

Economics of National Security: “Unfunding” Terror¹

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The discussion of how best to deprive terrorist organizations of funding is necessarily broad because of the numerous means people have devised to acquire and move funds for whatever purpose they intend. How seriously the United States takes this issue can be seen just in the number of statutory provisions that have been adopted and the diligence with which we update terror-associated lists that are aimed at depriving terrorists of funds. While it is clearly a matter of concern, the National Security Strategy’s treatment of this topic is very broad and is discussed only within fairly limited contexts. The muted language of the National Security Strategy (NSS) may simply be a realistic assessment of the difficulties we face in trying to dry up terrorist funding streams and the challenges of evaluating our efforts in spite of the fairly broad approach that has been undertaken in the past decade.

The two contexts within which the NSS raises the issue of depriving terrorist organizations of funds are countering al-Qa’ida specifically and, more generally, countering transnational criminal enterprises.² The NSS recognizes that terrorist organizations use criminal enterprises as a means of funding their activities and, although it only states that, “[t]he crime-terror nexus is a serious concern as terrorists use criminal networks for logistical support and funding,”³ making the connection between the two threats does imply that efforts to combat transnational criminal enterprises will have an ancillary dampening effect on terror financing. In contrast to the very general description of the target of efforts to counter transnational criminal activities, the NSS states its counter-terrorism objective very specifically as: “disrupt, dismantle, and defeat al-Qa’ida and its violent extremist affiliates in Afghanistan, Pakistan, and around the world.”⁴ With regard to this one terrorist enterprise, the NSS states that “[w]e also will strengthen our own network of partners to disable al-Qa’ida’s financial, human, and planning networks.”⁵ Although the NSS’s counter-terrorism objectives are stated only in terms of countering the al-Qa’ida enterprise, the system-wide mechanisms we choose to deprive al-Qa’ida of funding are not limited to use against that one target set. Even though it is contained within the section focused on countering al-Qa’ida, the NSS notes more generally that we are “coordinating better with foreign partners to identify, track, limit access to funding, and prevent terrorist travel.”⁶

A former Under Secretary for Enforcement in the Department of the Treasury described the counter-terror funding net we have cast as having five basic components: freezing terror related assets both domestically and internationally; implementing and enforcing regulatory systems to prevent terrorist abuse of the international financial system; implementing international standards on terrorist financing; prosecuting terrorist financiers and facilitators; and civil

1. See Jimmy Gurulé, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Northampton, MA: Edward Elgar Publishing, Inc., 2008). Jimmy Gurulé served as the Under Secretary for Enforcement in the U.S. Department of the Treasury during 2001-2003. While an obvious violation of basic English word formation rules the term “unfunding” is none-the-less communicative of the intent to deprive terrorist organizations of funding.
2. Barack H. Obama, *National Security Strategy 2010*, (Washington, D.C.: The White House, May 2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (accessed April 14, 2011).
3. Ibid., 49.
4. Ibid., 19.
5. Ibid., 21.
6. Ibid., 20.

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tort litigation by terror attack victims.⁷ All of these are quite logical and although it is relatively easy to assess whether we have established some capability to enable or carry out each component of the net, it is much more difficult to assess the economic impact of these components, individually or collectively, on terrorist organizations. Civil tort litigation by terror victims may be the most obvious example of the disparity between having a tool and reaping the desired result from its use.

Congress has provided a series of laws to enable terrorism victims to sue terrorists and terrorist supporters and seek monetary compensation for the damage inflicted. Initially targeting State sponsors of terror, Congress eventually also passed legislation to permit non-state sponsors to be held financially responsible for acts of terrorism. These laws provide victims a forum within which to seek justice and would ideally result in disgorging funds from terrorists and their supporters while simultaneously discouraging others from lending financial support to such acts of violence. The problem is how to satisfy any monetary judgment arising from such cases. Freezing terror related assets domestically provides a relatively convenient pool from which such judgments can be paid; however, freezing assets is a one use tool. Once assets within domestic jurisdiction are frozen it effectively caps the asset owner's liability as the owner is unlikely to subject any more assets to the freezing government's jurisdiction. This problem is further exacerbated, in the case of State sponsors of terrorism, by the executive branch's desire to use the same limited frozen asset pool. Tort cases against Iran illustrate these points.

