurs in Guantanamo Bay

i. The Uighurs—having fled Chinese repression—were picked up through a bounty program in Pakistan, not on the battlefield in Afghanistan as suggested

The twenty-two Uighurs who were held in Guantanamo Bay for over a decade were picked up in Pakistan through a bounty program that paid $5000 per head, not off a battlefield in Afghanistan.[207] These Uighurs first fled China in 2001 because they opposed the repressive policies of the Chinese regime.[208] They temporarily settled in an expatriate camp in Afghanistan in June 2001, where they stayed until the camp was destroyed during bombing by the United States following 9/11.[209] The Uighurs then fled to Pakistan, where they were turned over to Pakistani officials by local villagers for a

[207] Another interesting topic of investigation might be the bounty program. According to a study done on the GITMO detainees, only 5% of the detainees were captured by US forces. 86% were arrested by Pakistan or Northern Alliance and turned over to US custody, during a period of time in which the US offered a bounty for the capture of suspected enemies.

[208] Parhat, 532 F.3d at 835.

[209] *Id*.

bounty of $5000 per person provided by the United States.[210] The Uighurs were designated "enemy combatants" and sent to GITMO.

Chinese authorities, and the U.S. government in CSRT proceedings, argued that the Uighurs' very presence in Pakistan and Afghanistan proves that they were seeking combat training from al Qaeda, or at a minimum have terrorist ties.[211] However, there are two plausible explanations for the Uighurs' decision to flee to Pakistan, both entirely unrelated to the notion of terrorism advancement. First, the record of repression and abuse suffered by the Uighurs, and the influence China has over many countries in the region, sufficiently rationalizes the desire to escape the tight grasp of the Chinese government by seeking shelter in more lawless countries.[212] With its sway China regularly invokes extradition treaties to return Uighur activists who slipped across the border.[213] Because exiled Uighurs continuously feared repatriation to China, it makes sense that they would seek refuge in Afghanistan, whose weak governance served as a temporary safe haven from China's stronghold that affected the rest of the region.[214] Furthermore, China's strict policies on religion forced the Uighurs to practice and study

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[210] In re Guantanamo Bay, 581 F. Supp 2d 33, 34-35 (D.D.C. 2008)

[211] *See* Dumbaugh, *supra* note 192, at 2-3 ("[T]here have been unconfirmed reports that some Muslim activists may, in fact, be based in Afghanistan, receiving training from the Taliban—reports that appeared to gain more credence late in 2001 when it was revealed that a number of Uighurs from Xinjiang had been captured in Afghanistan.").

[212] *See* discussion *infra*, part II.A.i.

[213] UAA, Gitmo Uighurs, *supra* note 138, at 3 ("For example, in 1999, Kazakhstan forcibly returned Uyghur political activists Kasim Mahpir, Ilyas Zordun, and Zulfikar Memet to the PRC, where they were executed.") (citing Amnesty International, China: Further Information on Torture/Health Concern/Unfair Trial/Fear of Execution (2000)).

[214] *Id*. at 4.

Islam in secret, and Pakistan offered a more tolerant environment for religious expression and education.[215] Starting in the 1980s, young Uighurs slipped across the Chinese border into Pakistan in order to obtain religious training that was not otherwise available to them with the strict controls in Xinjiang.[216] When these men returned to China, their expansive knowledge of Koranic theology allowed them great prestige within the deeply mystical Uighur communities.[217] This does not mean that Uighurs went into Afghanistan and Pakistan seeking education in radical Islam and training in terrorist practices against the United States.[218]

Because the Uighurs were not picked up on the battlefield in an act of hostility towards the United States, in order to be detained lawfully in the war on terror the United States had to show that the Uighurs were associated with al Qaeda or the Taliban.[219] At this point, the military tribunals evaluating the Uighurs' enemy combatant status deferred to the judgment of the State Department, and used the blacklisting of the ETIM as evidence that the Uighurs in GITMO were tied to international terrorism and al Qaeda.

ii. CSRT proceedings were used to further investigate the Uighurs, and the Government relied on the terrorist listing by the State Department to connect the Uighurs to al Qaeda

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[215] *See* CFR, Religion in China, http://www.cfr.org/china/religion-china/p16272 (last visited Dec. 20, 2011).

