

ANTI-TERRORIST FINANCE IN THE UNITED KINGDOM AND UNITED STATES

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FOREWORD

This Article adopts a two-tiered approach: it provides a detailed, historical account of anti-terrorist finance initiatives in the United Kingdom and United States—two states driving global norms in this area. It then proceeds to a critique of these laws. The analysis assumes—and

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accepts—the goals of the two states in adopting these provisions. It questions how well the measures achieve their aim. Specifically, it highlights how the transfer of money laundering tools undermines the effectiveness of the states' counterterrorist efforts—flooding the systems with suspicious activity reports, driving money out of the regulated sector, and using inappropriate metrics to gauge success. This Article recognizes that both states consider the fight against terrorism to be partly military but also a matter of bringing certain democratic principles to bear. Critics have been quick to condemn some of the measures for their encroachments into civil liberties. My goal is not to measure the success of the laws according to any particular ideology but rather, accepting the governments' democracy-promoting goals, and the role these play in generating domestic and international support, to clarify which components do not appear to serve the states' aims.

I. INTRODUCTION

Preventing terrorist financial flows proves a nearly impossible task. The money comes from enterprises that range from legitimate businesses (e.g., taxi companies and donations to charitable organizations) to illegitimate activities like smuggling, intellectual property theft, and drug trafficking.¹ Terrorists move currency through complex wire transfers and unregulated alternative remittance systems. They physically carry it across international borders. They transfer cash into high value and hard to detect commodities—such as diamonds, tanzanite, and sapphires.²

1. See, e.g., FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES 2002–2003 (Feb. 14, 2003) [hereinafter 2003 FINANCIAL ACTION TASK FORCE REPORT]; THE ORGANISED CRIME TASK FORCE, ANNUAL REPORT 2005: SERIOUS AND ORGANISED CRIME IN NORTHERN IRELAND [hereinafter OCTF 2005 REPORT], available at <http://www.octf.gov.uk/index.cfm/section/publications/page/publicationList/viewArchives/true/month/Jun/year/2005>; JOHN ROTH, DOUGLAS GREENBURG & SERENA WILLE, NATIONAL COMMISSION ON TERRORIST ATTACKS AGAINST THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION, available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf [hereinafter STAFF REPORT]; Robert Block & Daniel Pearl, *Underground Trade: Much Smuggled Gem Called Tanzanite Helps Bin Laden Supporters*, WALL ST. J., Nov. 18, 2001, at A1; Thomas Catan & Michael Peel, *U.S. Suspects Al-Qaeda African Diamond Link*, FIN. TIMES (London), June 30, 2004, at 11; Douglas Farah, *Al-Qaeda Cash Tied to Diamond Trade*, WASH. POST, Nov. 2, 2001, at A1; Mark Huband, *Report Links Al-Qaeda with Diamond Trade*, FIN. TIMES (London), Apr. 17, 2003, at 8; *Pat Robertson Partner Charles Taylor Funded Al-Qaeda, Report Says*, CHURCH & ST., Feb. 2003, at 14.

2. See, e.g., Amelia Hill, *Bin Laden's \$20 M African "Blood Diamond" Deals*, THE OBSERVER (London), Oct. 20, 2002, available at <http://www.observer.co.uk/in/>; Robert Looney, *Hawala: The Terrorist's Informal Financial Mechanism*, 10 MIDDLE E. POL'Y 164 (2003); Ronald R. Wilson & D.E. Glanczand Jr., *Positive Trends in the Fight Against Money*

And the amounts involved may be nearly impossible to detect. The National Commission on Terrorist Attacks Upon the United States (September 11 Commission) estimated that the 1998 East African embassy attacks required just \$10,000. The 2002 Bali bombings cost al Qaeda only \$20,000. Despite the devastation caused by the September 11, 2001, attacks, the total amount spent on the actual operation ran between \$400,000 and \$500,000.³ Such estimates are hardly unique to al Qaeda: the Police Service Northern Ireland (PSNI) assesses the Provisional Irish Republican Army's (PIRA) entire running costs at just £1.5 million per year. The Ulster Defence Association, perhaps the largest Loyalist paramilitary group, requires only £500,000.⁴

Despite these difficulties, both the United Kingdom and the United States consider the interruption of terrorist finance one of their top priorities⁵—and with good reason: intercepting terrorist money may save lives. Diminished funds may reduce terrorist organizations' ability to recruit skilled members. As the average level of expertise of those

Laundering, AM. BANKER, June 25, 2004, at 12; Karen De Young & Douglas Farah, *Infighting Slows Hunt for Hidden Al-Qaeda Assets*, WASH. POST, June 18, 2002, at A1.

3. STAFF REPORT, *supra* note 1, at 131. This number excludes overhead costs, such as recruitment and training. For discussion of the limited value of money to terrorists, see REX A. HUDSON, *THE SOCIOLOGY AND PSYCHOLOGY OF TERRORISM: WHO BECOMES A TERRORIST AND WHY* 14–19 (1999); and Raphael Perl, *Terrorism, the Future, and US Foreign Policy*, Issue Brief for Congress IB95112, at 4 (Apr. 11, 2003). This is not to say that money plays no role in terrorism. See, e.g., *President's Fiscal Year 2000 Budget: Hearing Before the Subcomm. for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, of the Sen. Comm. on Appropriations*, 106th Cong. (1999) (statement of Louis J. Freeh, Director, Federal Bureau of Investigation), available at <http://www.fbi.gov/congress/congress99/freehct2.htm>; STAFF REPORT, *supra* note 1, at 144; JAMES ADAMS, *THE FINANCING OF TERROR* 165 (1986); SEAN O'CALLAGHAN, *THE INFORMER* 159–60 (1998); Mathew A Levitt, *War on Terrorism Scorecard*, MIDDLE E.Q., Summer 2002, at 39; THE AL QAEDA MANUAL, UK/BM-3, [E] 19/220, eng. trans., at UK/BM-22, available at http://www.usdoj.gov/ag/manualpart1_1.pdf (last visited Feb. 26, 2005) [hereinafter AL QAEDA MANUAL].

4. SELECT COMMITTEE ON NORTHERN IRELAND AFFAIRS, *THE FINANCING OF TERRORISM IN NORTHERN IRELAND, FOURTH REPORT OF SESSION 2001–2*, H.C. 978-1, Table 1, at 18 [hereinafter COMMITTEE ON NORTHERN IRELAND AFFAIRS, *FOURTH REPORT*]. In 1969 the Irish Republican Army (IRA) split into the Official IRA (OIRA) and PIRA. The latter became the main Republican paramilitary organization in Northern Ireland and is frequently referred to as the IRA. In this Article I distinguish between OIRA and PIRA, as well as later splinter groups from PIRA, such as the Real IRA.

5. See, e.g., President George Bush, Remarks on United States Financial Sanctions Against Foreign Terrorists and Their Supporters and an Exchange with Reporters (Oct. 1, 2001), in 37 WEEKLY COMP. PRESS 1364, cited in Pamela M. Keeney, *Frozen Assets of Terrorists and Terrorist Supporters: A Proposed Solution to the Creditor Collection Problem*, 21 EMORY BANKR. DEV. J. 301 (2004); U.S. DEP'T OF THE TREAS. & U.S. DEP'T OF JUSTICE, NATIONAL MONEY LAUNDERING STRATEGY 2 (2003) [hereinafter 2003 NATIONAL MONEY LAUNDERING STRATEGY].

involved in violence drops, groups may shift their emphasis to training instead of violent attacks.⁶

The problem is that the United Kingdom and the United States, two states driving international norms, have implemented anti-terrorist finance initiatives that undermine their security concerns. Yet legal and political analyses are few and far between, with historical accounts of the development of the law in both regions virtually nonexistent.

This Article thus takes a hard look at anti-terrorist finance in the United Kingdom and United States. Part II lays out the history of the law in both regions. Two cases provide the context: Northern-Ireland-related terrorism in the United Kingdom and al Qaeda threats to the United States.

Part II.A suggests that the Northern Ireland Executive, and later the U.K. government, maintained—but did not use—authority to interrupt the flow of funds to paramilitary organizations. The advent of the anti-drug campaign in the mid-1980s, however, brought with it greater state powers vis-à-vis criminal financial flows. These regulatory, forfeiture, and investigatory powers soon moved into the counterterrorist realm—where they expanded and intensified before seeping back into drug trafficking statutes. The September 11 attacks accelerated the trend toward ever greater state authority and catapulted the new counterterrorist regime into non-drug and non-terrorist-related offenses. The law moved from criminal law to civil law as a way to address criminal finance, weakening the burden of proof, the presumption of innocence, evidentiary rules, and the standards for determining guilt.