In 1996, in order to allow United States victims of terrorism to file civil suits against certain State sponsors of terrorism, Congress amended the Foreign Sovereign Immunities Act (FSIA)⁸ with the Anti-terrorism and Effective Death Penalty Act.⁹ Numerous judgments against Iran were subsequently awarded under these provisions, totaling approximately \$380 million. However, the executive branch frustrated victims' efforts to enforce the judgments against Iranian State property held in the United States in part because frozen assets are useful leverage in resolving disputes and re-establishing diplomatic relations with the State that owns the assets.¹⁰ After several statutory amendments aimed at balancing the executive branch's concern for maintaining diplomatic leverage and Congress' desire to ensure the victims were paid, Congress eventually passed a measure that did both but ran counter to the original intent of holding Iran accountable. This law required the United States Treasury to satisfy the existing judgments against Iran using United States' funds and then seek reimbursement from Iran at some later date, absurdly making the United States the surety for Iranian sponsored terrorism in the amount of \$380 million.¹¹

In the nine years since 9/11, the executive branch slightly softened its stance and a series of legislative measures aimed at overcoming incremental, narrow interpretations by the judicial branch have resulted in fine tuning the law,¹² which now provides for a federal cause of action and remedy that permits compensatory and punitive damages to be awarded and satisfied by certain frozen Iranian assets. In spite of these efforts, Iranian frozen assets actually available can be measured in the tens of millions,¹³ whereas existing outstanding terror related judgments against Iran are approximately \$9.6 billion.¹⁴ Awards made under earlier provisions of law, such as the 2007 award of \$2.6 billion for the 1983 Marine barracks bombing,¹⁵ remain unpaid and may never be satisfied.¹⁶ A judge in one case noted with some degree of

7. Gurulé, *Unfunding Terror*, 6.

8. 28 U.S.C. §§1602, *et seq.*

9. *Antiterrorism and Effective Death Penalty Act of 1996*, Public Law 104-132, 104th Congress, April 24, 1996 <http://www.gpo.gov/fdsys/pkg/PLAW-104publ132/pdf/PLAW-104publ132.pdf> (accessed April 14, 2011).

10. Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism*, 7-18.

11. *Victims of Trafficking and Violence Protection Act of 2000*, Public Law 106-386, §2002, "Payment of Certain Anti-Terrorism Judgments," (106th Cong., October 28, 2000), <http://www.gpo.gov/fdsys/pkg/PLAW-106publ386/pdf/PLAW-106publ386.pdf> (accessed April 14, 2011). Codified at 22 U.S.C. §7101 *et seq.*

12. On November 26, 2002, the President reversed, in part, earlier executive branch obstructions by signing the Terrorism Risk Insurance Act (TRIA) into law, which made the frozen assets of terrorist sponsor States available to satisfy judgments. Public Law 107-297 (November 26, 2002), 116 Stat. 2322; see also 28 U.S.C. §1605A. "Terrorism exception to the jurisdictional immunity of a foreign state."

13. Office of Foreign Assets Control, U.S. Department of the Treasury, "Terrorist Assets Report: Calendar Year 2009." <http://www.treasury.gov/resource-center/sanctions/Documents/tar2009.pdf> (accessed April 13, 2011).

14. James P. Kreindler and Megan Wolfe Benett, *Finding Justice for Victims of State-Sponsored Terrorism*, Los Angeles Lawyer, Vol. 33, No. 5, July/August 2010, 18. <http://www.lacba.org/Files/LAL/Vol33No5/2724.pdf> (accessed April 14, 2011).

15. *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 37 (D.D.C. 2007).

16. James P. Kreindler and Megan Wolfe Benett, *Finding Justice for Victims of State-Sponsored Terrorism*, Los Angeles Lawyer, Vol. 33, No. 5, July/August 2010, 19.

empathy for the victims' families that, "these judgments are largely unenforceable due to the scarcity of Iranian assets within the jurisdiction of the United States courts."¹⁷

Early in its efforts to address State sponsors of terrorism, Congress also provided for a cause of action against non-state sponsors of terror.¹⁸ Until recently this statute has gone largely unnoticed, probably due to the focus on state sponsor cases, and unlike the state sponsor cases there have been very few cases litigated under this statute.¹⁹ Although these few cases have yet to result in any compensation being paid, the courts have found that banking institutions and charitable organizations that provide financial support or financial services to terrorist organizations can be held liable for harm inflicted by the terrorist organization. While civil causes of action do provide the opportunity to permanently deny funds to terrorist organizations, little suggests this has actually been the result because victims have faced, and will probably face, years of appeals before any money is actually paid on these judgments. As measured by judgments actually paid, the financial impact of these types of suits appears to be minimal thus far; however, the threat of civil litigation may be sufficient to discourage non-state institutions from assisting known terrorist organizations. This impact is speculative, and perhaps the most we can assess is that civil tort litigation may make it more difficult for terrorist organizations to move funds through institutions whose records are exposed to public scrutiny.

