BLACKLISTING AS FOREIGN POLICY: THE POLITICS AND LAW OF LISTING TERROR STATES

MATTHEW J. PEED

INTRODUCTION

Among the various weapons in America's antiterrorist arsenal, one of the most intriguing and enduring is the State Department's list of state sponsors of terrorism. Conceived in the heady days of the 1970s,[1] the list is a mostly static group of seven countries designated each year by the secretary of state.[2] Although it has remained virtually unchanged from 1993,[3] the list commands more attention each year.[4] A who's who of rogue states, the release of the list along with the State Department's annual terrorism report engenders the ire of the condemned and the relief of the overlooked.[5] Perhaps for its

---

1. *See infra* Part I.A. (describing the origin of the list).

2. Until the U.S. invasion of Iraq in 2003, the list included Iran, Iraq, North Korea, Libya, Syria, Sudan, and Cuba. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003, at 85–92 (2004), *available at* http://www.state.gov/documents/organization/31944.pdf.

3. Sudan was added to the list in 1993. OFFICE OF THE

2003. *See* Presidential Determination No. 2004-52 of September 24, 2004, 69 Fed. R (Sept. 30, 2004) (directing the secretary of state to remove Iraq from the list of state s terrorism).

4. An August 28, 2005 Lexis database search for references to the terrorism li articles showed ninety-nine references from 1985 to 1990, 2,228 references for the 7,672 references for 2000 through 2004.

5. For a survey of world reaction to the State Department's 1999 report, see Fe Scientists, Patterns of Global Terrorism Report: "Terrorism's Changing Map," www.fas.org/irp/news/2000/05/wwwh0m23.htm (May 2000) (on file with the *Duke Law* The survey concludes:

> [S]ome found the document "fairly comprehensive" while others disagreed wi "methodology," complaining that its conclusions "avoided differentiating bet 'terrorism' and 'struggle'" and put "blackmailing terrorist gangs" on equal fo

promise of clarity and certainty, the list exudes a rhetorical power invoked by groups as diverse as observers of international politics[6] and producers of popular television shows.[7] With this increased attention have come new questions about the legitimacy of such a blacklist,[8] however, and the designation itself has been called more a question than an answer.[9]

Nevertheless, Congress continues to imbue the list with increasingly substantive legal implications.[10] These implications typically function as automatic triggers, kicking in whenever the secretary of state places a country on the list.[11] Such legal linkages might be appropriate were the secretary of state free from political pressures when determining which countries sponsor terror. In fact, however, the decision to place a country on the list is profoundly affected by necessary political compromises.[12] The proliferation of automatic consequences that it triggers raises the risk that the list will

---

> with "movements motivated by religious and nationalist incentives" . . . . Detractors contended that U.S. "strategic interests," particularly in the building of an oil pipeline in Central Asia, played a major role in the report's "categorization" of countries. Among the more positive assessments was a testimonial from a Lima daily that reported that Peru is finding ways to combat terrorism thanks to the report, which it said "is an example of how a well executed domestic policy can generate a positive foreign reaction."

Id.

6. *E.g.*, Marilyn Henry, *Campaign Under Way to Give Israel Seat on UN Security Council*, JERUSALEM POST, Sept. 24, 1997, at 5. Henry describes an advertisement sponsored by the American Jewish Committee and published in several international newspapers, which pled, "Why is it that [these seven nations], all cited by the U.S. State Department as sponsors of terrorism, are eligible to serve rotating terms on the Security Council, yet Israel, a democratic nation and member of the UN since 1950, is not?" *Id.*

7. *See, e.g.*, Press Release, American-Arab Anti-Discrimination Committee, NBC Reiterates, Rationalizes Slander Against Syria (Oct. 20, 1999), *at* http://www.adc.org/action/1999/20oct99.htm (on file with the *Duke Law Journal*) (quoting a letter from Rosalyn Weinman, Executive Vice-President of Broadcast Standards and Practices at NBC Television, to the American-Arab Anti-Discrimination Committee, responding to criticism over the fictional depiction of Syria as having, without provocation, shot down an unarmed American Air Force jet by noting that "quality dramas like 'The West Wing,' rely on verisimilitude in their storytelling. And given that Syria is on the official U.S. State Department list of countries that support terrorism . . . , the reference was fair for the program's use").

8. *See, e.g.*, PAUL R. PILLAR, TERRORISM AND U.S. FOREIGN POLICY 170–71 (2001).

9. *See* Keith Sealing, *"State Sponsors of Terrorism" Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT'L L.J. 119, 121 (2003) (analyzing the many questions surrounding the issue of "state sponsored terrorism").

10. *See infra* Part I.

11. *See infra* Part I.B.

12. *See infra* Part III.

leave a trail of political consequences in fields of law traditionally guarded from such considerations.

This has happened in at least one area. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[13] The act abrogated the sovereign immunity of countries on the terrorism list, and only of countries on the terrorism list, for certain crimes.[14] As a result, several countries have become embroiled in suits in U.S. courts, while others guilty of similar crimes remain immune.[15] Ironically, the more consequences that flow from inclusion on the list, the more politically calculating the secretary of state must be in crafting it. This further undermines the objectivity and legitimacy of the list. These constraints on the secretary's discretion not only lead to inequitable consequences in the courtroom, they ultimately breed ossification in the list. This threatens its utility and relevance in the political arena as well.

Reform is overdue. This Note examines the terrorism list in light of these interrelated problems. Part I explores the background and birth of the terrorism list as an extension of wartime economic sanctions policy and reviews Congress's significant enhancements of the list's consequences beyond the economic and diplomatic realm, principally through the AEDPA and post-9/11 legislation. Part II examines the fallout for the rule of law that results from the linking of an executive-determined and often politicized blacklist with the legal doctrine of sovereign immunity through the AEDPA. Finally, Part III proposes measures that could lessen the temptation to list states for political reasons, diffusing some of the list's externalities. By creating a more transparent, objective, and accurate list of countries sponsoring terrorism, the judicial inequities of the AEDPA and subsequent statutes can be mitigated. Moreover, a more accurate list will abate international cynicism over the list's political motives, ultimately strengthening the list as the legal and diplomatic tool it was designed to be.

---

13. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 28 & 42 U.S.C.).

14. 28 U.S.C. § 1605(a)(7) (2000).

15. *Compare* Saudi Arabia v. Nelson, 507 U.S. 349, 351 (1993) (finding that Saudi Arabia is immune from suits alleging torture), *with* Simpson v. Socialist People's Libyan Arab Jamahiriya, 180 F. Supp. 2d 78, 84–85 (D.D.C. 2001) (finding that Libya is not immune from a suit alleging false imprisonment and intentional infliction of emotional distress), *and* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 25 (D.D.C. 1998) (finding that Iran is not immune from punitive damages for acts of terrorism).

I. BIRTH AND EXPANSION OF THE TERRORISM LIST

A. Economic Sanctions and the Origin of the Terrorism List

The list of state sponsors of terrorism is primarily a product of the law of economic sanctions. During World War I, the U.S. first began to use economics sanctions systematically as a tool of foreign policy through the Trading with the Enemy Act of 1917 (TEA).[16] The Act allowed the president to declare a national emergency with respect to a country and comprehensively regulate financial transactions with that country. Eventually these powers were extended through the International Emergency Economic Powers Act of 1977 (IEEPA),[17] which allows the president to promulgate sanctions toward individual countries after first declaring a state of national emergency with respect to that country.[18] In addition to this "emergency" power, Congress also delegated to the president the power to regulate all foreign commerce as a tool of foreign policy through the Export Control Act of 1949 (ECA).[19] This act was intended as a temporary measure that would give the president substantial powers to deal with the post–World War II security threat.[20] The periodic renewals of the Act, beginning with the Export Administration Act (EAA) of 1969,[21] constitute the statutory basis of most economic sanctions.[22] During each lapse between renewals, the president has continued sanctions by declaring national emergencies under the IEEPA.[23]

---

16. Pub. L. No. 65-91, 40 Stat. 411 (codified as amended at 50 U.S.C. App. §§ 1-44 (2000)).

17. Pub. L. No. 95-223, 91 Stat. 1628 (codified at 50 U.S.C. §§ 1701–1706 (2000)).

18. Petra Minnerop, *Legal Status of State Sponsors of Terrorism in US Law*, *in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 733, 758 (Christian Walter et al. eds., 2004).

19. Pub. L. No. 81-11, 63 Stat. 7, 8–9 (1949).

20. *Id*.

21. Pub. L. No. 91-184, 83 Stat. 841, 845 (codified as amended at 50 U.S.C. § 2401 (2000)).

22. ROBERT D. SHUEY ET AL., CONGRESSIONAL RESEARCH SERV., NO. RL30169, CRS REPORT FOR CONGRESS: EXPORT ADMINISTRATION ACT OF 1979 REAUTHORIZATION, Summary (last updated Jan. 2, 2003) (available at www.au.af.mil/au/awc/awcgate/crs/rl30169.pdf).

23. *Id.* at 3–4. For examples of such renewals, see Exec. Order No. 13,222, 3 C.F.R. 783 (2002); Exec. Order No. 12,867, 3 C.F.R. 649 (1994); Exec. Order No. 12,730, 3 C.F.R. 305 (1991); Exec. Order No. 12,470, 3 C.F.R. 168 (1985); Exec. Order No. 12,444, 3 C.F.R. 214 (1984); Exec. Order No. 11,940, 3 C.F.R. 150 (1977).