Part II.B shifts the spotlight to the United States. It demonstrates that, unlike the United Kingdom, the United States is a relative late-comer to the world of anti-terrorist finance. Prior to September 11, the U.S. administrative structure all but ignored this field. In the legal realm, it was only since 1995 that the Executive Branch maintained a Specially Designated Terrorist List—on which Osama bin Laden did not appear until 1998. The mid-1990s also saw the introduction of the Anti-terrorism and Effective Death Penalty Act. Outside of these regimes, however, as in the United Kingdom, the transfer of provisions from the drug war shaped the contours of U.S. policy. Post-September 11, the United States aggressively redirected its administrative, legal, and, to some extent, political agenda toward stemming terrorist finance. Title III of the 2001 USA PATRIOT Act, and the issuance of Executive Order 13,224 under the International Emergency Economic Powers Act (IEEPA), had a significant impact on individual rights. The latter action,

6. Ethan Bueno de Mesquita, *The Quality of Terror*, 49 AM. J. OF POL. SCI. 515 (2005).

in particular, reflects the Executive Branch's effort to avoid not just criminal law but the judicial system altogether in its efforts to prevent the flow of funds. In the process, the United States replaced a criminal law standard with an intelligence one: mere *links* to known terrorists became sufficient to "prove" financial support, and administrative procedures replaced judicial processes.

These domestic measures, however, are only part of the story. Part II.C concludes the first part of this study with a brief discussion of both states' efforts to drive the international agenda to advance anti-terrorist finance regimes. The United Nations, the Financial Action Task Force, and the European Union provide the primary vehicles. International measures are relatively recent, and because of the key role played by the United Kingdom and the United States in pursuing anti-terrorist finance initiatives, they reflect the approaches adopted by both countries within domestic bounds. This underscores the importance of the two case studies.

Part III turns to analytic considerations. Here, the way in which the law evolved on both sides of the Atlantic—through the transfer of money laundering regimes to anti-terrorist finance efforts—means that the programs did not grow within a realm sensitive to the unique challenges posed by terrorism. As a result, many measures have been either ineffective or counterproductive. Suspicious Activity Reports, sensitive to political considerations, now flood the systems, making it difficult to separate the wheat from the chaff. Stricter reporting requirements have driven money out of the regulated sector, making it harder to trace terrorist funds. The metrics for gauging success fail to set goals appropriate to counterterrorist efforts. Instead of measuring the number of entities blocked and the value of assets frozen, a better approach would focus on the number of convictions for terrorist offenses, the importance of individuals captured, the percentage of overall terrorist assets seized, and the number and level of operations interrupted.

A number of rights-based concerns also undermine the effectiveness of the current regimes. Part III.B, using the United States as an example, highlights the impact of the anti-terrorist finance measures on free speech, freedom of association, privacy, property, and due process. None of these rights are absolute: indeed, administrative and regulatory structures elsewhere have the ability to interfere with individuals' holdings. But anti-terrorist finance presents a unique case: the absence of intent, the use of secret evidence and *ex parte* hearings, and the stigma associated with terrorism change the quality of the seizures. Unlike drug laws, where possession may trigger asset forfeiture, less concrete accusations

establish terrorist association. Also of concern is the seepage of these measures into the broader legal and regulatory structure.

Outside of their impact on a broad range of entitlements central to the health of democratic states, rights considerations also carry practical consequences. Public perception, critical in any state's counterterrorist program, is not blind to the effect of counterterrorist measures on individuals. The alienation of domestic and international audiences carries important negative consequences for the ability to prevent a terrorist threat. Here, "black lists" play a particularly important role. These lack important safeguards to protect individual rights, and states and private actors alike have increasingly called their credibility into question. Simultaneously, the U.S. refusal to allow external review of the list formation process, even if justified (namely, by the need to protect intelligence sources), means the system is open to abuse from states who use the lists to stifle dissent. This runs counter to U.S. efforts to spread democracy and undermines other important national security concerns. This Article briefly mentions a possible alternative: the creation of lists that reward regions, states, or entities that prove particularly helpful in tracing terrorist assets; and it considers the importance of public communication and the recent success of the United Kingdom in this area.

The Article concludes by highlighting some of the most important challenges facing the antiterrorist finance regimes of both the United States and the United Kingdom. Terrorists are just now moving into the electronic realm. Efforts to police the Internet and e-commerce raise issues related to anonymity, the lack of barriers, and clandestine communication. Given the concerns highlighted throughout this Article, the wholesale transfer of money laundering tools to anti-terrorist finance should be treated with some skepticism.⁷

7. Lurking outside the specter of this inquiry is the question of whether the battle against terrorism is, indeed, "war." Certainly, in seeking to interrupt funding, both states appear to consider terrorism as a fundamentally different challenge than ordinary crime—even transnational criminal activity. Some arguably unique qualities do present themselves: it is difficult, for instance, to prove that foreign recipients of funds who are not subject to U.S. jurisdiction are engaged in terrorism. Terrorist suspects frequently change names or make it seem as though they are engaged in legitimate enterprises to secure funding. And a rapidly changing environment suggests that administrative processes, instead of legislative mechanisms, may be the most effective way to interrupt terrorist finance. I have tried to be cognizant of these challenges throughout the Article, so as to present the strongest arguments for the provisions introduced. With that said, however, I reject the proposition that the "war on terror" goes beyond these considerations—that it is a "war" in the traditional sense. For detailed discussion of this point, see Allen S. Weiner, *Law, Just War, and the International Fight Against Terrorism: Is it "War"?* (Center for Democracy, Development and the Rule of Law, Working Paper No. 47, 2005), available at http://cddrl.stanford.edu/publications/law_just_war_and_the_international_fight_against_terrorism_is_it_war/.

II. DEVELOPMENT OF THE LAW

Despite the emphasis on anti-terrorist finance on both sides of the Atlantic, precious little attention has been paid to the development of the law or the effectiveness of current measures. Yet understanding the history is critical to apprehending the shortcomings of the current regimes. Part II offers a narrative of British and U.S. efforts to grapple with terrorist finance. For the former, Northern Irish terrorism is instrumental. For the latter, al Qaeda proves pivotal. International bodies, through which both states drive global norms, echo the U.S. and British transfer of money laundering regimes to counterterrorist finance.

A. The United Kingdom

Contrary to popular belief, most of the money underwriting Northern Ireland terrorism comes from domestic operations such as robberies, tax fraud, and black taxis. Only a small amount derives from overseas organizations such as Noraid. In the late twentieth century, paramilitaries' shift to political activity increased their monetary demands. Ironically, even as they attempted to obtain political legitimacy at the negotiating table, these groups increasingly turned to organized crime to fund their ventures, creating a murky overlap between ordinary criminal activity and terrorist intent. This evolution has had important consequences in the British legal and administrative realm.

Turning to the state's anti-terrorist finance regime, it quickly becomes clear that an almost symbiotic relationship between anti-drug and anti-terrorist finance measures has emerged since the mid-1980s, leading to a steady expansion in the number and range of related offenses, investigatory authority, regulatory provisions, and powers of forfeiture. September 11 served not as a seismic shift but merely an acceleration of a preexisting trend. With the obscuring of the line between terrorism and ordinary criminal activity, many of the more extreme provisions transferred into broader efforts to prevent crime.

In this transition, the United Kingdom shifted its emphasis from criminal to civil standards, divorcing financial forfeiture provisions from conviction of any underlying offense. Simultaneously, the burden of proof, presumption of innocence, evidentiary rules, and the standards employed to determine guilt weakened. Perhaps of greatest concern is the recent lifting of client-attorney privilege attached to state investigatory powers in Northern Ireland. While the statutory instrument currently applies only to the province, the history of British anti-terrorist finance measures suggests such powers may someday extend throughout the United Kingdom.

1. Northern Irish Paramilitary Funding

The recent Northern Bank raid, and the United Kingdom's subsequent failure to recover the money, provides a stark example of one traditional source of Northern Ireland terrorist funds—and the difficulty of preventing their acquisition and transfer.