Seeking to expose more terror-associated funds to public scrutiny, the Treasury Department has undertaken a systems approach to implementing and enforcing regulatory systems to prevent terrorist abuse of the international financial system. This has been pursued in large part by regularly updating lists identifying individuals, groups and institutions as being terrorist-associated. The Foreign Terrorist Organization (FTO) list contains groups and organizations that have been so designated by the State Department in coordination with the Department of Treasury and the Attorney General.²⁰ FTO owned funds must be reported to the Treasury Department by United States financial institutions. The Specifically Designated Nationals (SDNs) list,²¹ which is maintained by the Treasury Department, includes the Specially Designated Global Terrorists (SDGT) list and both are updated in coordination with the State Department and the Attorney General. The Treasury Department has the authority to block assets of any SDGT as soon as it is so designated and has sought to target, as specifically as possible, terror facilitators. One recent example of very precise financial targeting was the addition of specific members of Iran's Quds force to these lists.²² In addition to blocking SDGT assets within the United States, the Treasury Department has expanded the impact of domestic financial sanctions by encouraging non-U.S. banks to avoid doing business with SDGTs. This method has been specifically employed against Iran, but there is no reason that it cannot be used against other specific targets. With respect to efforts specific to Iran, a *New York Times* article reported in 2008 that, "So far, more than 80 banks have curtailed business with Iran."²³ This unofficial sanctions scheme may be the most successful component of the counter-terror funding net because it broadly impairs Iran's ability to move funds across the international financial system but, as a July 2010 Government Accounting Office report to congress indicates, there are real challenges in assessing the true impact of sanctions individually or collectively.²⁴

Freezing assets domestically is easier to assess from the perspective that we know the value of funds that we have directly prevented a terrorist organization from using but the total value of frozen assets actually appears to be fairly low. For 2009, the Treasury Department reported a total of \$280 million in blocked assets belonging to the four named state sponsors of terrorism (Cuba, \$223.7; Iran, \$43.3; Syria, \$0; Sudan, \$13) and \$19.8 million in blocked

17. In re *Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 122 (D. D.C. Sept. 20, 2009).

18. *The Anti-Terrorism Act (ATA) of 1990*, codified at 18 U.S.C. §2331, *et seq.*, imposes civil liability not just on organizations and individuals who commit acts of international terrorism, but also on those organizations and individuals that enable such activities.

19. Most notably - *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008) (en banc).

20. Office of the Coordinator for Counterterrorism, United States Department of State, "Foreign Terrorist Organizations," November 24, 2010, <http://www.state.gov/s/ct/rls/other/des/123085.htm> (accessed April 14, 2011). Currently lists 47 FTOs.

21. Office of Foreign Assets Control, U.S. Department of the Treasury, *Alphabetical Listing of Specially Designated Nationals and Blocked Persons*. <http://www.treasury.gov/ofac/downloads/sdnlist.txt> (accessed April 13, 2011).

22. The Investigative Project on Terrorism, "State, Treasury Departments Hit Iran's Support for Terrorism," *IPT News* (August 13, 2010). <http://www.investigativeproject.org/2107/state-treasury-departments-hit-irans-support-for> (accessed April 14, 2011).

23. Robin Wright "Stewart Levey's War," *New York Times*, October 31, 2008. http://www.nytimes.com/2008/11/02/magazine/02IRAN-t.html?_r=3&pagewanted=1 (accessed April 14, 2011.)