[216] DEVASTATING BLOWS, *supra* note 112.

[217] *Id*.

[218] In fact, several Uighur detainees were adamant about their friendly feelings towards the United States. *See* Eckholm, *supra* note 157.

[219] For more information about who can be detained under the laws of war and the limitations of the AUMF *see* Chris Jenks and Eric Talbot Jensen, *Indefinite Detention Under the Laws of War*, 22 STAN. L. & POL'Y REV. 41 (2011).

Challenging the adequacy of the CSRT process is beyond the scope of this paper; however, the insufficiency of the CSRT system drastically affected the Uighurs ability to challenge their enemy combatant status. One former JAG officer who participated in GITMO hearings stated, "What we purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence."[220] This statement rings true particularly when analyzing the evidence used against the Uighurs to confirm their enemy combatant designation. There were three pieces of evidence used in CSRT proceedings to connect Uighur detainees to al Qaeda, and thus authorize their continued detention under the AUMF—participation at an "ETIM training camp" in Tora Bora in Afghanistan, training with a Kalashnikov rifle, and the connection of the ETIM to al Qaeda as determined by the State Department. This evidence used to connect the Uighurs to international terrorism does not withstand scrutiny. Furthermore, it highlights the ease with which the terrorist designation made by the State Department can be, and most likely was, misused.

The US government used the existence of a Uighur camp in Afghanistan as evidence in CSRT determinations at Guantanamo Bay of an association between the ETIM and the Taliban or al Qaeda so close that the ETIM entity was "effectively part of the same organization."[221] However, this determination is problematic for several reasons. First, it was made based on a statement by a Uighur detainee who believed that the camp had been given to the Uighurs by the "Afghani Government," accompanied by

[220] Reply Brief of Petitioner, Affidavit of Stephen Abraham, Khaled Odah v. United States, No. 06-1196 (June 12, 2008).

[221] Parhat, 532 F. 3d at 845.

the known fact that at the time in 2001 the Afghani government was the Taliban.[222] However, as pointed out by the US Court of Appeals for the District of Columbia, which reviewed the CSRT determination, not all entities that received housing from the Taliban "government" in 2001 were associated with the Taliban.[223] Furthermore, there is evidence that the Uighur camp was in existence prior to the takeover of the Afghanistan government by the Taliban.[224] Detainee testimony about the training camp describes a desolate building, which most of the Uighurs simply considered a temporary respite on their flight from China to Turkey.[225] The majority of the Uighurs' time at the camp was spent rebuilding its dilapidated structure.[226] It is unlikely that a Taliban or al-Qaeda supported camp would be so poorly equipped, and would do such a poor job educating its trainees.[227] Moreover, the Uighurs at the camp had never heard of al Qaeda, and the sole detainee who claimed to know of a connection between the camp and al Qaeda later recanted this testimony. The Uighur camp was most likely a safe haven for desperate Uighurs seeking shelter in their flight from China. There is no evidence that it was funded by al Qaeda or the Taliban.

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[222] Parhat, 532 F. 3d at 845 (quoting FBI interview report dated July 19, 2003).

[223] For instance, orphanages and hospitals received property from the Taliban, as it was the acting government of Afghanistan. However, these organizations have not ever been charged of having been "associated" with the Taliban. *See* Parhat, 532 F. 3d at 845.

[224] Parhat, 532 F. 3d at 845 (citing Tribunal member's statement in the November 30, 2004 CSRT of detainee Abdul Semet).

[225] *See* Roberts, *supra* note 162, at 7.

[226] *Id*.

[227] *Id*.