The story of the bank raid begins the evening of December 19, 2004, when the temperature hit an icy zero degrees Celsius. Armed men, posing as police officers, knocked at the home of a 23-year-old Northern Bank official. The intruders forced Chris Ward to go under guard to his supervisor's home while Ward's family stayed behind at gunpoint. The men arrived with Ward at Kevin McMullan's home in Loughinisland, County Down, where they took McMullan's wife away to a secret location. Acting on the kidnappers' instructions, on Monday morning Ward and McMullan arrived at work as usual. Toward closing time they sent a messenger and three employees home. Ward and McMullan then entered the vaults that serviced the bank's 95 branches across Northern Ireland. They stacked 24 boxes of money onto trolleys and wheeled them to a loading bay. Men in a white Ford Transit van with false registration plates met them and drove away with £26.5 million pounds sterling and over £1 million in euros and U.S. dollars.⁸

Nearly 50 police officers began working around the clock to find the culprits. In just over a fortnight, the police service amassed 560 exhibits and carried out 100 interviews. On January 7, 2005, the Chief Constable issued his interim report: PIRA, and would they please give it back?⁹

Surprisingly, they did. Not all of it, but a month later a "police officer" telephoned and directed the Ombudsperson to five shrink-wrapped £10,000 bundles stuck in toilets at the Newforge Country Club—a law enforcement sports association in south Belfast. Hugh Orde, the Chief

8. See Owen Bowcott & Ted Oliver, *£20m Stolen in UK's Biggest Bank Robbery*, THE GUARDIAN (London), Dec. 22, 2004, at 3; Alan Erwin, *Millions Stolen in Belfast Bank Raid*, THE INDEP. E-MAIL NEWSL., Dec. 21, 2004; Simon Hunter, *IRA Issues Bank Robbery Denial*, BELFAST NEWS LETTER, Jan. 19, 2005, at 5; Jonathan McCambridge, *We Didn't Botch our Job, Insists Detective; Police at Scene 5 Minutes After Alert*, BELFAST TELEGRAPH, Dec. 24, 2004; *Morning View: Lessons to be Learnt from this Huge Robbery*, BELFAST NEWS LETTER, Dec. 22, 2004, at 8.

9. See Derec Henderson, *Police Chief Blames IRA for £26m Bank Heist*, THE INDEP. E-MAIL NEWSL., Jan. 7, 2005; Jonathan McCambridge, *Rubbish Searched in Bank Heist Hunt; Police Sift Through Refuse at Council Site*, BELFAST TELEGRAPH, Dec. 31, 2004; Jonathan McCambridge & Maureen Colemann, *Bank Heist Swoop; Police Raid Home of Leading Republican*, BELFAST TELEGRAPH, Dec. 24, 2004; David McKittrick, *Blow to Peace Process as IRA Blamed for Bank Heist*, THE INDEP. (London), Jan. 7, 2005, at 14; *Police Say IRA Behind Bank Raid*, BBC NEWS, Jan. 7, 2005, available at <http://newsvote.bbc.co.uk>; *Robbery Probe Chief to Quit*, BELFAST NEWS LETTER, Mar. 17, 2005, at 7; Jonathan McCambridge, *West Belfast Target in Bank Heist Probe; More Premises Are Searched*, BELFAST TELEGRAPH, Dec. 30, 2004.

Constable, reflected, "I'm not particularly impressed . . . but I did ask them to give the money back."¹⁰

As the security services redoubled their efforts, Republican panic set in. Down in County Cork, a burnt bank note drifted over a garden wall. The suspicious neighbor alerted the Garda Síochána. Officers arrived to find someone shoving Northern Bank notes into a bonfire.¹¹ Across the Channel, reports began to circulate about efforts to buy English houses with Northern Irish currency.¹² And in March 2003, "a disproportionate amount of Northern Ireland sterling changed hands" during the four-day Cheltenham horse race festival.¹³ In the meantime, more than 100 Gardaí took part in Cork and Dublin raids, uncovering £2.3 million linked to a PIRA money-laundering ring. Unfortunately, it appeared to be the wrong one.¹⁴ As of the time of writing, investigators have established no formal link between this money and the robbery.

The Provos made a half-hearted attempt to distance themselves from the incident. PIRA issued the lengthy statement, "We were not involved," signed by P. O'Neill, the IRA's historical *nom de plume*. Ian Paisley, Jr., scoffed, "P. O'Neill obviously stands for Pinocchio O'Neill."¹⁵ The Irish Taoiseach, Secretary of State for Northern Ireland, United Kingdom Independent Monitoring Commission, Irish Garda Síochána, Northern Ireland Police Service, and, indeed, most members of Dáil Éireann and Westminster seemed to agree.¹⁶

10. Ian Graham, *Bank Raid Cash "Planted by IRA"*, BELFAST NEWS LETTER, Feb. 21, 2005, at 6.

11. See Andrew Anthony, *The Price of Peace*, THE OBSERVER (London), Mar. 6, 2005, at 20.

12. Angelique Chrisafis, *IRA "Laundering Stolen Cash in UK Housing Market"*, THE GUARDIAN (London), Mar. 30, 2005, at 7.

13. *Suspicion over Ulster Notes at Race Meeting*, BELFAST NEWS LETTER, Mar. 28, 2005, at 4.

14. Although the Republic of Ireland announced that the money "absolutely" came from the heist, only £60,000 worth of the bank notes even bore the bank's insignia. See Angelique Chrisafis, *Raids May Yield IRA Link to Robbery*, THE GUARDIAN (London), Feb. 18, 2005, at 2; Martin Hodgson, *The Editor: What They Said About . . . IRA Finances*, THE GUARDIAN (London), Feb. 21, 2005, at 18; Gemma Murray, *Notes "Absolutely" Linked to Bank Raid*, BELFAST NEWS LETTER, Mar. 3, 2005, at 4. *But see Minister Names MPs as Members of IRA Ruling Army Council*, BELFAST NEWS LETTER, Feb. 21, 2005, at 8; *Police Quiz Seven Over "IRA Cash"*, BBC NEWS, Feb. 18, 2005, available at <http://newsvote.bbc.co.uk>.

15. Hunter, *supra* note 8, at 5. See also *Don't Fall for Pinocchio O'Neill Lies, Says Wilson*, BELFAST NEWS LETTER, Jan. 20, 2005, at 9.

16. For the connection drawn by the government to Sinn Féin, see David Charter, *No.10 Urged to Cancel its Invitation to Sinn Féin*, THE TIMES (London), Jan. 21, 2005, at 31; Stephen Dempster, *IMC Must be Given Bite to Match its Bark*, BELFAST NEWS LETTER, Feb. 15, 2005, at 8; *Minister Names MPs*, BELFAST NEWS LETTER, Mar. 28, 2005, at 4; *Sinn Féin Leaders "Backed Raids"*, BBC NEWS, Feb. 10, 2005, available at http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4253627.stm; Ann Treneman, *Murphy He May Be, But He's Hardly Stout*, THE TIMES (London), Feb. 23, 2005, at 24.

The amount of money in the vault took everyone—including, apparently, PIRA—by surprise.¹⁷ The terrorists had a real problem: the entire annual operating budget of the organization throughout the 1980s and 1990s routinely came in under £5 million.¹⁸ Even multiple robberies each year (including three in Belfast earlier in 2004) comprised only a small portion of the total. Two immediate complications ensued: what to do with the unanticipated loot and how to withstand the assault from the security establishment on both sides of the border, awakened by the sheer volume involved. Of the £26.5 million, some £16.5 million were new notes, making them difficult to move without identification.¹⁹ As for the remaining £10 million, Northern Irish promissory notes proved more or less useless outside of the province: most commercial and retail establishments, even in Great Britain, refuse to accept them, forcing individuals to exchange them for legal tender at banks. And Northern Bank upped the ante: three weeks after the robbery, it announced the recall and replacement of £300 million in bank notes, with currency bearing a new logo, new colors, and different prefixes on the serial numbers.²⁰ Britain and Ireland initiated one of the largest investigations in either state's history. PSNI recovered the kidnappers' feces from McMullan's sewage system for DNA analysis and began pouring over hundreds of hours of closed circuit television footage.²¹ And the Northern Ireland Police Service decided not to retire more than 800 reservists as previously planned—ensuring continued scrutiny of PIRA.

Despite these drawbacks, however, in many ways the heist brilliantly played to PIRA's advantage. For one, its sheer audacity and apparent success—without loss of life—earned the grudging respect of both security forces and the mainstream media.²² “Gerry, Gerry give us a loan”

17. Anthony, *supra* note 11.

18. See, e.g., 106 PARL. DEB., H.C. (6th ser.) (1986) 423; See also JAMES GLOVER, DEFENCE INTELLIGENCE STAFF, NORTHERN IRELAND: FUTURE TERRORIST TRENDS (1978); ADAMS, *supra* note 3, at 131.

19. Within three days of the raid, police released the serial numbers on the £1.5 million. See McCambridge & Colemann, *supra* note 9; Jonathan McCambridge, *Stolen Note Alert*, BELFAST TELEGRAPH, Dec. 24, 2004.