When the EAA came up for renewal after the terrorist atrocities of the 1970s, an amendment was added that would become the main statutory authority for the list of state sponsors.[24] Section 6(j) of the act requires a license for the export of militarily relevant goods or technology to any country that the secretary of state determines has "repeatedly provided support for acts of international terrorism."[25] The section also requires the secretary to list the designated countries in the Federal Register[26] and submit a report to Congress before the designation is rescinded.[27] For a country to be removed, the secretary must certify that there has been a "fundamental change in the leadership and policies of the government of the country concerned," i.e., that a coup had occurred, or that the government has not provided any support for terrorism "in the preceding six months."[28]

Although the statutory basis of the terrorism list is not limited to Section 6(j), most of the economic consequences of being included on the list relate to a fabric of export restrictions that reference Section 6(j).[29] For example, under the International Security and Development Cooperation Act of 1985, the president has almost unlimited discretion to restrict or ban imports from countries on the Section 6(j) list.[30] Similarly, specific statutes have been enacted against certain countries on the list, creating presidential authority for severe sanctions.[31] Though these statutes do not depend upon the

---

24. *See* 50 U.S.C. § 2405(j) (2000).

25. *Id.* § 2405(j)(1)(A).

26. *Id.* § 2405(j)(3).

27. *Id.* § 2405(j)(4).

28. *Id*. This requirement seems almost comical today in light of the inability of many countries to extricate themselves from the list despite their repudiation of terrorism for many years. *See infra* Part III.A.

29. Minnerop, *supra* note 18, at 743.

30. 22 U.S.C. § 2349aa-9 (2000) ("The President may ban the importation into the United States of any good or service from any country which supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations.") The president has invoked this authority to enact restrictions against Iran and Libya. *See* Exec. Order No. 12,613, 31 C.F.R. § 560.201, 52 Fed. Reg. 41940 (1987) (Iran); Exec. Order No. 12,538, 3 C.F.R. 395, 50 Fed. Reg. 47527 (1985) (Libya).

31. *See, e.g.*, Cuban Liberty and Democratic Solidarity Act, Pub. L. No. 104-114, 110 Stat. 785, 815 (1996) (codified at 22 U.S.C. § 6021(2000)) (enacted to garner support for the transition to democratic government in Cuba); Iran-Libya Sanctions Act, Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C. § 1701 (2000)) (enacted to discourage contributions to Libya and Iran's military efforts); Syria Accountability and Lebanese Sovereignty Restoration Act, Pub. L. No. 108-175, 117 Stat. 2482 (2003) (codified at 22 U.S.C.S. § 2151 (West Supp. 2004)) (enacted to stop Syrian support for terrorism).

Section 6(j) list for their authority, they typically do not expire until the country is removed from that list.[32]

In addition to the trade restrictions applied by the 1979 amendments to the EAA, two other acts require the State Department to identify terrorist states as means of applying economic pressure to countries based on their support for terrorism. First, the Foreign Assistance Act (FAA)[33] prohibits U.S. agricultural aid, Peace Corps involvement, and Export-Import Bank assistance to countries identified by the secretary of state as state sponsors of terrorism.[34] These provisions were enacted in 1976 when human rights became more of a policy focus in U.S. foreign aid programs.[35] Second, the Arms Export Control Act restricts the sale of munitions to countries identified as supporting terrorism.[36] This act plays prominently in the multifarious sanctions concerning nuclear nonproliferation and state sponsors of terrorism.[37]

Although all three of these statutes presuppose a terror-sponsoring designation process and require that those designations be published in the Federal Register, none require the creation of an official list of state sponsors of terrorism, nor do they define either sponsorship or terrorism.[38] Rather, these provisions were added in a 1987 statute requiring the secretary of state to provide Congress with an annual report on worldwide terrorism that includes the list of states designated as state sponsors.[39] The statute provides a definition of terrorism to guide the report: "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[40] In the report, *Patterns of Global Terrorism*, the secretary of state must identify those countries which will be subject to the Section 6(j) and other sanctions, and thus compose the official terrorism list. Unfailingly, the annual release of

32. Minnerop, *supra* note 18, at 758.

33. 22 U.S.C. § 2371 (2004).

34. Minnerop, *supra* note 18, at 759–60.

35. *See* International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified at 22 U.S.C. §§ 2151–2796 (2000)) (adding the terrorism provision and detailing Congress's findings and preferences concerning human rights and terrorism).

36. 22 U.S.C. § 2780.

37. *See id.* (delineating prohibited transactions with countries on the terrorism list).

38. Minnerop, *supra* note 18, at 743.

39. 22 U.S.C. § 2656(f) (2000).

40. *Id*.

this report creates a regular media splash despite the unchanging nature of the list itself.[41]

B. The AEDPA and the Expansion of the Terrorism List's Legal Consequences

For most of its tenure, the terrorism list was limited in its effects to the core diplomatic areas of trade sanctions and aid restrictions. More recently, however, Congress has begun to link the terrorism list to more substantive legal classifications significantly removed from the diplomatic realm. The most significant enhancement of the list's consequences occurred with the passage of the AEDPA. The AEDPA references the terrorism list in several ways. First, the act makes it a crime for individuals to engage in financial transactions with countries on the list.[42] Second, it requires the U.S. to withhold FAA assistance even from countries that give foreign aid, loans, or subsidies to countries on the list.[43] Third, the act orders the U.S. missions to several international financial institutions to use the "voice and vote" of the U.S. to oppose any loan to terrorist-list countries.[44] This provision applies to U.S. representatives at the International Bank for Reconstruction and Development (the World Bank), the International Development Association, the International Monetary Fund, the Inter-American Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the African Development Bank, the African Development Fund, and any fund created after the statute's enactment.[45]

Although these provisions significantly increased the list's penalties, each follows the general principle of the terrorism list—no aid or trade for terrorism-list countries. The AEDPA went further, however, enhancing the terrorism list's import beyond these economic pressures. It did so by amending the Foreign Sovereign

---

41. *See* Fed'n of Am. Scientists, *supra* note 5, at 1 (discussing the "wide-ranging discussion" that the release of the 1999 report generated in Europe, Asia, and Latin America).

42. 18 U.S.C. § 2332d (2000).

43. 22 U.S.C. § 2377. For good reason, the president was given a waiver over this heavy-handed provision. Failing to include such a waiver would have created considerable diplomatic embarrassment, as even staunch allies may fail to see eye-to-eye on the terrorism list. *See, e.g.*, Sam Kiley, *France Training Sudan Intelligence Service*, TIMES (London) Sept. 13, 1994, at 1 (describing French military assistance to Sudan, a nation on the terrorist list).

44. 22 U.S.C. § 262p-4q (2000).

45. *Id*.

Immunities Act of 1976 (FSIA)[46] to allow U.S. citizens to sue countries on the list for acts of torture, extrajudicial killing, and terrorism.[47] Previously, the FSIA shielded even terrorist-list countries from suit for any action other than those falling into a narrow exception for commercial activity.[48] After the amendment, however, countries on the terrorism list could be sued for certain specified acts committed while the country was on the list, while nonblacklisted countries retained their sovereign immunity from litigation for the same acts.[49]

C. Post-September 11th Legislation

The legislative response to the 9/11 terrorist attacks has further added to the terrorism list's legal implications. For example, a provision of the USA PATRIOT Act[50] effectively equates nationals of terror-list countries with criminals.[51] The statute makes it a crime for any "restricted person" to transport or receive any biological toxin.[52] The statutory definition of "restricted persons" includes only persons convicted for serious crimes, fugitives of justice, drug users, the mentally ill, and aliens from countries on the terrorism list.[53] These aliens are also singled out for more special attention in the Enhanced Border Security and Visa Entry Act of 2002.[54] The Act prohibits aliens from states on the terrorism list from receiving immigrant visas unless the secretary of state, in consultation with the Attorney General, makes a specific finding that the alien does not pose a threat to national security.[55]

A survey of pending legislation indicates that the list continues to be a focus of congressional attention. Apparently unsatisfied with the Enhanced Border Security legislation passed in 2002, Representative

---

46. *Id.* § 1605.

47. *Id.* § 1605(a)(7)(A).

48. *Id.* § 1605; *see also* Tachiona v. Mugabe, 169 F. Supp. 2d 259, 270 (S.D.N.Y. 2001) (describing the history of the FSIA).

49. 28 U.S.C. § 1605(a)(7)(A) (2000).

50. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 412, 201–25, 115 Stat. 272, 350–52, 278–96 (codified in scattered Titles of U.S.C.).

51. Minnerop, *supra* note 18, at 758.

52. Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 175(b)(2) (2000)).

53. Minnerop, *supra* note 18, at 767.

54. Pub. L. No. 107-173, 116 Stat. 543 (codified in scattered sections of 8 U.S.C.).

55. 8 U.S.C. § 1735 (2000).

Barrett has proposed barring the admission of aliens from terrorist-list countries altogether.[56] After the uproar over Libya's chairing of the U.N. Human Rights Commission, Representative Fossella proposed a bill requiring the U.S. to withhold "contributions to any United Nations commission, organization, or [] agency that is chaired" by a terror-list country.[57] A similar sentiment is evident in a resolution put forth by Representative Crowley, calling for the U.N. to suspend the membership of any state on the terrorism list.[58] Although these pending bills may never be enacted, they do indicate the attractiveness of the list for congressional sloganeering and problem solving.[59]

II. PROBLEMS WITH GIVING THE TERRORISM LIST JUDICIAL CONSEQUENCES

Political jockeying has plagued the terrorism list; its history is replete with moves of questionable sincerity, creating classifications that are out of step with countries' practices.[60] Nevertheless, as Part I indicates, the consequences of the terrorism list continue to expand as Congress employs the list as a ready-made vehicle for counterterrorist initiatives. This creates its own problems in the political sphere, but it is especially incongruous with judicial principles such as consistency, transparency, and equality.[61] Given the tremendous political and diplomatic pressures surrounding the designation of a state as a sponsor of terrorism, the trend toward increasing the legal and judicial effects of the designation beyond the realm of foreign policy is therefore increasingly problematic.