A second piece of evidence used to connect the Uighurs with international terrorism was their use and training on a Kalashnikov rifle. The detainees described training activities to include running in the morning and a "one-time opportunity to fire a few bullets with the only Kalashnikov rifle that was available at the camp."[228] The charge, "[t]he detainee received military training on the Kalashnikov rifle," appeared in every Uighur summary of evidence for CSRT proceedings.[229] However, simple possession of a Kalashnikov rifle does not distinguish a civilian from a terrorist in Afghanistan and Pakistan, where the culture is permeated with Kalashnikov rifles and there is no exact count on the number of weapons in circulation.[230]

Finally, and most importantly for the premise of this paper, on several evidence summaries of Uighur detainees, a factor used to support the detention of the Uighurs was the fact that the State Department had listed the ETIM as a foreign terrorist organization. Though the listing is presumably limited to having financial and immigration repercussions, it was used as evidence to tie the Uighurs to al Qaeda. The CSRT hearings alleged in the summary of evidence memo that each Uighur was a member of the ETIM, the ETIM had been designated as a foreign terrorist organization by the Secretary of State due to its suspected ties to al Qaeda and Bin Laden, and thus the Uighur detainee was

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[228] *Id*.

[229] Moreover, the evidence against 39% of the detainees rests in part on the possession of a Kalashnikov rifle. DENBEAUX AND DENBEAUX, *supra* note 3, at 19.

[230] *Id*. (quoting Pakistan Mission to the United Nations (Feb. 6, 2006) ("Our economy has been suffering and continues to suffer because of the situation in Afghanistan. Rampant terrorism as well as the culture of drugs and guns – that we call the "Kalashnikov Culture" – tearing apart our social and political fabric – was also a direct legacy of the protracted conflict in Afghanistan.")).

properly classified as an enemy combatant.[231] Furthermore, the evidence sometimes cited the listing of the ETIM on the "Terrorist Exclusion List," and sometimes it cited the Secretary of State's listing of the ETIM as an "FTO."[232] As previously mentioned, the ETIM was never formally listed as an FTO by the Secretary of State, which requires a factual record before Congress; it was only listed as a terrorist organization through Executive Order 13224, and later §411 of the Patriot Act. The incorrect usage of the designation in the evidence summary illustrates two important points. First, it shows the ease with which a blacklisting can be used in a far more expansive and consequential way than mere financial sanctions. Second, it demonstrates how easily the various blacklists are confused, intertwined, and exploited—even by those who are extraordinarily educated and knowledgeable about the issue. It appears that a person viewing one of the State Department's blacklists—regardless of the exact name and purpose of the list, and notwithstanding the intelligence and position of the person—will psychologically align the group with al Qaeda, even if that was not the intent of the designation and the designation does not necessarily support that conclusion.[233] Understanding how easily the

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[231] OARDEC, Summary of Evidence for Combatant Status Review Tribunal, Bahtiyar Mahnut (Sept. 29, 2004) ("The Secretary of State has designated The Eastern Turkestan Islamic Movement (ETIM) as a Foreign Terrorist Organization (FTO)."), available at http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/ARB_Round_1_Factors_000295-000393.pdf (last visited Dec. 22, 2011); Summary of Evidence for Combatant Status Review Tribunal, Dawut Abdurehim (Nov. 10, 2004) ("ETIM is listed on the state departments terrorist exclusion list."), *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/csrt_arb/000300-000399.pdf (last visited Dec. 20, 2011).

[232] *See* Unclassified Summary of Evidence for Administrative Review Board in the Case of Bahtiyar Mahnut.

[233] Park, *supra* note 124, at 799.

scope of terrorist blacklists can be broadened and misused, and the significance it had in the case of the Uighurs, should prompt and encourage reevaluation of proper safeguards.

c. Had the listing procedures of EO 13224 included minimal due process protections, the travesty that occurred to the Uighurs could have been prevented

China abused counterterrorism framework in order to pursue a policy of discrimination against the Uighurs, a people the Chinese government finds politically undesirable. By relying entirely on Chinese intelligence for the improper political purpose of gaining a Security Council ally, the United States incorrectly designated the ETIM as a foreign terrorist organization under Executive Order 13224, and inappropriately supported a designation of ETIM on the al Qaeda Sanctions List through UN Resolution 1267. This sealed the fate of the twenty-two Uighur men who were mistakenly brought to Guantanamo Bay as enemy combatants where the terrorist designation by the Secretary of State was used to connect the Uighurs to al Qaeda in CSRT proceedings and justify their prolonged detention.[234] However had there been proper oversight, the ETIM might never have been blacklisted under EO 13224.

i. Requiring the US to make an evidentiary showing might have discouraged the government from making a designation with such faulty authentication

The purpose of due process is to ensure that the government acts with transparency and legitimacy. This can occur by first providing a structure that encourages