20. Gary Anderson, *Two Arrested After Bank Notes Found*, BELFAST NEWS LETTER, Jan. 11, 2005, at 6.

21. Jonathan McCambridge, *The Northern Job: What We Need to Know*, BELFAST TELEGRAPH, Dec. 23, 2004.

22. See, e.g., *Morning View: Lessons to be Learnt from this Huge Robbery*, *supra* note 8, at 8 (reporting, “This was a very highly organized robbery in a league well above anything that has gone before in Northern Ireland.”); Alan Murray, *Query on Everyone's Lips: Why Wasn't an Alarm Triggered?*, BELFAST TELEGRAPH, Dec. 22, 2004 (leading off, “A heist on the scale of the Northern Bank robbery is the stuff of Hollywood movies.”) Within a week of the incident, Cliff Goodwin (an English author) and Justin Stanley (an American producer) had signed agreements to turn it into a book, *Spectacular*, and then a film. Goodwin announced, “As a writer, this is a tremendous story. I appreciate there are victims involved but I will make

turned up scrawled on walls in the North.²³ Republicans, feeling the weight of pressure for decommissioning, considered it a slap in the face of the British government.²⁴ Indeed, it had an immediate and profound impact on the peace process.²⁵ While it could be argued that the heist undermined the Republicans' position by portraying them as common criminals,²⁶ the sophistication of the raid and the resources it produced elevated them to a force to be taken seriously. The British government decided to interpret the raid as a sign of PIRA's capability, not intention.²⁷ In some ways 10 Downing Street did not have a choice: it needed Republicans at the negotiating table. Sinn Féin swept the April 2005 Northern elections, pushing the nationalist Social Democratic Labour Party (SDLP) efforts to capitalize on the heist aside.²⁸ In a crucial by-election south of the border, Sinn Féin *gained* 13 percent of the first-preference votes.²⁹ Simultaneously, for the first time since the drawing of the border in 1922, the Northern Ireland police and the Garda Síochána signed an agreement to exchange personnel, furthering PIRA's goal of an integrated Ireland.³⁰ Nor did the raid appear to dent Sinn Féin's fundraising ability abroad: Unionists' calls to halt EU PEACE II funding to the Republicans' constituents failed.³¹ Although Washington banned Gerry Adams from fundraising during his traditional March tour of the United

my book as accurate and interesting as possible." *Bank Raid Story to Hit Big Screen*, BELFAST NEWS LETTER, Feb. 1, 2005, at 4.

23. Angelique Chrisafis, *Sinn Féin and Dublin in Grudge Match*, THE GUARDIAN (London), Feb. 4, 2005, at 6. Gerry Adams, to whom the quote refers, is the President of Sinn Féin, the political arm of PIRA.

24. See, e.g., *id.*; E-mail exchange between Danny Morrison & Charles Moore, printed in Charles Moore & Danny Morrison, *Bite My Bullet: Take Two: Are Irish Republicans Really Committed to Peace, Charles Moore and Danny Morrison Thrash it Out*, THE OBSERVER (London), Mar. 5, 2005, at 21.

25. See, e.g., SIXTH STANDING COMMITTEE ON DELEGATED LEGISLATION, HOUSE OF COMMONS, Session 2004–2005, Column No. 16–23 (2005). See also Anthony, *supra* note 11; David McKittrick, *supra* note 9, at 2.

26. See, e.g., SECRETARY OF STATE FOR NORTHERN IRELAND, OFFICIAL REPORT 2005, H.C. Vol. 429, Column No. 429; Henry McDonald, *Man Questioned over Bar Killing*, THE OBSERVER (London), Feb. 27, 2005, at 3; *Sinn Féin Has to Renounce Crime: Party Financing Must be Above Board*, THE OBSERVER (London), Feb. 20, 2005, at 28.

27. SIXTH STANDING COMMITTEE ON DELEGATED LEGISLATION, *supra* note 25, at Column No. 23.

28. *Id.* Column No. 8; *Public "Must Not Pay Cost of Raid,"* BELFAST NEWS LETTER, Jan. 10, 2005, at 5. But see Angelique Chrisafis, *Election 2005: Sinn Féin Likely to Tighten Grip in SDLP Heartlands*, THE OBSERVER (London), Apr. 20, 2005, at 7.

29. Henry McDonald, *IRA "Untouchables" Still Out of Reach: Witnesses Remain Silent on the Murder of Robert McCartney as His Sisters Carry on their Fight for Justice*, THE OBSERVER (London), Mar. 13, 2005, at 6.

30. Ian Graham, *Irish Police Officers to Cross the Border*, BELFAST NEWS LETTER, Feb. 21, 2005, at 5.

31. *Northern Raid Raised in Euro Cash Debate*, BELFAST NEWS LETTER, Jan. 11, 2005, at 9.

States (and disinvented him to the White House St. Patrick's Day party), this temporary slap on the wrist appears to have been just that.³² And, as of the time of writing, the only money from the heist that has resurfaced is the £50,000 deliberately placed in the toilets of the police officers' club.

This heist and the subsequent unfolding of events illustrate the difficulties of preventing terrorist groups from obtaining and transferring funds. Multiple soft targets exist. In a nationalist conflict fought over state legitimacy, the political costs of robbing the state, or multinational corporations, may be low. Sympathizers may see such operations as victimless. Weaknesses in the private sector's recordkeeping may make it difficult to recover assets. And the movement of funds across international borders may create jurisdictional and administrative difficulties, exacerbated by inconsistent domestic legal structures. These issues are particularly pronounced in the U.S. context, where al Qaeda acts as a transnational force. As Part III.B suggests, hawala banking, the use of religion to facilitate financial exchanges, interregional smuggling and trade, and the emergence of a global Arab and Islamic media make the international nature of groups linked to the al Qaeda network particularly important. Even Northern Irish terrorist groups are beginning to operate on a global scale. These developments suggest the importance of a more comprehensive strategy for interrupting terrorist finance.

a. Domestic Sources of Money

Raids like the one on the Northern Bank, while a traditional form of paramilitary funding, are far from the only option. In the early twentieth century, the Irish Republican Army (IRA) also robbed in-transit services, bookmakers, retail establishments, and post offices.³³ It exacted fines from the local population.³⁴ And it solicited ("voluntary") donations.³⁵ Branches of Republican groups in Great Britain funneled money back to

32. See *Crack Down*, THE TIMES (London), Mar. 3, 2005; *Sinn Féin's Challenge*, THE TIMES (London), Mar. 16, 2005, at 19.

33. See, e.g., *House of Commons*, THE TIMES (London), June 3, 1921, at 6; *Irish Bank Robbers Sentenced*, THE TIMES (London), June 22, 1926, at 7; *Bank Messenger Robbed, Thieves' Escape with £2,000*, THE TIMES (London), June 24, 1936, at 18; *The Free State Election: Sectional Interests*, THE TIMES (London), Aug. 11, 1923, at 10.

34. See, e.g., *DeValera's Telegram: Sinn Féin Defence*, THE TIMES (London), Oct. 27, 1927, at 10.

35. In 1934, for instance, the organization attempted to run the "Cambridge Sweep" to raise proceeds for the paramilitary movement. The tickets featured a picture of a soldier in a green IRA uniform trampling on the Union Jack, with the General Post Office in Dublin, the site of the 1916 Easter Rising, burning in the background. *Sweepstake Tickets Seized: Irish Republican Army Scheme*, THE TIMES (London), Aug. 24, 1934, at 14.

the island.³⁶ And prominent Republicans traveled to the United States to raise money.³⁷

The terrorist demand for financial resources, at least in the early to mid-twentieth century, was not a constant; on the contrary, following the Civil War in the South, only three Republican campaigns emerged. This changed, however, with the dawning of the Troubles in the late 1960s and the assumption of Direct Rule by Parliament. For the next three decades, violence on both sides of the sectarian divide raged. With the growth of paramilitary organizations came the diversification of funding streams. The number of armed robberies and the percentage they contributed annually to paramilitary coffers declined: extensive sentences specifically for terrorist-related robberies and modern forensic techniques (which made it easier for the police to identify the culprits) increased the risk to those engaged in such operations. Simultaneously, protection rackets made paramilitary robberies on their own turf somewhat of a moot point. This led to more sophisticated forms of organized crime.³⁸ Already in control of local communities, paramilitaries used their power to make more money, which reinforced their social and economic dominance—while undermining their claims to be engaged in political, not criminal, pursuits.³⁹ Tax fraud, extortion, drinking clubs, black taxis, smuggling operations, drug trafficking, and kidnapping opened new revenue streams. This section briefly discusses each.

i. Tax Fraud

In the 1970s, the Official Irish Republican Army (OIRA), and later PIRA, moved into building site fraud using tax exemption certificates. Forged documents (costing between £3,000 and £13,000 on the black market), allowed the organizations to pocket a 30 percent income tax by

36. See, e.g., *Irish Deportees: Hearing of Further Claims*, THE TIMES (London), Jan. 15, 1924, at 8.

37. *Mr. Eamon DeValera: The Embodiment of Irish Nationalism*, THE TIMES (London), Aug. 30, 1975, at 14. See also *O'Brien's Defence*, THE TIMES (London), July 3, 1923, at 16. Between 1820 and 1920, approximately five million Irish left the "Emerald Isle" for Boston, Providence, New York, Philadelphia, and elsewhere. This community proved to be a rich source of funds for the fledgling Republican movement. *Irish Look Back from America*, THE TIMES (London), Mar. 18, 1959, at 11. Even as late as 1940, the Irish government was "certain that large sums of money in dollars were coming in from America" to regenerate Republican coffers. *Public Safety in Eire: Emergency Powers Demanded*, THE TIMES (London), Jan. 4, 1940, at 8. See also *Irishman With an Iron Cross: Alleged Funds for the I.R.A.*, THE TIMES (London), June 22, 1940, at 3.