In particular, Congress's decision to amend the FSIA to allow suits against state sponsors of terrorism has received heavy criticism. Although the aims of the AEDPA's amendment of the FSIA were to

56. Stop Terrorist Entry Program Act of 2003, H.R. 3075, 108th Cong. (2003).

57. H.R. 800, 108th Cong. (2003).

58. H.R. Con. Res. 293, 107th Cong. (2001).

59. *See* Mark A. Chinen, *Presidential Certifications in U.S. Foreign Policy Legislation*, 31 N.Y.U. J. INT'L L. & POL. 217, 269–71 (1999) (describing the congressional evasion of responsibility that makes certification requirements attractive).

60. *See infra* Part III (discussing the politically motivated delisting of Iraq, continued listing of North Korea and Cuba, and omission of Pakistan and Greece from the list).

61. *See, e.g.*, Richard A. Wasserstrom, The Judicial Decision 56–83 (1961) (identifying certainty, consistency, fairness, and equality as justifications for adherence to precedent).

compensate victims and deter terrorism countries,[62] many commentators have argued that it has done neither.[63] Others have noted that foreign-policy-by-litigation illegitimately grants judges and plaintiffs' attorneys a power that should reside in the political branches.[64] For example, by awarding damages out of the frozen assets of terrorist-list countries, judges limit the president's ability to use those assets to diplomatic ends.[65] There is also the potential for political friction caused by the pronouncement of judgments on foreign states, and political embarrassment when those states retaliate with similar trials arising from American actions.[66]

---

62. Allison Taylor, Note, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 552 (2003); *see also* Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 43 (D.D.C. 2000) (describing Congress's purposes in enacting the AEDPA); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 34 (D.D.C. 1998) (indicating that the purpose of the AEDPA is to deter acts of terrorism and to provide for punitive damages).

63. *See, e.g.*, Sean K. Mangan, Note, *Compensation for "Certain" Victims of Terrorism Under Section 2000 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payment at Institutional Cost*, 42 VA. J. INT'L L. 1037, 1067–68 (2002) (highlighting the failure of the AEDPA to achieve victim compensation); Taylor, *supra* note 62, at 534 ("In the years since the terrorism exception was added to the FSIA, it has accomplished neither compensation nor deterrence.").

64. *See, e.g.*, Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 460 (2001) ("The most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs . . . . These actors, however, have neither the expertise nor the constitutional authority to determine US foreign policy."); Daveed Gartenstein-Ross, Note, A Critique of the *Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 887 (2002) ("Because terrorism is a foreign policy problem, it is best dealt with by the political branches of government rather than by a wide array of courts and judges engaging in their own foreign policy experiments.").

65. The Clinton administration vigorously resisted congressional efforts to use Iran's $251.9 million in frozen assets to satisfy terror judgments. Taylor, *supra* note 62, at 546. These assets, the administration argued, are important diplomatic bargaining chips and necessary components of a flexible foreign policy. *Id.* Indeed, the release of frozen assets was critical in securing the release of U.S. hostages from Iran in 1981. *Id*.

66. *See, e.g.*, Sealing, *supra* note 9, at 121 ("Since there are many states that would consider the United States a state sponsor of terrorism, the United States should expect to be haled into diverse foreign domestic courts by victims of 'terrorists' funded and supplied by the United States."); Sean P. Vitrano, Comment, *Hell-Bent on Awarding Recovery to Terrorism Victims: The Evolution and Application of the Antiterrorism Amendments to the Foreign Sovereign Immunities Act*, 19 DICK. J. INT'L L. 213 (2000) (describing the AEDPA as opening a "Pandora's box"); Roger Parloff, *Sue Afghanistan!*, N.Y. TIMES BOOK REV., Dec. 23, 2001, at 9 ("Do we really want Chinese courts deciding whether the United States' unintended bombing of the Chinese embassy in Belgrade in 1999 was a violation of international law? Do we want Saudi courts opining on whether Israel engages in state-sponsored racism and terrorism?").

Although many of these criticisms apply generally to suits against foreign nations, the AEDPA presents several problems related solely to the use of the terrorism list in a judicial context, where principles of equality and uniformity should prevail.[67] First, by tying the subject matter jurisdiction of federal courts to the decision of the secretary of state, the statute invites foreign policy entanglement in the judicial process. Second, by using political criteria to determine which nations may be sued, the AEDPA fosters inconsistent treatment of similarly situated plaintiffs and defendants.[68] Third, by only allowing suits against specific countries, the statute encourages plaintiffs to stretch the bounds of plausibility in their pleadings to catch a state-sponsor of terrorism, warping the judicial process.[69]

A. Inconsistent Treatment of Defendants

Historically, sovereign nations were considered immune from the jurisdiction of the domestic courts of other sovereign nations. Whether expressed as a principle of right under international law,[70] or as merely a national exercise of comity and reciprocity,[71] the effect was to shield foreign nations from the ignominy of being haled into court before their equals. This long-standing custom came under pressure in the twentieth century, however, as contacts between nations increased exponentially and state-controlled industries greatly expanded into the commercial sphere.[72] This created a competitive disadvantage and the potential for injustice for private parties, because nationalized enterprises could hide behind the sovereign immunity defense in commercial or contractual disputes.[73] As a result, a new "restrictive theory" of sovereign immunity emerged[74] and had a

67. Wasserstrom, supra note 61, at 56–83.

68. Taylor, *supra* note 62, at 550.

69. *Id*.

70. *See, e.g.*, Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (holding that Germany, as a sovereign nation, could not be sued by plaintiff, a Holocaust survivor, in United States courts due to lack of jurisdiction).

71. *See, e.g.*, The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 147 (1812) (holding that an American vessel seized under a decree of Napoleon could not be reclaimed when it entered American territory because the schooner, while in U.S. territory, entered "under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country").

72. Tachiona v. Mugabe, 169 F. Supp. 2d 259, 270 (S.D.N.Y. 2001).

73. *Id.* at 271.

74. *Id*.

degree of success in the courts.[75] This theory considered nations to be immune from suits arising from public acts (*jure imperii*), but not those arising from private or commercial acts (*jure gestionis*).[76] The State Department, in a legal opinion that would come to be known as the "Tate Letter," adopted the restrictive theory in 1952.[77]

Although the Tate Letter acknowledged that such a shift in executive policy "cannot control the courts,"[78] the difficulty of navigating this public/private distinction eventually led courts to request "suggestions of immunity" from the secretary of state on a case-by-case basis.[79] These suggestions, filed with courts by the secretary of state, were almost universally followed by courts in their immunity rulings.[80] Because of political pressures facing the State Department, these suggestions sometimes produced embarrassing immunity determinations that sacrificed commercial interests to diplomatic goodwill and left courts without objective rules of law for determining immunity.[81] This inconsistency greatly frustrated jurists, sometimes prompting scathing opinions.[82]

In response to these developments, Congress passed FSIA, codifying the restrictive theory of sovereign immunity expressed in the Tate Letter.[83] FSIA's express purpose was to replace the

---

75. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 38 (1945) (denying immunity to a Mexican state-owned vessel under the control of a private party under contract with the government).

76. *Mugabe*, 169 F. Supp. 2d at 271 (discussing the absence of precedent in customary international law for granting immunity for a foreign sovereign's commercial acts).

77. Letter from Jack B. Tate, Acting Legal Adviser of the United States Department of State, to Philip B. Perlman, Acting Attorney General of the United States (May 19, 1952), *reprinted in* 26 Dep't State Bull. No. 678 at 984 (June 27, 1952).

78. *Id*. at 985.

79. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983).

80. *Id*.

81. *Mugabe*, 169 F. Supp. 2d at 271–72.

82. Justice Musmanno of the Pennsylvania Supreme Court summed up the feeling of many jurists with his dissent in Chemical Natural Resources, Inc. v. Venezuela, 215 A.2d 864, 893, (1966):

> The sovereign immunity doctrine . . . is no longer a healthy manifestation of society. It is, in fact, an excrescence on the body of the law, it encourages irresponsibility to world order, it generates resentments and reprisals. Sovereign immunity is a stumbling block in the path of good neighborly relations between nations, it is a sour note in the symphony of international concord, it is a skeleton in the parliament of progress, it encourages government toward chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud.

83. Letter from Jack B. Tate, *supra* note 77.

"considerable uncertainty"[84] of immunity decisions with "uniformity" by shifting responsibility for them from the foreign policy apparatus of the State Department to the judiciary.[85] Doing so, Congress felt, would "assure litigants that these often crucial decisions are made on purely legal grounds."[86]

In light of this purpose, the AEDPA's incorporation of the state sponsors of terrorism list into the FSIA is a significant departure from the purpose of the Act. It resurrects the State Department's ability to introduce highly political considerations into determinations of sovereign immunity, raising the very concerns Congress sought to avoid.[87] Although the provision ostensibly focuses on the most abhorrent crimes of the most stigmatized regimes, producing less embarrassing results than the case-by-case executive determinations of old, its tendency to undermine judicially appropriate principles such as objectivity and uniformity is no less real. As the heart of the U.S. foreign policy apparatus, the State Department must balance competing and often contradictory policy goals. Decisions over which countries to put on the list, no less than decisions to file "suggestions of immunity," are fraught with political considerations.[88] As a result, major allies are often spared inclusion despite their ties to terrorists,[89] while longtime enemies remain on the list despite scant evidence of state support of terrorism.[90]

B. Inconsistent Treatment of Victims

While disparate treatment of equally abhorrent regimes might not garner much sympathy, there is another problem with using the

---

84. H.R. Rep. No. 94-1487, at 9 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

85. *Id*. at 13.

86. *Id*.

87. *Id*.