[234] Furthermore, the designation not only affected the Uighurs in Guantanamo Bay, but also led to an increase in human rights violations against Uighurs in Xinjiang. Because the PRC was able to use the U.S. designation as further justification of its "counterterrorism" tactics against the Uighurs in Xinjiang, the pretext allowed for hundreds of additional arrests and executions, as well as stricter religious and cultural controls. *See June 16 Uighur Hearing*, *supra* note 169 (testimony of Sean Roberts).

compliance with recognized norms, and second by providing access to judicial review to challenge the government when those norms are not fully respected. Had the US been required to make an evidentiary showing to Congress, it might not have followed through with listing the ETIM in the first place. This is illustrated by the decision of the United States not to list the ETIM under the FTO statute, 8 U.S.C. §1189 late in 2001.[235] Even when urged by the Chinese, the US did not have enough evidence to support the listing of the ETIM before Congress—and so it did not list it. Instead, the US later turned to a backdoor existing without the proper oversight and controls, and was able to impose similar sanctions and reproach without having to formally defend its decision. Arguably, had this loophole not existed, the US might have been forced to make a more full hearted effort to investigate the issue of the Uighurs and the ETIM, and at that point hopefully would have realized the extent to which the Chinese information was inaccurate. However, even supposing the State Department decided to present the deficient evidence to Congress in support of it blacklisting, there would have been a mechanism preventing the executive from abusing its authority for a political whim. When Congress examined the issue seven years later in a series of hearings, a bipartisan committee was appalled to discover the degree to which the Uighurs seem to have been taken advantage of in order to pursue a political goal. It is likely that even in the wake of 9/11 there would have been the same moral certitude to protect an oppressed minority from persecution and opportunism.

ii. Mistakes are inevitable, but as a country we must acknowledge them and learn from them—and in this instance the US must take advantage of this experience to correct the lack of due process that implicates serious human rights issues

[235] *July 16 Hearing*, *supra* note 193 (statement of Jason Pinney).

It is vital to learn from mistakes made in the past and to avoid repetition of them in the future. Because the case of the Uighurs proves that a blacklisting designation can have such serious repercussions, the listing scheme must contain protections to ensure accuracy and defend individual liberty. Simply labeling the blacklisting procedure "preventive" rather than "criminal" is not sufficient to avoid required basic human rights protection, when in reality the consequences of blacklisting can affect life and liberty. The designation of the ETIM did not merely put a hold on the financial assets and property of Uighur nationalists in the United States; it was used as evidence to detain a group of men guilty of no wrongdoing for years on end. However, with minimal oversight imposed on listing procedures this chain of events could have been prevented. Now is the time for the US to address the gaping holes in terrorist sanctioning framework, and ensure that what happened to the Uighurs because of the faulty designation of the ETIM does not reoccur. Luckily however, there is already a model in place in an existing blacklist, 8 U.S.C. §1189, that can provide the outline for minimal due process that should be expected in all terrorist sanctioning regimes.

IV. To maintain the integrity of terrorist blacklists, to avoid manipulation of counterterrorism framework, and to prevent improper designations and the resulting injustice that can occur, the listing of an organization or individual on any terrorist blacklist should require the minimum due process protections provided for in 8 U.S.C. §1189

a. §1189 finds the proper balance between the need for national security and diligent human rights protection

Terrorism is an international concern and must be opposed with multi-faceted solutions. Preventing the financing of terrorism is one essential mechanism to combat

international terrorism, and the FTO framework within the INA is a legitimate means to this end. This framework should be a model for all terrorist listings, in order to prevent a reoccurrence of the tragedy that occurred to the Uighurs in Guantanamo Bay.

i. §1189 allows for deference to the executive while requiring checks and balances on listing power to prevent misuse

The United States should tread carefully when accepting foreign intelligence as its sole source of evidence used to support the determination that an organization is connected to international terrorism—and one way to safeguard against the use of counterterrorism measures as a justification for persecution of politically undesirable groups is to require Congressional oversight of the factual findings needed for listing, such as is required in §219. Though Congress may not be the perfect fact-finding body, simply having a layer of review outside the designating body is crucial for maintaining legitimacy in the system. An elementary review of the evidence alleged against the Uighurs would have unearthed the degree to which it was uncorroborated and inaccurate. Had the government been required to put forth this evidence to support its terrorist determination, it likely would have declined to list the group at all, or it would have been challenged by Congress as it was years later.