24. Joseph A. Christoff, Director International Affairs and Trade, *Iran Sanctions: New Act Underscores Importance of Comprehensive Assessment of Sanctions' Effectiveness*, testimony before the Committee on Oversight and Government Reform, House of Representatives (Government Accounting Office, July 29, 2010).

assets belonging to “terrorists, terrorist groups, and terrorist supporters” of which \$11 million was identified as being al-Qa’ida affiliated.²⁵ Assessed from the perspective of our own national debt or even the DoD budget, these figures appear paltry; however, assessed from the perspective that the 9/11 Commission estimated that it cost al-Qa’ida between \$400,000 and \$500,000 to carry out the 9/11 attacks,²⁶ one may argue that by freezing the al-Qa’ida assets we may have prevented over twenty 9/11 scale attacks from being perpetrated. On the other hand, “[t]he CIA estimates that it cost [al-Qa’ida] about \$30 million per year to sustain its activities before 9/11, an amount raised almost entirely through donations.”²⁷ In that context, freezing \$11 million in a nine-year period appears much less significant.

Prosecuting terrorist financiers and facilitators is another area where it is a simpler matter to collect statistics than it is to assess whether those statistics are indicative of a dampening impact on terrorist financing. Compiling the statistics in this area is actually more difficult than one might think. The Department of Justice has published a list of just over 400 terrorism related convictions obtained between September 11, 2001 and March 18, 2010.²⁸ However, the list makes no attempt to classify the cases in terms of whether they are related to al-Qa’ida specifically or to Islamic extremism more generally. Moreover, the Department of Justice (DoJ) does not highlight terror finance related offenses and lists only two convictions where the “Prohibition Against Financing of Terrorism” (18 U.S.C. § 2339C) was charged.

While that appears a rather poor track record, the United States may be more successful in prosecuting terrorist financiers and facilitators than the DoJ chart indicates on its face. The New York University School of Law has undertaken a more in depth analysis of terrorism related prosecutions and lists a total of 828 ‘terrorism-associated’ indictments between September 2001 and September 2009 of which 593 had been resolved.²⁹ Of the 828 indictments, 127 (or 15%) include racketeering as a top charge, and of those, 101 cases have been resolved with an 82% conviction rate.³⁰ The reason racketeering charges may be a better metric to assess prosecutions of terror financing is because “racketeering or commercial fraud charges may be brought in terrorism financing cases or in connection to terrorism financing allegations.”³¹ It is reasonable; therefore, to assess the many racketeering convictions as a positive indicator of terror finance prosecution efforts even if, like the other components of our counter-terror funding net, it is difficult to assess the incapacitation or deterrent effect of such prosecutions.

Even though some of the “five basic components” of our counter-terror funding net lend themselves to certain metrics, it is clear that progress or overall impact is extremely difficult to evaluate. In the end, our efforts may not in fact “unfund” terrorism but may rather simply force terrorist organizations to flex their funding streams away from areas that we have managed to illuminate and thus target. Given that situation, the scope and the muted language of the National Security Strategy, as it pertains to our efforts to deprive terrorist organizations of funding, probably articulates and maintains reasonable expectations to merely “limit access to funding.”

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25. Office of Foreign Assets Control, United States Department of the Treasury, “Terrorist Assets Report: Calendar Year 2009.” <http://www.treasury.gov/resource-center/sanctions/Documents/tar2009.pdf> (accessed April 13, 2011).

26. National Commission on Terrorist Attacks Upon the United States, *Monograph on Terrorist Financing*, 27 (undated) http://govinfo.library.unt.edu/911/staff_statements/index.htm (accessed April 13, 2011). “Al Qaeda funded a number of terrorist operations, including the 1998 U.S. embassy bombings in East Africa (which cost approximately \$10,000), the 9/11 attacks (approximately \$400,000–500,000), the October 18, 2002, Bali bombings (approximately \$20,000), and potential maritime operations against oil tankers in the Strait of Hormuz (approximately \$130,000). The actual operations themselves were relatively cheap, although these figures do not include such “overhead” as training at camps, evaluation of trainees, and recruitment.” Ibid.

27. Ibid., 19.

28. United States Department of Justice, *National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions 9/11/01 - 3/18/10*, <http://www.fas.org/irp/agency/doj/doj032610-stats.pdf> (accessed April 14, 2011).

29. Center on Law and Security, New York University School of Law, “Terrorist Trial Report Card: September 11, 2001-September 11, 2009” (New York, New York University School of Law, January 2010), 1. http://www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan142.pdf (accessed April 14, 2011).

30. Ibid., 12.

31. Ibid., 8.