38. NORTHERN IRELAND AFFAIRS COMMITTEE, THE FINANCING OF TERRORISM IN NORTHERN IRELAND, 2001–2, H.C. 978-I, at 5.

39. See Christopher Walker, *Provisional IRA Man Dies in Parkhurst After Hunger Strike*, THE TIMES (London), June 4, 1974, at 1; Christopher Walker, *Three IRA Men at Albany Begin Hunger Strike*, THE TIMES (London), Apr. 11, 1974, at 2.

making it look like building companies passed work on to subcontractors. By the time Inland Revenue caught up with the last company in the chain to collect the taxes owed, it turned out that the operation, generally registered to a dead person, did not exist. Given the three-year window for each falsified certificate, the relatively inefficient state administrative structure, and the persistent bureaucratic bias that such schemes represented fish too small to fry, PIRA frequently used the same certificate for a number of fraud schemes. Toward the end of the decade, the Ulster Defence Association (UDA), a Loyalist paramilitary, also moved into the business. By the mid-1980s fraud from the tax exemption certificates had grown to approximately £40 million per year. Some £10 million of this appears to have been divided between Republican and Loyalist paramilitaries. In addition to tax fraud, both sides ran social security schemes, with workers on construction sites drawing unemployment benefits—which were then earmarked for paramilitary reserves. Between 1984 and 1986 the courts upheld some 87 convictions for this offense, with the total money in question amounting to £13.25 million.⁴⁰

ii. Extortion

The early 1970s saw a number of other innovations. Protection rackets became so ingrained that business contracts eventually built in a 10 percent increase to pay off paramilitaries. By the mid-1980s the cruder forms of intimidation had given way to quasi-legitimate security companies. From only six security firms in Belfast in 1970, more than sixty materialized by the mid-1980s. Some side effects followed: as protection schemes expanded, paramilitaries, unable to conduct robberies, initiated more raids in the South.

Although ordinary criminal enterprises attempted to enter the protection market, by the early twenty-first century most extortion rackets tended to be controlled by paramilitaries, particularly Loyalists.⁴¹ Popular targets included fast food restaurants, retail establishments, licensed premises, garages, and filling stations.⁴² Terrorist groups learned to demand just enough money to maintain their income streams—and thus

40. See 110 PARL. DEB., H.C. (6th ser.) (1987) 406.

41. THE ORGANISED CRIME TASK FORCE, THE THREAT ASSESSMENT 2002, SERIOUS AND ORGANIZED CRIME IN NORTHERN IRELAND, <http://www.octf.gov.uk> [hereinafter OCTF 2002 REPORT]. In 2002 the Organised Crime Threat Assessment revealed that of 99 instances of extortion reported to police between January 1, 1999, and March 6, 2002, more than 80% linked to paramilitaries. As of 2004, approximately 70% of all extortion was attributable to Loyalists. NORTHERN IRELAND ORGANISED CRIME TASK FORCE, CONFRONTING THE THREAT: SERIOUS AND ORGANISED CRIME IN NORTHERN IRELAND THREAT ASSESSMENT & STRATEGY 2004, at 9, http://www.nio.gov.uk/octf_threat_assessment_and_strategy_2004.pdf [hereinafter OCTF 2004 REPORT].

42. OCTF 2002 REPORT *supra* note 41, at 3.

tailored the payments to each establishment's financial profile. Widespread intimidation, reinforced by acts of violence, made this a particularly difficult area for the police to penetrate. Even today, victims report only an estimated 10 percent of all cases of extortion to the police. Most of those who do approach the police request that the security forces not act on their information.⁴³ Victims report abusive and threatening letters, death wreaths, Mass cards, and rounds of ammunition—frequently delivered to their homes—serving as overt threats against potential police informants.

iii. Drinking Clubs and Black Taxis

Other quasi-legitimate businesses, such as shebeens and black taxis, also became important sources of funding. The former, from the Irish *síbin* (“illicit whiskey”), began to proliferate in Belfast in the early 1970s. In return for “protection,” breweries supplied drink at reduced prices, providing paramilitaries with both a social outlet and a source of quick money. With names like the “Sweety Bottle,” “Dr. Hood’s,” and “Zebra Crossing” (PIRA establishments) and the “Cracked Cup” or “Long Bar” (OIRA affiliates), the drinking clubs came under pressure in a series of raids in 1977. Thereafter they became quasi-legitimate, with the proceeds—and money from the one-armed bandits gracing their walls—funneled to paramilitaries.⁴⁴ The slot machines alone yielded substantial profits: At some £27,000 per year from each unit, by the mid-1980s they generated more money for the movement than Noraid (addressed below).⁴⁵

In 1972 PIRA also moved into the black taxi market.⁴⁶ To create demand, the organization first firebombed the public transportation system: the campaign forced Citybus to retire more than 300 buses, which cost the city £10 million, plus annual revenue losses thereafter of another £2 million. PIRA then stepped into the transportation gap and within three months had 600 cabs running in Catholic areas. In what can be described as a vertically-integrated enterprise, drivers rented cabs from the paramilitaries, had them repaired at Republican garages, bought fuel from PIRA petrol stations, and paid dues into a central fund. The taxi network proved not just a source of revenue but a way of moving weapons and

43. In 2002–2003, 65% of those reporting the crime requested that the police not take action. In 2003–2004, the number increased to 81%. OCTF 2004 REPORT, *supra* note 41, at 31.

44. ADAMS, *supra* note 3, at 178.

45. *Id.*

46. Chris Dishman, *Terrorism, Crime, and Transformation*, 24 *STUD. IN CONFLICT & TERRORISM* 43, 48 (2001).

people through the city. In time, the Ulster Volunteer Force and other Loyalist paramilitaries followed suit.⁴⁷

iv. Smuggling Operations

Smuggling and fraud also generated significant sources of income, with contraband ranging from pigs to tobacco.⁴⁸ Perhaps the most notorious operation is that of Thomas “Slab” Murphy, who earned his nickname from his habit of dropping cement blocks on peoples’ legs. In the mid-1980s, Murphy led an active service unit along the border. For many years he served as a member of the IRA northern command and currently is believed to be the Chief of Staff of the IRA. In 1970 Murphy constructed a barn that straddles the border with the Republic of Ireland. When the European Economic Community offered a subsidy to Irish farmers for every animal exported to the United Kingdom, Murphy brought livestock into the North by ferry, collected the subsidy, and then herded the animals into one end of his barn. The livestock then went through the structure to the South, whence Murphy again ferried the animals up North for the collection of the subsidy. As of 2005, Murphy’s smuggling operations were believed to net PIRA and Sinn Féin in the range of £20 million per year.⁴⁹

Murphy proved to be a trendsetter, with other farmers along the border setting up similar schemes.⁵⁰ These and other smuggling operations extend well beyond livestock. Over the past decade, for instance, petrol fraud has generated increasing attention. The offense ranges from individuals living 30 to 40 miles from the border with the Republic filling up in the South to more formal smuggling and laundering exercises. For the most part, Republicans control this sector. At one point the Secretary of State for Northern Ireland issued an order limiting petrol tankers to certain roads.⁵¹ Ian Pearson, the Parliamentary Under-Secretary of State for Northern Ireland, estimated that the revenue lost in 2002 from petrol fraud came to £115 million.⁵² The smuggling operations have an enormous impact on the Northern Ireland fuel market: as prices plummeted and paramilitaries took hold, 139 filling stations closed between 1994

47. ADAMS, *supra* note 3, at 167–75.

48. See, e.g., OCTF 2004 REPORT, *supra* note 41.

49. See Remarks of Mr. Jeffrey M. Donaldson, in NORTHERN IRELAND GRAND COMMITTEE, PROPOSAL FOR A DRAFT SPECIAL EDUCATIONAL NEEDS AND DISABILITY (NORTHERN IRELAND) ORDER 2004, col. 4, available at <http://www.publications.parliament.uk/pa/cm200304/cmstand/nirelg/st040520/40520s01.htm>. See also the remarks of Mr. David Trimble, Mr. Ian Pearson, and Rev. Ian Paisley. *Id.*

50. ADAMS, *supra* note 3, at 157–60.

51. O’CALLAGHAN, *supra* note 3, at 168.

52. NORTHERN IRELAND GRAND COMMITTEE, PROPOSAL FOR A DRAFT SPECIAL EDUCATIONAL NEEDS AND DISABILITY (NORTHERN IRELAND) ORDER 2004, *supra* note 49, col. 3.