88. For example, North Korea remains on the list largely as a bargaining chip for nuclear negotiations, while Cuba's presence on the list owes more to internal U.S. politics and the pariah status of Fidel Castro. PILLAR, *supra* note 8, at 161. Similarly, Pakistan, a U.S. ally, and Greece, a NATO member, have remained off the list despite their reported ties to terrorist groups. *Id*. at 179–84. Another political episode in the list's history is the removal of Iraq by the Reagan administration, discussed *infra* notes 222–30 and accompanying text.

89. *See* Nat'l Comm'n on Terrorism, Countering the Changing Threat of International Terrorism 25 (2000), *available at* http://www.gpo.gov/nct/nct9.pdf (urging the State Department to confront the failure of longtime allies Pakistan and Greece to combat terrorism).

90. *See* Council on Foreign Relations, Terrorism: Questions and Answers: Cuba, *at* http://www.terrorismanswers.com/sponsors/cuba.html (last visited Apr. 1, 2005) (on file with the *Duke Law Journal*) (describing the paucity of evidence of Cuban ties to terrorism).

list of state sponsors of terrorism as part of a legal regime: the potential for creating unprincipled distinctions between similarly situated plaintiff-victims.[91] Because the terrorism list is both over- and underinclusive—that is, it retains unfriendly states no longer engaged in terrorism while omitting allies that are—victims of state violence have unequal access to courts of justice. Ironically, a defendant, Libya, was the first to raise this argument as an equal protection challenge to the state-sponsored terrorism classification.[92] "[F]rom the plaintiff's point of view," Libya argued, "it is of no moment that the alleged torturer was a Saudi Arabian jail guard . . . or a Libyan jail guard."[93] As a constitutional argument, this challenge went nowhere. Because no fundamental right or suspect classification was implicated, the court dismissed the argument after applying rational basis review to the terror-list classification and finding that the list rationally related to the goal of preventing terrorism.[94] This conclusion is undoubtedly correct as a matter of constitutional doctrine. As a broader critique of the state sponsors of terrorism exception to the FSIA, however, Libya's rather self-serving argument merits attention.

Because the state sponsors of terrorism list is the only window for judicial scrutiny of the noncommercial, extraterritorial acts of states,[95] victims of nonlist states remain without a remedy under U.S. law, no matter how egregious the states' crimes may be.[96] This discrepancy leads to disparities between victims that are difficult to

---

91. Taylor, supra note 62, at 550.

92. Simpson v. Socialist People's Libyan Arab Jamahiriya, 180 F. Supp. 2d 78, 86 (D.D.C. 2001) (citing Def. Mot. to Dismiss). Libya had tried a similar equal protection argument in *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325, 330 (E.D.N.Y. 1998), but apparently misconceived the role of the terrorism classification as simply a jurisdictional predicate, urging strict scrutiny for the interference with its right to a fair trial. Iraq echoed the equal protection argument in *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 52 (D.D.C. 2000), but requested only rational basis review. In neither case does this particular attack on the classification make its way into the court's analysis, as it did in Simpson.

93. Simpson, 180 F. Supp. 2d at 86. This argument is more than mere rhetoric. In Saudi Arabia v. Nelson, 507 U.S. 349 (1993), the plaintiff was indeed the victim of torture at the hands of Saudi Arabian jail guards. Unlike the victim in *Simpson*, however, Nelson was unable to recover because the actions giving rise to the suit did not fit the FSIA's narrow commercial exception. *Id.* at 363.

94. Simpson, 180 F. Supp. 2d at 86.

95. 28 U.S.C. § 1605(a)(7), (e), (f) (2000).

96. *See* Jennifer A. Gergen, Note, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765, 770–71 (1996) (noting that FSIA offers the only exceptions to states' sovereign immunity).

justify. For example, while victims of slave labor camps in Nazi Germany cannot recover damages under the FSIA,[97] a plaintiff was able to receive a $7 million judgment against Cuba for the emotional trauma of being tricked into marrying a spy.[98] This disparity is particularly poignant given the paucity of evidence that Cuba still engages in state-sponsored terrorism.[99] It also highlights one of the strongest arguments against restricting the FSIA's exceptions to those states on the list: if the point of the list is to deter state acts of terrorism, why not allow recovery against all nations for terrorist acts? There seems to be no good reason to provide a cause of action for nonterrorism-related acts against terror-list countries, particularly ones that may have shed their terrorist ways, while preserving the immunity of nonlisted countries, even for acts of torture or terrorism.[100]

Interestingly, the FSIA exception can also discriminate among victims of the same terrorist state, depending on when the violation occurred.[101] The statute permits a cause of action only if the foreign state was designated a state sponsor of terrorism either at the time of the event that gives rise to the suit or directly as a result of that event.[102] Several of the original hostages held in Iran from 1979 to 1981 bumped up against this provision when they recently tried to recover under the AEDPA amendments.[103] Because Iran was not designated as a state sponsor of terrorism until 1984, the United States District Court for the District of Columbia dismissed the case

97. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1175 (D.C. Cir. 1994).

98. *US Court Exposes Cuban "Honey Trap,"* BBC NEWS, Mar. 10, 2001, *available at* http://news.bbc.co.uk/1/hi/world/americas/1212575.stm (reporting that a U.S. court awarded Ana Margarita Martinez $7 million in damages for being "raped" by her nominal husband, an alleged Cuban spy, every time they had intercourse).

99. *See* Council on Foreign Relations, *supra* note 90 (indicating that experts doubt that Cuba supports terrorism despite the U.S. government's belief that it does).

100. The plight of Scott Nelson in Saudi Arabia further underscores this inequity. After being arrested without charge, brutally beaten, kept hungry in a rat-infested jail, and forced to sign Arabic confession documents, Nelson was left without recovery of damages due to Saudi Arabia's immunity under FSIA. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 351 (1993) (dismissing claims due to lack of jurisdiction under the FSIA because the alleged acts were not based on a commercial activity as required under the statute). It is difficult to see how barring such a suit, while allowing suits against countries like Cuba, promotes counterterrorism policy.

101. Taylor, *supra* note 62, at 550.

102. 28 U.S.C. § 1605(7)(A) (2000).

103. Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 159–60 (D.D.C. 2002).

for lack of jurisdiction, finding the cause of Iran's listing too remote from the suffering of the hostages to qualify under the statute.[104]

C. Confusing Default Judgments and Warping of the Pleadings Process

Because only seven countries can currently be sued under the terrorism exception, a tremendous temptation exists for victims of terrorist attacks and their lawyers to search for any conceivable connection to one of the designated states.[105] This temptation is strengthened by the possibility of multimillion-dollar default judgments[106] and the sense of vindication that comes from holding someone accountable for unspeakable horrors inflicted against one's loved ones.[107] While state sponsors of terrorism should certainly be held accountable, the fact that virtually all of these states fail to offer defenses greatly increases the incentive for questionable claims.[108] This incentive can result in claims that truly stretch the bounds of plausibility.[109]

Because many foreign states do not defend these suits, there is no adversarial testing of evidence, and the plaintiffs need only convince a judge that the evidence is "satisfactory" to obtain a default judgment.[110] This raises the potential for erroneous rulings that distort

---

104. *Id.* at 161.

105. For example, several 9/11 victims have sued Iraq for the attacks, despite the lack of evidence of its involvement. *See* Smith v. Islamic Emirate of Afg., 262 F. Supp. 2d 217 (S.D.N.Y. 2003). Afghanistan, a more natural target, is immune under FSIA because it is not on the terror list.

106. *See* Gartenstein-Ross, *supra* note 64, at 505–06 (2002) (recounting that courts have entered "massive default judgments based solely on allegations" made against Iran in eight suits and citing relevant cases).

107. *See* Donna M. Balducci, Note, *American Taxpayers Bear the Burden of Beating Iraq in the Courtroom*, 31 HOFSTRA L. REV. 819, 842 (2003) ("The main objective of naming Iraq as a defendant is to make the country pay. Pay morally. Pay financially. Morally, in the eyes of the victims, Iraq will pay by being held accountable in an official setting . . . .").

108. *See id.* at 827 (recounting that Iran failed to appear in court in each of sixteen cases in which multimillion-dollar judgments were entered against it).

109. *See, e.g.*, Taylor, *supra* note 62, at 551–52 (describing a lawsuit filed by Judicial Watch against Iraq for the 1995 bombing of the federal building in Oklahoma City). The complaint, which alleges a conspiracy between Terry Nichols, Ramzi Yousef, and Iraqi agents, is available at http://www.judicialwatch.org/cases/86/complaint.html.

110. *See* 28 U.S.C. §1608(e) (2000) ("No judgment by default shall be entered by a court of the United States or of a State against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."); *see also* Editorial, Foreign Policy by Lawsuit, WASH. POST, Dec. 9, 2002, at A22 (noting that plaintiffs "need only convince a

the public's perception of events and create legal and diplomatic hurdles should U.S. policy toward the country shift. In one case, for example, the plaintiffs managed to "prove," in just two days of uncontested testimony, what the Bush administration still has not been able to demonstrate: a conclusive link between Iraq and the events of September 11, 2001.[111] The timing of the ruling, during a period of intense public debate over a recently launched war, was especially troublesome. Anyone unfamiliar with the nature of default judgments, or who simply read a headline reporting the outcome of the case, could easily misinterpret the ruling as a judicial endorsement of Iraq's complicity in the 2001 terrorist attacks.[112] Such misperceptions risk allowing the executive to cloak its policy arguments in the "neutral colors of judicial action."[113]

D. Separation of Powers Concerns

In theory, the nondelegation doctrine prohibits Congress from delegating excessive legislative authority to coordinate branches.[114] In practice, however, no congressional delegation of power has been struck down by the Supreme Court since the New Deal.[115] So long as the executive's discretion is constrained by an "intelligible principle," the Court will not overturn the delegation.[116] The laxity of this requirement is nearly impossible to overstate: the constraining principle can be something as malleable as "the public interest"[117] or a

judge that the evidence is 'satisfactory'" to secure a "windfall" when defendant states fail to appear).

111. Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 229 (S.D.N.Y. 2003) (finding "satisfactory" evidence that Iraq materially supported Osama bin Laden and al-Qaeda in their attacks on the United States).

112. Like a child's game of telephone, subsequent reporting can, in turn, increase the risk of misperception. *See*, *e.g.*, Patricia Hurtado, *Baghdad Liable for September 11: Judge*, SYDNEY MORNING HERALD, May 9, 2003, *available at* http://www.smh.com.au/articles/2003/05/08/1052280380297.html (reporting the court's "finding" that Iraq was complicit without explaining the nature of the default judgment proceeding or the minimal evidentiary threshold it requires).

113. Mistretta v. United States, 488 U.S. 361, 407 (1989).

114. For a general explanation of the doctrine, including its possible renaissance, see generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

115. *Id*. at 1723.

116. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

117. *See* N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (noting that the public interest is a legitimate criterion by which to evaluate delegation questions).

standard as subjective as "generally fair and equitable."[118] Thus, as a constitutional matter, the definition of terrorism provided by the list's reporting requirements[119] falls well within the scope of intelligible principles previously sanctioned by the Court, even if the list's members do not accurately reflect that definition.[120]

Does this end the inquiry? Regardless of the specificity of the guidance given the executive by a congressional delegation of authority, one might wonder whether all congressional powers could be so delegated. If there is a hierarchy of values, certainly the legislative power to define the scope of federal jurisdiction exists near the top. The Seventh Circuit expressed this view in construing a statute narrowly to avoid a constitutional problem: "[O]ne can readily distinguish between Congress' ability to delegate its commerce power over price controls during wartime and its ability to delegate a power as sensitive and central to our Anglo-American legal tradition as shaping a federal court's jurisdiction."[121] A similar position was expressed by the Eleventh Circuit, which took it as "axiomatic" that Congress could not delegate the power to any agency to strip federal courts of subject matter jurisdiction.[122]

This view of Congress's power to delegate has featured prominently in arguments by Libya and Iraq that the AEDPA's amendment of the FSIA is unconstitutional.[123] All four courts to hear the issue saw no need to reach its merits, however.[124] Because both Libya and Iraq were on the terrorism list when Congress passed the

---

118. *See* Yakus v. United States, 321 U.S. 414, 420, 426 (1944) (approving as "sufficiently definite and precise" the "generally fair and equitable" standard articulated by Congress for courts to use in adjudicating price control disputes under the Emergency Price Control Act).

119. *See supra* note 40 and accompanying text.

120. *See, e.g.*, *supra* note 88 (comparing reasons for including both North Korean and Cuba on the list).

121. U.S. v. Mitchell, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (internal citation omitted).

122. Miller v. FCC, 66 F.3d 1140, 1144 (11th Cir. 1995).

123. See Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 755, 762–63 (2d Cir. 1998) (stating Libya's argument that the AEDPA is an unconstitutional delegation of legislative power); see also Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 49 (D.D.C. 2000) (advancing the same argument).

124. *See Rein*, 162 F.3d at 764 (failing to find any delegation of power by Congress via the AEDPA); Simpson v. Socialist People's Libyan Arab Jamahiriya, 180 F. Supp. 2d 78, 86 (D.D.C. 2001) (finding no delegation by Congress as to whether the FSIA applied to Libya following the 1996 amendments); Daliberti, 97 F. Supp. 2d at 51 (finding no delegation of power with regard to Iraq's inclusion under the AEDPA); Price v. Socialist People's Libyan Arab Jamahiriya, 110 F. Supp. 2d 10, 13–14 (D.D.C. 2000) (finding no delegation by Congress as to whether the FSIA applied to Libya following the 1996 amendments).

AEDPA in 1996, these courts presumed that Congress specifically intended to strip these countries of their immunity.[125] As the *Rein* court explained, "No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya. . . . That jurisdiction existed the moment that the AEDPA amendment became law."[126]

Without deciding the issue, the *Rein* court nevertheless laid out a strong argument for the constitutionality of the provision.[127] It based its reasoning on two cases in which a factual determination by the executive controlled the court's jurisdiction: *Jones v. United States*[128] and *Matimak Trading Co. v. Khalily*.[129] In *Jones*, the court's jurisdiction over a criminal defendant turned on whether the island of Navassa was within U.S. territory.[130] Congress had delegated this determination to the secretary of state in the Guano Island Act of 1856.[131] In deciding whether it had subject matter jurisdiction, the court ruled that the secretary's determination of territorial jurisdiction settled the matter.[132] In *Matimak*, the court's diversity jurisdiction depended on whether the United States recognized one of the party's place of citizenship as a foreign state, a decision within the sole discretion of the executive.[133] Because the secretary of state had not recognized Hong Kong as a state, the court decided that it lacked jurisdiction.[134]

The *Daliberti* court approved of this analysis.[135] It noted that congressional-executive delegations have been ruled unconstitutional only twice in American history, "both in the same year and both involving delegations under the same statute, the National Industrial Recovery Act."[136] It also emphasized the determinative weight carried

125. *E.g.*, *Rein*, 162 F.3d at 764.

126. *Id*. Though followed by all three subsequent courts, this expedient reasoning suggests peculiar results. For example, does imputing to Congress the specific intention to target the then-existing sponsors of terrorism mean that Libya would remain subject to suit even if the secretary of state removed it from the list? Could Congress have intended the immunity exception as an eternal punishment for Libya's past sins of terrorism sponsorship?

127. 162 F.3d at 763–64.

128. 137 U.S. 202 (1890).

129. 118 F.3d 76 (2d Cir. 1997).

130. 137 U.S. at 211.

131. 48 U.S.C. §§ 1411, 1417 (2000); 137 U.S. at 209.

132. 137 U.S. at 217.

133. 118 F.3d at 83.

134. *Id.* at 86.

135. Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 50 (D.D.C. 2000).

136. *Id.* (quoting Milk Indus. Found. v. Glickman, 949 F. Supp. 882, 889 (D.D.C. 1996)).

by the secretary's "suggestions of immunity" before the enactment of the original FSIA.[137] The court made the ingenious argument that if it were constitutional for the secretary of state to determine federal sovereign immunity jurisdiction before the FSIA, Congress should be free to return that power to the secretary in individual cases.[138]

Although attractive, the path taken by the *Rein* and *Daliberti* courts betrays a subtle confusion of principles. Although the jurisdiction of the courts in *Jones* and *Matimak* did depend on a presidential determination of a factual situation, it was a *political* fact to which the secretary of state attested. In other words, the secretary was asked to characterize diplomatic policy on the recognition of a certain territory. Once that policy choice was made, the territory's legal personality and its relationship with the court were settled, and jurisdiction either adhered or evaporated.

This mirrors the longstanding practice of denying unrecognized states access to U.S. courts, which in turn depends on the Executive's recognition decision.[139] The Executive has near-total discretion over the doors to the courthouse in such cases, because it is the political body that determines the legal personality of the petitioner's sovereign existence.[140] As the Supreme Court wrote in *Pfizer Inc. v. India*,[141] "It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue."[142] Similarly, in head-of-state immunity cases, the secretary of state still has political discretion over whether to recognize the government under which a defendant is claiming immunity, which in turn determines the court's jurisdiction.[143] The court's role is simply to take

137. *Id*. at 49–50.

138. *Id*. at 50–51.

139. *See* Mary Beth West & Sean D. Murphy, *The Impact on U.S. Litigation of Non-Recognition of Foreign Governments*, 26 STAN. J. INT'L L. 435, 441 (1990) (describing nonrecognition as a bar to access for U.S. courts).

140. *Id*. at 441–42.

141. 434 U.S. 308 (1978).

142. Id. at 319–20.

143. *See, e.g.*, Lafontant v. Aristide, 844 F. Supp. 128, 130, 132 (E.D.N.Y. 1994) (holding, upon suggestion of immunity by the Department of State, that the Haitian president was immune from suit); Estate of Domingo v. Republic of Philippines, 694 F. Supp. 782, 786 (W.D. Wash. 1988) (concluding that a former Philippine president was not immune from suit where the Department of State had not renewed the suggestion of immunity after Ferdinand Marcos left office).

judicial notice of the executive-recognized political facts governing the situation.[144]

Incorporating such political facts into jurisdictional predicates is different from delegating the power to discriminate between two recognized governments based on policy prerogatives, however. In *Jones*, *Matimak*, and heads-of-state immunity cases, immunity (or jurisdiction) preexists as a legal category requiring only the filling in of certain political facts. In other words, "'[t]he President, by 'recognition' or its opposite, create[s] a general juristic field; the courts declare[] the effect of the existence of this field on 'standing to bring suit.'"[145] In contrast, the AEDPA's terror-list exception to sovereign immunity empowers the secretary of state to pick and choose which sovereign nations will enjoy immunity whether or not the recognized political facts governing their territory have changed. While this discretion may be constitutional, its legitimacy cannot be established by reference to the jurisdictional effects of presidential determinations that simply define the legal personality of the country before the court.

Nor does the existence of the pre-FSIA practice in which the secretary of state filed immunity suggestions with courts dispose of the argument. While the State Department had a say in the application of immunity doctrines in the era before the FSIA, its opinions were followed as a matter of judicial deference.[146] No constitutional or statutory requirement placed this power with the executive.[147] Rather, courts developed an independent common law view of restrictive immunity while almost always accepting the executive's characterizations of its politically charged particulars.[148] Under the AEDPA, however, the jurisdictional effects of the State Department's classification of countries as terror-sponsors occur not

144. West & Murphy, supra note 139, at 468.

145. *Id*. at 472 (quoting Charles Black et al., Petition for Writ of Certiorari, Nat'l Petrochem. Co. of Iran v. The M/T Stolt Sheaf, 860 F.2d 551 (2d Cir. 1988), *reprinted in* Mealey's Litigation Rep.: Iranian Claims, Feb. 3, 1989, at 10).