The FTO framework makes allowances for confidential information and gives deference to decisions of the executive, but requires a minimal showing that the facts alleged against an organization are correct. As seen in the federal court system, this balance of oversight and deference is not an easy one to maintain; however, it is far superior to having no oversight at all. Moreover, §1189 contains procedures for the organization or individual to challenge the listing, and listings are reevaluated at periodic intervals.

Some might argue that because the repercussions of listing through Executive Order 13224 are less severe than under the FTO statute §219 of the INA, the standard of proof and review *should* be lower. However, as was shown in CSRT proceedings of the Uighurs, often the designation of an organization on any of the U.S. terrorist lists is interchangeable for the purposes of insinuating a connection to international terrorism. The stigma of being labeled a "terrorist group" by the State Department is equally great, regardless of which list is used. Because the risk of stigmatization is just as high, and the elements required for listing are the same, the standard of proof for listing an organization on the terrorist list under Executive Order 13224, or any terrorist blacklist, should be at minimum the same as required for §219.

ii. Requiring a higher standard of due process for listing will increase the legitimacy of the blacklists, which will increase effectiveness

National security and human rights are often viewed as in contention with each other, but the opposite is actually true. Strengthening human rights protections can increase the effectiveness of counterterrorism measures.[236] The same is true in the instance of terrorist blacklists—with stronger due process protections comes greater accuracy and legitimacy of the lists themselves, which will in turn make the entire

[236] *See generally* William Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249 (2004). The UN Global Counter-Terrorism Strategy, presented by former UN Secretary-General Kofi Annan and adopted unanimously by the UN General Assembly in 2006, is a reflection of the acceptance of this correlation between human rights and national security. The Strategy calls on states to deter terrorism with effective law enforcement and criminal justice, while vigorously defending human rights. *See* Kofi Annan, Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy, Report of the Secretary-General, U.N. Doc. A/60/825 (Apr. 27, 2006) ("[D]efending human rights runs like a scarlet thread through the report.").

counterterrorism mechanism more effective. Thus, as important as deference to the executive may be, ensuring thorough human rights protections is equally as vital.

b. The United States should include §1189 protections in EO 13224 and §411 of the PATRIOT Act; as well, it should join the international community in lobbying the UN to do the same for UN Resolution 1267

China used the existing counterterrorism framework to persecute an ethnic minority in Xinjiang, and the United States facilitated China in this process by using its domestic blacklisting procedure to designate the ETIM a terrorist organization on EO 13224 and by supporting the UN designation of the ETIM on the terrorist blacklist of UN Resolution 1267/1989. In order to correct these wrongs, the United States must first safeguard its own blacklisting mechanism from any future abuse. It must amend the procedures in EO 13224 and §411 of the Patriot Act to include the notice, hearing, and evidentiary requirements of 8 U.S.C. §1189. Although the United States cannot unilaterally change the standards for listing an organization on the al Qaeda Sanctions List under UN Resolution 1267/1989, it should recommend a similar fact finding requirement for listing at the international level. There is a small subset of the international community that has already lobbied the United Nations to consider this proposition,[237] and after correcting its own domestic blacklists the United States should put its full weight of support behind this action before the UN.

[237] Fassenbender, *supra* note 13. *See also* ODIHR DILEMMA, *supra* note 104 (A proposal for an "advisory panel" was submitted suggesting that an independent, impartial panel be appointed by the Security Council to hear non-confidential and perhaps even confidential information of state parties regarding to proposed listings. The panel would be governed by international law regarding fair procedure, will recommend de-listing where evidence does not justify listing, and will publish a summary report for the Security Council.).