and 2004. Of the 700 remaining establishments, around 200 to 250 sell only or mostly illegal fuel, while 400 to 450 have some involvement with illegal trade.⁵³ In response to increased pressure from HM Customs & Excise, the illegal market appears to have receded slightly in the past year.⁵⁴ Other smuggled items include alcohol, tobacco, and counterfeit goods such as currency, CDs, perfume, designer clothes, and videos.

v. Drug Trafficking

Like protection rackets, drug trafficking in the North appears to be dominated by Loyalist organizations. This does not mean that Republicans play no part: following the 1994 ceasefire, for instance, small-scale dealers began to distribute ecstasy, marijuana, and LSD in Republican neighborhoods. For much of the Troubles, however, PIRA claimed to be acting against drugs, occasionally conducting “purges” to this end. In the mid-1980s, for instance, a concerted operation in Belfast led to a number of deaths. In late 1995 and early 1996, a Republican group called Direct Action Against Drugs “killed five men in as many weeks”.⁵⁵ At least some of these efforts to expunge drugs from the North, however, appear to have been efforts to consolidate power bases within the movements, using drugs as something of an excuse.⁵⁶ The recent discovery of links between PIRA and the Revolutionary Armed Forces of Columbia (FARC), however, suggests a changing formal relationship with trafficking.⁵⁷ The most commonly seized drug in Northern Ireland is cannabis, which constitutes approximately 75 percent of all illegal drugs annually intercepted by the state.⁵⁸ Ecstasy, which comes in at 15 percent, is

53. NORTHERN IRELAND AFFAIRS COMMITTEE: THE FINANCING OF TERRORISM IN NORTHERN IRELAND ¶ 30, 2001–2, H.C. 978-I.

54. NORTHERN IRELAND GRAND COMMITTEE, PROPOSAL FOR A DRAFT SPECIAL EDUCATIONAL NEEDS AND DISABILITY (NORTHERN IRELAND) ORDER 2004, *supra* note 49, col. 5. Also see NORTHERN IRELAND AFFAIRS COMMITTEE, IMPACT IN NORTHERN IRELAND OF CROSS-BORDER ROAD FUEL PRICE DIFFERENTIALS: THREE YEARS ON, 2002–2003, *available at* <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmniaf/204/204.pdf>.

55. *The IRA Flexes its Muscles*, ECONOMIST (U.S. Edition), Jan. 6, 1996, at 44.

56. Author interviews with convicted Republican paramilitaries, Londonderry, Northern Ireland (1993).

57. See *Colombia “IRA” Trial Adjourned*, BBC NEWS, Dec. 4, 2002, *available at* http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/2537537.stm; Jeremy McDermott, *IRA Training and Tactics Help Colombian Rebels*, NEWS.TELEGRAPH, May 5, 2005, *available at* <http://portal.telegraph.co.uk/news/main.jhtml?xml=/news/2005/05/10/wcol10.xml>. But see P. O’Neil, *IRA Reiterates Colombia Position*, AN PHOBLACHT, Apr. 25, 2002, *available at* <http://republican-news.org/archive/2002/Apr.25/25iras.html> (denying PIRA involvement in Colombia).

58. See, e.g., THE ORGANISED CRIME TASK FORCE, THE THREAT ASSESSMENT 2003, SERIOUS AND ORGANIZED CRIME IN NORTHERN IRELAND, <http://www.octf.gov.uk> [hereinafter OCTF 2003 REPORT]; OCTF 2004 REPORT, *supra* note 41.

widely available at dance venues and many licensed premises. More recently, there is evidence that cocaine is gaining ground. The Loyalist Volunteer Force (LVF), in particular, appears involved in this market.⁵⁹

vi. Kidnapping

Unlike other paramilitary groups in Northern Ireland, PIRA branched out to kidnapping as a way to raise money. Almost all of its efforts failed. In 1973, for instance, the organization abducted the Belfast-based German industrialist Thomas Niedermayer, who died during the ordeal, without any money changing hands. In 1975 PIRA imprisoned Dr. Tiede Herrema, a Dutch Industrialist, in County Kildare. Thousands took to the streets in protest. After a two week siege, Eddie Gallagher and Marion Coyle released Herrema—and went to jail. Ireland granted Herrema and his wife honorary citizenship, but his departure for the Netherlands resulted in the closing of his factory and a loss of 1,400 jobs in Limerick.⁶⁰ In 1983 Don Tidey, head of Associated British Foods, stopped at a fake Garda checkpoint near Rathfarnham, Dublin. After 23 days of captivity, the kidnapping ended in a shoot-out.⁶¹ Perhaps the most famous case of the time involved not people but the Epsom Derby-winner, Shergar.⁶² In 1981 the race horse disappeared from the Aga Khan's stables in County Kildare. Lloyds of London had put the value of the horse at stud at some £10 million. The following morning the kidnappers phoned in a ransom of £2 million—but within hours dropped the demand to £40,000.⁶³ The 40 stakeholders in the horse, however, refused to pay, saying that while this was the first such kidnapping, they did not want to encourage similar acts. Rumors circulated of Shergar sightings, but he was never officially seen again.

The British state contributed to the failure of such operations: specifically, Westminster introduced legislation making it illegal to negotiate

59. See Northern Ireland Organized Crime Task Force, *Confronting the Threat: Drugs*, <http://www.octf.gov.uk/index.cfm/section/article/page/drugs>; see also Organized Crime Task Force, *News: Dutch Police Seize LVF Linked Ecstasy Haul*, <http://www.octf.gov.uk/index.cfm/section/News/page/details/key/D03F1C86-B0D0-7815-0F04D3517720D30D/?month=10&year=2003> (for discussion of LVF involvement in cocaine and the interception in The Netherlands of 750,000 ecstasy tablets tied to the LVF in October 2003).

60. *IRA Kidnappers Release Industrialist*, BBC NEWS, Nov. 7, 1975, available at http://news.bbc.co.uk/onthisday/hi/dates/stories/November/7/newsid_2539000/2539461.stm.

61. Paul T. Colgan, *Ireland's Richest Businessmen Victims of 1980s Kidnap Epidemic*, SUNDAY BUSINESS POST, Sept. 22, 2002, available at <http://archives.tcm.ie/businesspost/2002/09/22/story604929528.asp>.

62. For accounts of these and other high-profile kidnappings in Northern Ireland, see PAUL HOWARD, *HOSTAGE: NOTORIOUS IRISH KIDNAPPINGS* (2004).

63. *1983: Police Hunt Shergar's Kidnappers*, BBC NEWS, Feb. 9, 1983, available at http://news.bbc.co.uk/onthisday/hi/dates/stories/February/9/newsid_2538000/2538595.stm.

privately or take out insurance for kidnapping.⁶⁴ By the end of the 1980s, PIRA had largely ceased such attempts.

vii. Additional Domestic Sources

Additional sources of funding present themselves. Contributions from supporters in Scotland help to fund Loyalist paramilitaries: a recent Parliamentary report put the total support generated from Scotland to the UDA/Ulster Volunteer Force (UVF) in 1992 at approximately £100,000 per year.⁶⁵ Paramilitaries on both sides of the divide use public gatherings such as funerals to garner funds.⁶⁶ Some also engage in contract bombing, where individuals pay for paramilitaries to destroy their businesses, entitling them to insurance or compensation.⁶⁷ One area of growing paramilitary involvement is intellectual property theft. Counterfeit items include website-based operations for DVDs, CDs, clothing, computer video games, power tools, computer software, perfume, sunglasses, and the like. Currency also presents a potential profit: Northern Ireland has more than 55 different types of notes in circulation, making it difficult for retailers to detect a forgery.⁶⁸ Importantly, as with the Northern Bank raid that opened this Article, many members of the public view counterfeiting as a victimless crime. According to surveys conducted by law enforcement, approximately one-third of the British population would knowingly purchase counterfeit goods if the price and quality were right.⁶⁹

Most recently, law enforcement has witnessed a movement by paramilitaries into high technology. Some crimes, which focus on computers and IT networks, hack, spread viruses, engage in denial of service attacks, and create spoof web sites. Other crimes, such as fraud, blackmail, extortion, pornography, identity theft and cyber-stalking, simply use new technologies for old crimes. As of 2003, approximately 25 percent of the cases undertaken by the Police Service Northern Ireland Computer Crime Unit related to terrorism.⁷⁰ Both Republicans and Loyalists have

64. Prevention of Terrorism (Temporary Provisions) Act 1974, ch. 56, §§ 10–11 (Gr. Brit.).

65. COMMITTEE ON NORTHERN IRELAND AFFAIRS, FOURTH REPORT, *supra* note 4, at 19.

66. *Twelve Soldiers Hurt, 26 Arrests in Derry Clash*, THE TIMES (London), Mar. 30, 1970, at 1.