146. *See* Tachiona v. Mugabe, 169 F. Supp. 2d 259, 271–72 (S.D.N.Y. 2001) (acknowledging that courts "uniformly deferred" to Executive Branch suggestions as "conclusive," but noting that such determinations were not always based on consistent standards and created confusion and inconsistent judicial results).

147. *See id.* at 270–71 (discussing the deference accorded to Executive Branch determinations of immunity by courts and reviewing the development of common law doctrines supporting such judicial deference).

148. *Id*.

through a practice of judicial deference, but as a policy delegated by Congress to the Executive and binding on the Judiciary.[149] This policy, unlike the pre-FSIA common law tradition, impinges upon the "sensitive and central" issue of federal jurisdiction.[150]

The terrorism list is a unique situation in which the Executive can determine who may be sued in federal courts, not by the attesting of diplomatic facts that define a country's legally recognized status, but by the parsing of countries for political reasons otherwise unrelated to their standing before a court of law. Although the *Rein* and *Daliberti* courts, and others, took care to avoid reaching the issue, they do not chart a satisfactory path around the concerns of the Seventh and Eleventh Circuits that some powers may be too sensitive to delegate, regardless of the intelligibility of the principle that guides their use. If anything, their arguments demonstrate the difference between what the executive can and has always done, and the new power the AEDPA delegates to the executive to tailor federal court jurisdiction to its foreign policy interests.

III. MAKING THE TERRORISM LIST CONSISTENT AND EFFECTIVE

These problems highlight the perception of illegitimacy (or worse, false legitimacy) that can be fostered by tying legal consequences to a political list. The congressional trend is to increase rather than decrease the list's consequences, however.[151] In light of this trend, and to strengthen the list's ability to meet even its political goals, steps could be taken to at least minimize the political calculations that skew the list's results. While a list of such public prominence and political significance will perhaps never be generated with a detached and mechanized objectivity, many of the political problems that have frozen the list for over ten years could be solved, greatly enhancing its legitimacy as a diplomatic and legal tool. So long as the legal and political aspects of the list are linked, their problems must be solved together, or not at all.

The place to begin in reforming the list is the set of recommendations put forth by the heralded National Commission on

149. *See* 28 U.S.C. § 1605(a)(7)(A) (2000) (establishing process to designate state sponsors of terrorism for purposes of revoking sovereign immunity under the FSIA).

150. *See* United States v. Mitchell, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (distinguishing between a permissible delegation of Congress's commerce power and an arguably impermissible delegation of its power over federal courts' jurisdiction).

151. *See supra* Part I.

Terrorism (NCT), headed by Ambassador L. Paul Bremer.[152] The NCT was a ten-person, bipartisan commission created by Congress to comprehensively review U.S. antiterrorism policy after the devastating 1998 embassy bombings in Kenya and Tanzania.[153] The NCT report challenged Congress to redouble its efforts to fight terrorism, but to do so with smarter and more effective tools.[154] Namely, the NCT focused on the lack of dynamism and honesty in the list of state sponsors of terrorism, and the fact that competing policy objectives had prevented its use as an effective counterterrorism tool.[155] These criticisms have even been echoed by those responsible for administering the list.[156] These problems prompted the NCT and other observers to offer proposals for reform, including creating a separate list of lesser offenders[157] and decoupling the list from automatic sanctions.[158] Using objective fact finders to introduce accountability into the designating process could also promote accuracy in the list.

The aims of these proposals are largely the same: to utilize the stigma inherent in a blacklisting process while promoting the flexibility and honesty necessary for consistent and effective policy. This would not solve all of the problems of extrasanction consequences of the list, but it would make it more transparent and accurate, and, therefore, more legitimate as a judicial tool. Moreover, the list would likely become more useful as a counterterrorism tool. Presidents would be freer to add and remove countries from a lean blacklist than they would from a catch-all list laden with diplomatically demanding and potentially embarrassing jurisdictional consequences.[159]

---

152. Nat'l Comm'n on Terrorism, *supra* note 89, at iv–v.

153. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-210.

154. Nat'l Comm'n on Terrorism, *supra* note 89, at 23.

155. *Id*.

156. *See, e.g.*, *Countering the Changing Threat of International Terrorism: Report of the National Commission on Terrorism: Hearing Before the S. Foreign Relations Comm.*, 106th Cong. 27–33 (statement of Michael A. Sheehan, Coordinator for Counterterrorism, U.S. Department of State) (2000) [hereinafter *Changing Threat*].

157. Nat'l Comm'n on Terrorism, *supra* note 89, at 25.

158. *See* PILLAR, *supra* note 8, at 162–67 (discussing sanction policy in the context of state sponsors of terrorism).

159. *Id*. at 170–72 (discussing the international stigma associated with being placed on the list).

A. Using a Two-Tiered Approach

One of the most influential recommendations of the NCT was to seize upon an underutilized provision of the AEDPA as a means of applying pressure to nonresponsive governments.[160] The AEDPA amends the Arms Export Control Act to prohibit the sale of defense articles to countries "that the President determines . . . [are] not cooperating fully with United States antiterrorism efforts."[161] These determinations are independent of, but largely overlap with, the terrorism list: to date, only the seven official state sponsors of terrorism and Afghanistan under the Taliban have been designated as "not fully cooperating."[162] This likely reveals an institutional reticence within the State Department to attaching the stigma of the terrorist label to friendly nations, particularly given the sanctions that come with such a label.[163] This reticence, the NCT urged, must be overcome.[164] The "Not Cooperating Fully" label, the Commission wrote, "could be used to warn countries that may be moving toward designation as a state sponsor."[165] Moreover, such a label "could also be used as a 'halfway house' for states that have reduced support for terrorism enough to justify removal from the state sponsors list but do not yet deserve to be completely exonerated."[166] The NCT wasted no time in specifying Pakistan and Greece as candidates for the designation based on their substandard performance in counterterrorism efforts.[167]

The NCT's suggestion to use a lower-level list as a way-station for countries on their way onto or off of the "official" list won high praise from observers.[168] Such a list would inject much needed dynamism and honesty into the terrorism list. First, with regard to

---

160. Nat'l Comm'n on Terrorism, *supra* note 89, at 25.

161. 22 U.S.C. § 2781 (2000).

162. Gary Hufbauer, Barbara Oegg, & Jeffrey J. Schott, *Using Sanctions to Fight Terrorism*, Policy Brief 01-11, INT'L. INST. ECON. (2001), *at* http://www.iie.com/publications/pb/pb.cfm?ResearchID=79 (on file with the *Duke Law Journal*).

163. PILLAR, *supra* note 8, at 175 ("The objective is not to paint the regime as evil; that has potential only for angering it, not for improving its behavior.").

164. *See* Nat'l Comm'n on Terrorism, *supra* note 89, at 25 (recommending that the president should "make more effective use of authority to designate foreign governments as 'Not Cooperating Fully'").

165. *Id.* at 24.

166. *Id.* at 25.

167. *Id*.

168. PILLAR, *supra* note 8, at 173.

allies, it would help the State Department to overcome its reticence to call a spade a spade. The secretary of state could utilize the signal and stigma of categorization for important allies such as Pakistan, which nurtured and aided the Taliban,[169] without triggering an automatic wave of economic and legal sanctions that might jeopardize the relationship. The evidence suggests that giving such a formal warning could be effective. In December of 1992, the U.S. dropped hints that it might add Pakistan to the list of state sponsors of terrorism based on its support of Kashmiri guerrilla fighters.[170] The response was immediate. By January, Pakistan had ordered all Afghan Mujahedin offices closed, ending a fifteen-year relationship with the fighters.[171] Later that year, to demonstrate its commitment to international order, Pakistan endured significant casualties in unpopular peacekeeping missions against fellow Muslims in Somalia.[172] Pakistani cooperation would later lead to the arrest of Ramzi Yousef, believed to be the mastermind of the first attacks on the World Trade Center.[173]

Second, using such a "halfway house" would signal to countries on the terrorism list that such designations are not permanent. Giving states a clear look at how they might "graduate" off the list was a major focus of Mike Sheehan, President Clinton's Coordinator for Counterterrorism.[174] Doing so would help the U.S. to avoid the perception that it has a "once a terrorist state, always a terrorist state" policy.[175] This change will give countries on the list greater incentive

---

169. *See id.* at 162 (recognizing that Pakistan stays off the "official" list due to US interests in Pakistan and South Asia, and not because it has not fostered terrorism).

170. Gerald Bourke, W*ashington Ready to Brand Pakistan a Terrorist State*, GUARDIAN (London), Dec. 14, 1992, at 9.

171. Kathy Evans, *Pakistan Clamps Down on Afghan Mojahedin And Orders Expulsion of Arab Jihad Supporters*, GUARDIAN (London), Jan. 7, 1993, at 7.

172. Ahmed Rashid, *Pakistan Grieves for its Sepoys; Ahmed Rashid Explains Why Islamabad Cannot Afford to Cut its Losses and Pull Out of Somalia*, INDEPENDENT (London), June 8, 1993, at 15.

173. Gerald Bourke, *Arrest is Coup for Pakistan*, GUARDIAN (London), Feb. 10, 1995, at 11.

174. *See Changing Threat*, *supra* note 156, at 30 (statement of Michael A. Sheehan, Coordinator for Counterterrorism, U.S. State Department) (discussing the need to work with governments for this purpose and citing efforts with Sudan and North Korea).