Furthermore, not only should the United States ensure that an inaccurate listing does not occur again in the future, it should correct the erroneous listings that occurred in 2002. Although the U.S. has already removed the ETIM from its domestic terrorist list EO 13224, it should also formally condemn the UN listing of the ETIM that it supported in 2002. The US Ambassador Clark Randt stated, "[b]eing a valuable member of the coalition does not mean that China can use terrorism as an excuse to persecute its ethnic minorities,"[238] yet the US has not withdrawn its condemnation of the ETIM, or petitioned that the ETIM be removed from the UN al Qaeda Sanctions List.[239] Correcting the case of the Uighurs through encouraging de-listing of the ETIM from the al Qaeda Sanctions List, or at least suggesting independent investigation by a UN delegation is a necessary step in correcting the mistakes that were so detrimental to the liberty of the Uighurs. The United States should pressure China into providing more accurate information about their legitimate terrorist threats, and encourage the United Nations to facilitate an investigation into the alleged terrorist activities in East Turkestan by an independent outside commission.

With great power comes great responsibility,[240] and the United States should be leading the international community in diligent pursuit of counterterrorism measures that

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[238] DEVASTATING BLOWS, *supra* note 112 (citing United States-China Relations in the Wake of 9-11, Speech by Ambassador Clark T. Randt, United States Ambassador to China, The Asia Society, Hong Kong Jan. 21, 2002).

[239] *Id*.

[240] As President Franklin D. Roosevelt would have said after WWI, "Today, we have learned in the agony of war that great power involves great responsibility." President Roosevelt's Undelivered Jefferson Day Address, N.Y. Times, Apr. 13, 1945.

incorporate strong human rights protection. This includes admitting and learning from mistakes, and taking action to ensure they are never repeated.

Conclusion

President Bush echoed the concern of human rights advocates around the world when he stated, "[t]he war on terrorism must never be an excuse to persecute minorities."[241] Unfortunately, the case of the Uighurs in Guantanamo Bay illustrates how the abuse of counterterrorism framework can have severe repercussions on the life and liberty of innocent people. Because China took advantage of the post 9/11 atmosphere to target a politically undesirable minority, and the United States turned a blind eye to the lack of corroborating evidence in order to secure a political ally, a small innocuous organization was included on a high profile terrorist blacklist. Although this might have been originally intended as a purely symbolic gesture, the listing was used as evidence in CSRT proceedings to justify the detention of guiltless men. These men were held in captivity for years, and some have yet to be released to this day. However, basic due process protections in the blacklisting procedure could have halted this chain of ill-fated events.

Terrorist blacklists are a vital resource for an effective international counterterrorism policy, but the listings must be reliable. The listing schemes are considered "preventive" measures rather than criminal prosecutions, and thus have been

[241] U.S., China Stand Against Terrorism: Remarks by President Bush and President Jiang Zemin, Press Conference at the Western Suburb Guest House in Shanghai, People's Republic of China (Oct. 19, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011019-4.html.

formulated with negligible due process protections. However, the label given to these measures does not matter as much as the actual consequences that result from listing. The direct and indirect consequences of listing are severe, including property acquisition, restriction on individual movement, and in some extreme cases—such as the Uighurs—detention. Because this is the case, due process protections need to be included in the blacklisting structure. Due process safeguards are not incompatible with a terrorist sanctioning regime; incorporating reasonable human rights guarantees will make a sanctioning regime more credible and effective. The FTO statute in 8 U.S.C. §1189 has a detailed scheme that balances the need for oversight with appropriate national security protections and deference. This statute should be the model for all terrorist blacklists. Standardizing blacklists with baseline protections will prevent the government from picking and choosing a blacklist in order to avoid Congressional oversight, and will encourage more responsible use of this particular counterterrorism tool.

The case of the Uighurs is tragic, but not using the experience to correct the framework to prevent a similar occurrence in the future would be even more appalling. As Congressman Dana Rohrabacher stated in a Congressional hearing investigating the Uighurs, "Whatever human endeavor is made . . . mistakes will be made. If we don't admit our mistakes and we don't try to correct them, we are adding on to what was a mistake."[242] The United States can either continue adding to its mistake by leaving open a loophole for human rights abuse, or it can take the steps to ensure that its terrorist blacklists are maintained with the highest level of scrutiny and legitimacy. As seen

[242] *June 10 Uighur Hearing*, *supra* note 1 (statement of Congressman Dana Rohrabacher).

through the experience of the Uighurs, blacklists can affect more than just a bank account; they can cause the loss of life and liberty.