67. See Criminal Damage (Compensation) (Northern Ireland) Order, 1977, S.I. 1247 (N.Ir 14), art. 11. See also KENNEDY LINDSAY, THE BRITISH INTELLIGENCE SERVICES IN ACTION 158 (1980).

68. Northern Ireland Organized Crime Task Force, Counterfeit Currency, <http://www.octf.gov.uk/index.cfm/section/article/page/CounterfeitCurrency>.

69. OCTF 2005 REPORT, *supra* note 1.

70. OCTF 2004 REPORT *supra* note 41, at 51.

also attempted to raise funds from similar activities in Great Britain. The Real IRA, a late twentieth century off-shoot of the PIRA, has been particularly active in this area.

b. International Sources of Money

Although, as detailed above, most paramilitary money derives from domestic operations, neither Republicans nor Loyalists limit their fund-raising efforts to the domestic realm. The IRA, for instance, initially drew money from the Irish government—with or without sanction.⁷¹ In the early 1970s, on the grounds that Libya would fight the United Kingdom everywhere, Moammar Gaddafi began sending money, arms, and equipment to PIRA.⁷² Republican arms also arrived from the Czech Republic.⁷³ Loyalist paramilitaries raised money in Canada and obtained weapons from South Africa.⁷⁴ By far the most publicized and well-known source of funding, though, resides in the United States. The Irish Northern Aid Committee (Noraid), founded in 1969 by Irish civil war veterans, has at times provided important ideological and financial support to PIRA.⁷⁵

With one or two exceptions, the United States initially turned a blind eye to Noraid—which claimed that all donations went to humanitarian aid for people in Northern Ireland.⁷⁶ Gradually, however, it became clear that Noraid's claims fell somewhat short of the truth: by the early 1970s Noraid was supplying more than 50 percent of the resources required for PIRA's armed campaign.⁷⁷ James Callaghan, the British Secretary of State for Foreign and Commonwealth Affairs, complained, "We take every opportunity to make these facts known to American senators and congressmen as well as to the administration."⁷⁸ Eventually the diplomatic pressure paid off. Aided too by the growing disillusionment of the

71. *New Violence in Ulster May be Linked to Reforms—Mr. Maudling*, THE TIMES (London), Feb. 16, 1971, at 9.

72. Robert Fisk, *Three Civilians Killed in Belfast Battle Between Troops, Protestants and Catholics*, THE TIMES (London), Jun. 12, 1972, at 1; Paul Martin, *The Cost of Libya's Revolutionary Largesse*, THE TIMES (London), Aug. 17, 1972, at 12.

73. GERARD HOGAN & CLIVE WALKER, *POLITICAL VIOLENCE AND THE LAW IN IRELAND* 161–2 (1989).

74. Author interviews with members of the Ulster Defense Association, Londonderry, Northern Ireland (circa 1994).

75. *New York Irish March Supports IRA Violence*, THE TIMES (London), Mar. 10, 1983, at 1; *New York Honour for IRA Man*, THE TIMES (London), Feb. 16, 1984, at 8; Philip Webster, *Thatcher Rejects Inquiry on Noraid Incident*, THE TIMES (London), Aug. 21, 1984, at 1.

76. ADAMS, *supra* note 3, at 154.

77. *Id.* at 136.

78. *Complaint Over Fund Raising in United States for IRA*, THE TIMES (London), Feb. 19, 1976, at 6.

Irish American community with PIRA's tactics, the United States began to take a more active role in stemming the flow of money.

In 1983 the Reagan administration closed six years of negotiations with an extradition agreement. Although the document itself did not refer specifically to PIRA or Noraid, Department of Justice officials announced that the treaty, which made it easier to extradite individuals seeking to generate funds through Noraid, underscored Reagan's stance against terrorism.⁷⁹ The FBI became more focused on Noraid's role in arms smuggling,⁸⁰ and in 1982 the judiciary ruled that Noraid would have to comply with the 1938 Foreign Agents Registration Act and register as PIRA's agent.⁸¹

Tactics adopted by PIRA also alienated U.S. citizens otherwise supportive of a united Ireland. The 1979 assassination of Lord Mountbatten, the Queen of England's second cousin, in Mullaghmore played a particularly polarizing role: PIRA bombed his fishing boat, killing not just Mountbatten, a frequent visitor to Ireland's shores and clearly a soft target, but his 14-year-old grandson and his grandson's friend, 15-year-old Paul Maxwell from Donegal. The rest of the family suffered severe injuries. And an 82-year-old woman on the expedition died the following day.

Until the attack, support for PIRA largely derived from the context of the Irish civil war.⁸² But after the ambush, funds from supporters slowed, and U.S. prosecutions of PIRA members and supporters increased. Noraid had to establish a special reserve, the Irish-American Defense Fund, to cover legal costs.⁸³ Simultaneously, Britain upped the ante with a public relations campaign against Noraid, substantially assisted by the increasing militancy of PIRA operations.⁸⁴ By the mid-1980s, less than £135,000 of PIRA's annual budget came from the United States.⁸⁵ In 1994 Gerry Adams launched a new fundraising organization to replace Noraid: Cairde Sinn Féin now funnels money to the Republican political arm.⁸⁶ Following September 11, under Executive Order 13,224 (discussed below) the United States government formally

79. *U.S.-Ireland Extradition Deal Signed*, THE TIMES (London), July 15, 1983, at 7.

80. *See, e.g.*, Att'y Gen. of the United States v. Irish N. Aid Comm., 668 F.2d 159 (1982); Att'y Gen. of the United States v. The Irish People, Inc., 796 F.2d 520 (1986); *The IRA; Luck of the Irish*, ECONOMIST (U.K. Edition), Nov. 13, 1982, at 50.

81. Irish N. Aid Comm., 668 F.2d; *see also* J.L. Stone, Jr., *Irish Terrorism Investigations*, FBI LAW ENFORCEMENT BULL., Oct. 1987, at 18-23.

82. *The IRA; Luck of the Irish*, *supra* note 80, at 50.

83. ADAMS, *supra* note 3, at 152.

84. *Id.* at 155.

85. *Id.* at 136.

86. Jimmy Burns, *Battle Over Ulster Fraud Stepped Up: Renewed Fears on Racketeering*, FIN. TIMES, Dec. 9, 1994, at 8.

blocked all assets held by the Real IRA, Continuity IRA, LVF, Orange Volunteers, Red Hand Defenders, and Ulster Defence Association/Ulster Freedom Fighters (UFF).⁸⁷

c. The Impact of Politics on Paramilitary Funding

As noted at the beginning of this Article, a terrorist campaign does not require extensive funding. The annual estimated costs of PIRA run to only £1.5 million. The UVF requires between £1 and £2 million, and the UDA, the largest Loyalist group, requires only £500,000 per annum. These represent the largest and most complex terrorist operations—some, such as Continuity IRA, run on a budget of £30,000 or less.⁸⁸ Not only are these budgets fairly low level, but the rate of return per pound sterling represents a significant gain when measured against the cost to the British state: in 1993, for instance, for every £1 raised by terrorist organizations and put into acts of violence, the average cost to the

87. Parliament spoke out in support of these measures. *See, e.g.* COMMITTEE ON NORTHERN IRELAND AFFAIRS, FOURTH REPORT, *supra* note 4, at (e), List of Conclusions and Recommendations. Also note that although Noraid gained notoriety for its assistance to Republicans, Loyalist paramilitaries also obtained arms and funding from the United States. Friends of Northern Ireland, for instance, located in the vicinity of Chicago, had as its aim the provision of a gun to every Protestant household in Northern Ireland. *See* Robert Fisk, *Mr. Whitelaw Expected to Relax the Ban on Parades in Ulster*, THE TIMES (London), Apr. 5, 1973, at 1.

88. *Police Service Northern Ireland, reprinted in* COMMITTEE ON NORTHERN IRELAND AFFAIRS, FOURTH REPORT, *supra* note 4.

TABLE I

| <i>Organization</i> | <i>Annual Estimated Running Costs</i> | <i>Annual Estimated Fundraising Capacity</i> |
|------------------------|---------------------------------------|--|
| Provisional IRA (PIRA) | £1.5million | £5-£8million |
| Real IRA (RIRA) | £500,000 | £5 million |
| Continuity IRA (CIRA) | £25,000-£30,000 | N/A |
| INLA | £25,000-£30,000 | £500,000 |
| UDA | £500,000 | £500,000-£1m |
| UFF | £250,000 | N/A |
| UVF | £1-£2million | £1.5 million |
| LVF | £50,000 | £2 million |

United Kingdom and Ireland in countering or repairing the subsequent damage ran around £130.⁸⁹

While terrorism itself does not require exorbitant amounts of money, politics does. And as paramilitaries have moved into the political realm, important effects have followed. Gerry Adams noted in the 1980s that £2 million in operating funds would prove woefully inadequate to run a £5–10 million political machine. His personal attention to this issue resulted in the “slow but steady and noticeable ‘professionalization’ of the IRA’s handling of its finances.”⁹⁰ To meet increased demand, paramilitaries began to diversify their funding schemes, and, in a Darwinian sense, they “learned” from their own—and other groups’—successes and failures.