175. PILLAR, *supra* note 8, at 171. The case of Sudan illustrates the difficulty that once-stigmatized countries have in getting off the terrorism list. After years of progress, Sudan was removed by the State Department from its list of countries "not cooperating fully" with counterterrorism efforts. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM (2005), *available at* http://www.state.gov/s/ct/rls/45392.htm. Yet the State Department maintains that "areas of concern

to cooperate, since countries may stop responding to the terrorism list if it appears that positive steps in counterterrorist policy will not be rewarded.[176]

Third, providing a clearer exit pathway off the list might also help temper the tendency of the executive to "hijack" the terrorism list for unrelated foreign policy goals, such as the promotion of human rights or nuclear nonproliferation.[177] In close calls, the executive will always be tempted to use extrastatutory criteria when certifying facts of any political magnitude.[178] It justifies such decisions, if at all, "by arguing that the substantive requirements of the certification have been met while, at the same time, asserting that other considerations weigh in favor of the certification."[179] The influence of these broader policy considerations can be seen by observing the prominence of Weapons of Mass Destruction (WMD) discussions in the annual Patterns of Global Terrorism reports put out by the State Department.[180] Most observers believe that countries like North Korea, which the State Department acknowledges is not known to have sponsored any terrorist acts since 1987,[181] remain on the list primarily as bargaining chips for the end-game of nuclear negotiations.[182] Sheehan has himself expressed frustration with interest groups in Congress that make it difficult to remove Cuba from the list, despite its renunciation of terrorism following the collapse of the Cold War: "I have told people on Capitol Hill, if you have a problem with Cuba on human rights, get your own sanctions,

---

remain" with regard to Sudan's terrorist activities and keeps Sudan on the list of state sponsors of terrorism. *Id*. The brief treatment of Sudan in the State Department's report does not explain how a country can simultaneously sponsor terrorism while cooperating fully with efforts to prevent it.

176. *Id*.

177. Barbara Slavin, *"Terrorist State" List Should be Flexible, State Official Says Targeting the Real "Troublemakers,"* USA TODAY, Apr. 13, 2000, at 14A (quoting Michael Sheehan).

178. Chinen, *supra* note 59, at 240–43.

179. *Id*. at 240.

180. *See, e.g.*, COUNTERTERRORISM OFFICE, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 2001, at 66–68 (2002), *available at* http://www.state.gov/s/ct/rls/pgtrpt/2000 (emphasizing the new threat of WMDs and criticizing North Korea for its nuclear activities); PATTERNS OF GLOBAL TERRORISM: 2003, *supra* note 2, at 87 (2004) (further highlighting the threat of WMD-terrorism through a special full-page section devoted to joint U.S.-European statement on WMDs).

181. COUNTERTERRORISM OFFICE, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1998, at 66–68 (1999), *available at* http://www.state.gov/www/global/terrorism/1998Report/sponsor.html#nk.

182. PILLAR, *supra* note 8, at 162.

don't use mine."[183] This pressure to keep countries on the list for extrastatutory reasons is further fueled by the all-or-nothing nature of the terrorism list and the significant sanctions attached to it.[184] Few other provisions of U.S. law confer the kind of pariah status that comes with being placed on the list.[185] Diffusing this list's consequences through use of a noncooperating list would help bring the terrorism list back to its original statutory purposes.

B. Decoupling the List from Sanctions

Although the NCT encouraged a deeper commitment to economic sanctions, some scholars believe that counterterrorism efforts might be more effective if the terrorism list were decoupled from automatic sanctions.[186] This view results in part from the decreasing willingness of the international community to engage in multilateral sanctions, and in part from pessimism about the power of unilateral sanctions.[187] In a landmark study of threatened or imposed sanctions, the Institute for International Economics determined that in 34 percent of cases sanctions made "a modest contribution to the goal sought by the [sanctioning] country and . . . the goal was in part realized."[188] The effectiveness of these sanctions dropped off dramatically after the 1970s, however, as the U.S.'s relative portion of the global economy decreased.[189] Only 24 percent of studied cases of sanctions initiated between 1973 and 1990 resulted in even partial success, despite the modest policy goals that usually motivated the sanctions.[190] When the sanctions involved "high" policy goals such as bringing about a major change in the policies of the target country, success was achieved in only three of thirty cases absent armed intervention.[191]

---

183. Slavin, *supra* note 177.

184. PILLAR, *supra* note 8, at 162.

185. *Id.* at 170–72. Professor Pillar refers to the terrorism list as "the atomic bomb of counterterrorist diplomacy." *Id*. at 172.

186. *Id.* at 173.

187. *See id.* at 169 (recognizing "cracks" in several multilateral sanctions regimes and difficulties with unilateral sanctions' effectiveness).

188. GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOT, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 33 (2d ed. 1990).

189. *Id*.

190. *Id*.

191. *Id*.

Tracing a causal link between sanctions and positive behavior by the sanctioned is difficult, particularly for countries on the terrorism list.[192] Most of these sanctions have been in place for decades, and other events may have had a much larger effect on the behavior of terror-list states than sanctions.[193] The collapse of the Soviet Union, for example, undoubtedly had more to do with the decline in Cuban adventurism than did any hope of persuading the U.S. to end its sanctions.[194] Sanctions have not led to a decreased reliance on terrorism by Iran and had little effect on the intentions of the Iraqi regime prior to its removal.[195]

Libya may be the best example of a concrete payoff from the terror-list sanctions.[196] For most of the 1990s, Libya faced a tightening noose of U.N.- and U.S.-sponsored sanctions imposed after its involvement in the explosion of Pan Am Flight 103, with little apparent effect.[197] Then, in 1999, Libya began to show a desire to end its international isolation.[198] First, after years of stonewalling, Libya agreed to extradite the Pan Am bombing suspects.[199] Then, following the 9/11 terrorist attacks, Libya pledged its support for the war on terror and declared al-Qaeda its enemy.[200] It later agreed to settle compensation claims with the families of the victims of Pan Am 103, opening the way for the lifting of U.N. sanctions.[201] Finally, it announced in dramatic fashion that it was ending its WMD program and that it would allow British and American arms inspectors to enter

192. *See* PILLAR, *supra* note 8, at 165 (noting that "it is impossible to measure accurately the effectiveness of sanctions that have been imposed to curb sponsorship of terrorism").

193. *Id*.

194. *See id*. at 166 (noting Cuba's penury caused by withdrawal of Soviet aid and the subsequent decline in its support for terrorism).

195. *Id*.

196. *See* Mark Matthews & David L. Greene, *Libya Agrees to Dismantle its Weapons Programs; Gadhafi's Surprise Move a Bid to Shed Sanctions, Terror Label*, SEATTLE TIMES, Dec. 20, 2003, at A1 (chronicling Libya's acknowledgement that it had pursued weapons of mass destruction and noting its decision to dismantle these programs).

197. *See* KENNETH KATZMAN, TERRORISM: NEAR-EASTERN GROUPS AND STATE SPONSORS 32–33 (Cong. Research Serv., RL 31119, 2002) (detailing sanctions).

198. Scott Peterson, *Trying to Shed Pariah Status, Libya Warms to West*, CHRISTIAN SCI. MONITOR, Sept. 13, 1999, at 7.

199. *See* KATZMAN, *supra* note 197, at 32 (reporting that Libya turned over two suspects in 1999 after several Security Council Resolutions).

200. *See id.* at 33 (indicating that Libya views al-Qaeda as a threat and that it has indicted Osama bin Laden).

201. *Id.*

the country to verify its commitments.[202] Still, as one scholar has noted, one must "distinguish[] between sanctions themselves and the more general opprobrium with which they are associated."[203] The latter may have as much to do with improved behavior as the former in the case of attention-hungry leaders such as Qaddafi.[204]

Even supposing that the terror-list sanctions have led to successes such as Libya, they exact a costly diplomatic toll that discourages the president from categorizing countries in a way that would trigger their application.[205] This toll includes greater friction with allies that might oppose sanctions, increased suffering by the nationals of terror-list countries, who may have no ability to change the regimes' policies, and a loss of business opportunities for one's own citizens.[206] Moreover, their high cost for the sanctioned country make them inappropriate for regimes that may be willing to cooperate in counterterrorism efforts yet still need to be called to account.[207]

A more nuanced approach to sanctions, such as one patterned on the NCT's textured strategy, might be preferable. The president might, for example, choose from a "menu of sanctions, such as denial of Export-Import bank assistance or U.S. Government procurement opportunities," rather than imposing them all at once.[208] Since designation as a state sponsor of terrorism itself acts as a lightning rod for world attention, discouraging foreign investment and assistance,[209] additional official sanctions could be used more judiciously. A menu of possible sanctions would give the president the ability to influence state sponsors of terrorism with carrots and sticks, rather than to impose an all-or-nothing label they are unlikely ever to shed.[210] Given

---

202. Matthews & Greene, *supra* note 196.

203. PILLAR, *supra* note 8, at 167.

204. *Id*.

205. *Id*.

206. *Id*. at 165.

207. *See id*. (suggesting an individually tailored approach to sanctions).

208. *See Changing Threat*, *supra* note 156, at 32 (statement of Michael Sheehan) (discussing the need to work with governments for this purpose and citing efforts with Sudan and North Korea).

209. *See* Bob Hepburn, *Regaining the Golan is Syria's Top Priority*, TORONTO STAR, May 9, 1993, at F2 ("Assad is desperate for the U.S. state department to remove Syria from its list of states that allegedly sponsor terrorist organizations. He feels that will give the green light to foreigners to invest in Syria.").

210. The all-or-nothing aspect of the terrorist label itself makes removal of countries difficult. As Professor Pillar notes, "It is politically hard to make any favorable gesture to any

the post-9/11 threat from non-state actors, enlisting the support of the terrorism-list countries through this menu approach is probably in the U.S.'s strategic interests.[211]

C. Using Independent Fact Finders

Many of the NCT's recommendations, especially those related to civil liberties and the role of the military in counterterrorism, were controversial when delivered.[212] After 9/11, however, they sound frighteningly prescient.[213] This illustrates the power of independent commissions to chart a path through the political haze that often clouds important decisions. One way for Congress to prevent the institutional erosion of the terrorism list and ensure that the designations remain accurate and effective might be to enlist independent fact finders in the process of creating the list. Such fact finders need not ride roughshod over political considerations, and indeed, ultimate decisionmaking authority would likely have to rest with the secretary of state. Establishing even a minor role for an independent voice in the designation process, however, would expose the political and legal compromises that inhere in the terrorism list. Should differences in opinion between the fact finders and the secretary emerge, pressure would build among Congress and the public for an explanation. A measure of accountability and transparency would thus be introduced into the process of designating states as sponsors of terrorism. Such accountability would convey the minimum level of legitimacy that should be expected to carry judicial consequences.

Just such a commission was established in a different context under the International Religious Freedom Act.[214] The act created a regime that roughly mirrors the terrorism list, authorizing the

---

regime that has long been labeled as embracing the evil of terrorism and about which considerable rhetoric and resources have been expended in countering the evil behavior." PILLAR, *supra* note 8, at 171.

211. *See* KATZMAN, *supra* note 197, at 41–42 (discussing selective engagement of terror-list countries).

212. *See* Franklin Foer, *Sin of Commission: How an Anti-Terrorism Report Got Ignored*, NEW REPUBLIC, Oct. 8, 2001, at 14 (describing hostile receptions to the Commission's report by both public interest groups and institutional security officers).

213. *See* Nat'l Comm'n on Terrorism, *supra* note 89, at iv–v (warning of a major terrorist atrocity on domestic soil and recommending increased military and law enforcement cooperation). Even the cover of the report, depicting the twin towers of the World Trade Center, proved to be "prescient." Foer, *supra* note 212, at 14.

214. Pub. L. No. 105-292, 112 Stat. 2787 (1998).

secretary of state to designate countries that trample religious freedoms as "countries of particular concern" (CPCs) and attaching certain economic sanctions when such designations are made.[215] Unlike the provisions creating the terrorism list, however, the act also established the Commission on International Religious Freedom (CIRF), which must produce an annual survey of religious freedom around the world and issue recommendations to the secretary for the designation of CPCs.[216]

Comparing CIRF recommendations with the final determinations of the secretary of state reveals just how political the secretary's judgments can be, even for such an unknown and technical designation as "CPC."[217] Each year it has existed, CIRF has urged the secretary to designate Saudi Arabia, Pakistan, Turkmenistan, and a dozen other U.S. allies as "countries of particular concern."[218] The CIRF commission was most vocal about Saudi Arabia, protesting the brutalities of the Saudi religious police and noting that the State Department's own reports indicate that in Saudi Arabia "[f]reedom of religion does not exist."[219] Indeed, the CIRF commission went so far as to hold hearings on whether religious intolerance in Saudi Arabia made the U.S. ally a "strategic threat."[220] Despite the CIRF's recommendations, however, the only countries designated by the secretary of state have hewed a safe and well-trod line: Burma, China, Iran, Iraq, North Korea, and Sudan.[221] It is hard to imagine such a discrepancy between recommendations and designations passing without scrutiny in a more contentious area such as national security and terrorism policy.

---

215. *Id*.

216. *Id*. § 202, 112 Stat. 2798 (1998).

217. *See id*. § 402(b), 112 Stat. 2802.

218. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT OF THE UNITED STATES COMM'N ON INT'L RELIGIOUS FREEDOM 7 (2003), *available at* http://www.uscirf.gov/reports/02May03/finalReport.050203.pdf; *see also Saudis Stay Off U.S. List of Nations Violating Religious Freedom: List Includes China, Iran, Iraq, N. Korea*, WORLDTRIBUNE.COM, March 7, 2003, *at* http://216.26.163.62/2003/ss_saudis_03_07.html (on file with the *Duke Law Journal*).

219. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT, (2003), *available at* http://www.state.gov/g/drl/rls/irf/2003/27185.htm.

220. *See Is Saudi Arabia a Strategic Threat: The Global Propagation of Intolerance*, Hearing of Commission on International Religious Freedom (Nov. 18, 2003) *available at* http://www.uscirf.gov/hearings/18Nov03/saudi.php3.

221. *See* Press Statement, U.S. Dept. of State, Designation of "Countries of Particular Concern" Under the International Religious Freedom Act (Mar. 5, 2003), *available at* http://www.state.gov/r/pa/prs/ps/2003/18302.htm (announcing the designation).

Had independent fact finders been present at the beginning of the life of the terrorism list, the most embarrassing, and ultimately, costly mistake of its tenure might have been avoided. Of the countries placed on the list, Iraq is the only country that has been removed based on the secretary of state's determination that it no longer sponsors terrorism.[222] Iraq has actually been removed twice from the list. The first time occurred in 1982 during a strategic tilt by the U.S. toward Iraq in the Iran-Iraq War.[223] By taking Iraq off the list, the Reagan administration freed it to receive billions of dollars in agricultural credits and sensitive military technology, developments that are credited with assisting its development of chemical weapons.[224] Documents emerged years later showing that the secretaries of state under both the Reagan and G.H.W. Bush administrations had knowledge of Iraq's continued support for and harboring of terrorists, including one of the most infamous terrorists, Abu Nidal.[225] Noel C. Koch, the Defense Department's director for counterterrorism programs at the time of Iraq's 1982 removal, stated in the *Washington Post* that "no one had any doubts about [Iraqi president Saddam Hussein's] continued involvement with terrorism."[226] "The real reason," for the removal, according to Koch, "was to help [Iraq] succeed in the war against Iran."[227] Indeed, just months after Iraq was removed from the terrorist list, Iraqi intelligence agents were implicated with Abu Nidal in the 1982 assassination attempt against Shlomo Argov, Israel's ambassador to the United Kindgom.[228] Nevertheless, the State Department persisted

222. PILLAR, *supra* note 8, at 169–70. The only other instance in which a country was taken from the list occurred when South Yemen merged into the more moderate Yemen. *Id*.

223. Michael Gaugh, *GATT Article XXI and U.S. Export Controls: The Invalidity of Nonessential Non-Proliferation Controls*, 8 N.Y. INT'L L. REV. 51, 84 (1995).

224. *Id*.

225. Elaine Sciolino, *U.S. Documents Raise Questions Over Iraq Policy*, N.Y. TIMES, June 7, 1992, at A1.

226. *At War, Iraq Courted U.S. Into Economic Embrace*, WASH. POST, September 16, 1990, at A1.

227. *Id*.

228. Lawrence Joffe, *Obituary: Shlomo Argov*, GUARDIAN UNLIMITED, February 25, 2003, *available at* http://www.guardian.co.uk/israel/Story/0,,902422,00.html; David Schenker, *Removing Syria from the List of State Sponsors of Terrorism: Between Peace And Counterterrorism*, WASH. INST. NEAR EAST POL. PEACE WATCH, #239, January 5, 2000, *at* http://www.washingtoninstitute.org/templateC05.php?CID=1930 (on file with the *Duke Law Journal*).

in a campaign to transfer high-technology goods to Iraq over resistance by the Pentagon and the Commerce Department.[229]

The blowback from this manipulation of the terrorism list came later, as the U.S. would engage in two wars against the Iraqi regime. The rationale of the latest war against Iraq demonstrates the ultimate political failure of the terrorism list. War was necessary, the administration urged, because of the attempts of the Iraqi regime to maintain and further develop weapons of mass destruction, combined with the threat that these weapons would be delivered to terrorists.[230] But it was the politicized decision to remove Iraq from the terrorism list that enabled it to receive military assistance that would lead to such weapons, while, at the same time, indicating that the U.S. would overlook its associations with terrorists. This is precisely the sort of executive overreach that certification requirements like the terrorism list were created to reign in.[231] Had there been an independent fact-finding voice, even a powerless commission, which could have called the State Department to account over its delisting of Iraq, some of this painful history might have been avoided. At the very least, the U.S. would have maintained pressure on Iraq over its terrorist ties and likely frustrated Iraqi attempts to develop weapons of mass destruction, while avoiding the hypocritical message sent to other countries, such as Iran, that strategic interests mattered more than terrorism.

CONCLUSION

The list of state sponsors of terrorism, like all tools of policy, suffers from the inconsistencies and minor hypocrisies sometimes necessary in the real world. Unless these hypocrisies are minimized and shielded from the domain of law, however, there is a real risk will that the aura and stature of the terrorism list will deteriorate, frustrating its objectives and undermining world support for accountability, transparency, and the rule of law. Although this Note has highlighted some of the legal challenges to Congress's use of the list to guide executive policymaking and deter state sponsorship of

229. Sciolino, *supra* note 225.

230. Press Release, Office of the White House Press Secretary, President Says Saddam Hussein Must Leave Iraq Within 48 Hours: Remarks by the President in Address to the Nation (March 17, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html.

231. Chinen, *supra* note 59, at 233.

terrorism, the list remains an essential component of the American counterterrorism arsenal. As that arsenal confronts the enormous challenges of the post-9/11 world, policymakers should reformulate the list as a more precise instrument for imposing sanctions and stigma, thereby avoiding the one-size-fits-all penalties that make it politically impossible to use the list against any but the most distasteful of pariah states.[232] If this can be accomplished, the list will move toward becoming a more objective picture of state sponsorship of terrorism, mitigating the legal inconsistencies it generates. It would also allow Congress to progress towards its goal of holding recalcitrant regimes, and the State Department, accountable.

232. *See* PILLAR, *supra* note 8, at 173 (detailing the benefits of both decoupling the terror-list and having a more individualized approach to sanctions).