Even as paramilitaries have increased their appetite for money, the presence of ceasefires has introduced a new element into the dynamic. With the peace process addressing political aspirations, the profit motive has increasingly played a role. In many ways, this has made it easier for the British state to address the financing issue, treating it as criminality not as political challenge. The Article now turns to the United Kingdom’s formal efforts to stem the flow of terrorist funds.

2. The State Response

Unraveling the United Kingdom’s efforts to interrupt terrorist finance in the first three quarters of the twentieth century proves difficult. Although from 1922 to 1972 the Northern Ireland Executive maintained extensive authority to seize private assets,⁹¹ very little information

89. From this Andrew Silke estimates that the overall cost of Northern Irish terrorism to the United Kingdom in 1993 was around £2 billion. *See* COMMITTEE ON NORTHERN IRELAND AFFAIRS, FOURTH REPORT *supra* note 4, ¶ 14.

90. O’CALLAGHAN, *supra* note 3, at 168.

91. Intended to be in place for one year, the Civil Authorities (Special Powers) Act (SPA), 1922 (UK) remained in force until Westminster took direct control of Northern Ireland in 1972. Drawing from military powers introduced under the 1914–1915 Defence of the Realm Act and the 1920 Restoration of Order in Ireland Act, the new statute gave the civil authority the ability “to take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order.” Civil Authorities, (Special Powers) Act, 1922, § 1. Even while recognizing the importance of property rights writ large, the statute empowered the state to take away or destroy property and refuse compensation where acts contrary to the public good might be involved. Civil Authorities, (Special Powers) Act, 1922, § 11(1)-(3). The legislation also created a positive right for the state to take possession of any private property. Regulations For Peace and Order in Northern Ireland, 1922, § 8 (UK). *See also id.* § 20. Regulations subsequently issued under the legislation made it illegal to raise money for unlawful associations. *See id.* § 24. Another regulation gave the state the ability to prevent the illegal smuggling of fuel, requiring individuals to provide information on the use and transfer of motor spirits. *See id.* § 9. All entities became required to provide information when requested by either law enforcement or the civil authority. *See id.* § 17. The state also could enter and search banks and other financial institutions without warrant. *See id.* § 18. During the post-World War II rapprochement, the Northern Executive relaxed many of the provisions introduced under the 1922–1943 SPAs. Yet while powers related to arbitrary arrest, restriction,

appears in the Public Record Offices in Belfast or London that details the manner in or extent to which such powers issued. In part this may be because the 1922–1943 Special Powers Acts and Regulations did not require the Civil Authority to lay property seizure or arrest orders before Stormont, the Northern Ireland Parliament, nor did they demand their promulgation in the *Belfast Gazette* or local newspapers. Journalists, in turn, made only random and limited references to state actions in this area.⁹² Particularly from the mid-1960s forward, the lack of information may have been due to the persistent omission of monetary property rights in civil liberties concerns: neither the Northern Ireland Civil Rights Association nor the Standing Advisory Commission on Human Rights addressed the issue. In its well-known semimonthly accounting of events related to the Troubles, *Fortnight* makes not one reference in relation to the seizing of assets from 1970 through 1974. Instead, property rights only appear relative to security force destruction of personal property in the course of search operations.⁹³

Another, and perhaps more convincing, reason for the lack of information on these powers may be that the British state, while it had the authority to take possession of resources supporting the commission of violence, simply did not in practice make heavy use of this authority. Indeed, when faced by dispersing riots, finding gelignite, and defusing bombs, the state may have assigned a low priority to examining revenue streams. The problem with this explanation is that it does not elucidate the apparent lack of use of these powers during the substantial periods of relative calm in Northern Ireland. For this reason, I suggest—although I am happy to entertain contrary theses—that the lack of emphasis on and use of such powers merely reflects a cultural norm.

That is to say, under Stormont, certain ways of dealing with the threat from Republicanism became standard. Officials may have seen emphasizing the financial underpinnings of the movement as pointless: terrorist operations did not require tremendous amounts of money, and it would have been difficult to trace such funds prior to the growth of the

curfew, censorship, and the closing of roads temporarily left the books, the civil authorities retained the ability to “examine bank documents where it is suspected that money has been collected for a purpose prejudicial to the preservation of the peace.” *Civil Order in Ulster: Forty-one Old Regulations Revoked*, THE TIMES (London), Aug. 29, 1949, at 4. The state also preserved its authority to interfere with personal property without compensation and to seize property where its use interfered with public order.

92. See, e.g., *Sinn Féin March in London To-Day: The Dead Lord Mayor Prisoners' Tribute*, THE TIMES (London), Oct. 28, 1920, at 12; *Irish Plots in Britain: Rebel Campaign of Outrage*, THE TIMES (London), Mar. 16, 1923, at 12.

93. See, e.g., *The Past Two Weeks*, FORTNIGHT, Feb. 19, 1971, at 16 (reporting women residents of New Lodge Road in Belfast parading outside the Army Barracks in protest); *The Past Two Weeks*, FORTNIGHT, May 28, 1971, at 17 (reporting a meeting of over 1,000 people to protest the same).

modern banking and credit industries. The government may also have deemed this approach an inefficient way to prevent attacks—particularly when the Executive could simply imprison suspects and hold them indefinitely without judicial interference.

What is clear, however, is that from the mid-1980s forward, the emphasis shifted. A steady ratcheting of state authority occurred within counterterrorist legislation and between counterterrorist law and drug trafficking statutes. It is particularly in relation to the latter that the cultural norms changed—in turn influencing and being influenced by antiterrorist finance provisions. Contemporary events assisted in this evolution: as discussed above in Part II.A, the peace process brought with it an increased demand for money to fund political activities—as well as a need to satisfy claims to legitimacy in order to sustain participation in the negotiations. This basically forced paramilitaries between a rock and a hard place. Deviations from the law became important propaganda tools for the state to undermine groups' participation in the dialogue.

a. Statutory Measures Prior to September 11

Two seminal pieces of legislation comprise Westminster's counterterrorist efforts prior to the introduction of the Terrorism Act 2000: the 1973 Northern Ireland (Emergency Provisions) Act (1973 EPA) and the 1974 Prevention of Terrorism (Temporary Provisions) Act (1974 PTA). The former applied to Northern Ireland and the latter primarily to Great Britain, with some overlap to Northern Ireland. Although technically both statutes operated under sunset provisions, they never lapsed. On the contrary, successive Secretaries of State called for the extension of the powers, in a dialogue occasionally punctuated by Parliament reissuing the statutes with amendments.⁹⁴ Two points are of note. First, the EPA's powers went well beyond those incorporated into the PTA. This was a conscious decision made by the British government to limit inroads into property rights in Great Britain. The state accepted that this meant it would not be able to cut off terrorist funding entirely. Reginald Maudling, appointed Home Secretary in 1970, gave voice to the concern that

94. In 1973 Westminster repealed the 1922–1943 SPAs and introduced the 1973 EPA to govern the security situation in Northern Ireland. Thereafter, the “temporary” statute became permanently entrenched in the Northern Ireland constitution. The statute, intended to be in place for 12 months, was extended on an annual basis, amended in 1975, and again extended on an annual basis. In 1978 Parliament reissued the statute, and for the next nine years the Secretary of State continued the temporary measures at six month intervals. In 1987 Westminster added some measures to the Act, again extending it semiannually until replacing it with the Northern Ireland (Emergency Provisions) Act, 1991 (which it renewed annually thereafter). In 1996, Westminster again replaced the entire statute, amending it further in 1998. The EPA finally left the books in 2000, replaced by the permanent counterterrorist measures.

both efficacy and individual rights would be sacrificed should the state seriously attempt to stop all resources flowing to the IRA:

It is admittedly offensive that the IRA factions...should flaunt themselves over here and openly collect money for their subversive purposes. But there has to be a stronger reason to take extraordinary powers than the removal of such flaunting and collecting, especially since the powers would not by their mere assumption remove the activities, but would have to be exercised with a thoroughness that would quickly give rise to objections of a different kind.⁹⁵

There seems to have been fairly widespread public agreement with this approach. Even the *Times* of London, not particularly known for being a hotbed of radicalism, suggested that as long as the IRA was not trying to exploit legal loopholes regarding proscription, ordinary powers were sufficient to prevent paramilitaries from obtaining resources in Great Britain. The *Times* also raised concerns regarding individual rights:

[I]n conditions of free political debate and in the absence of an overwhelming public conviction concerning the objectives of policy, recourse to unaccustomed powers of coercion, the suspension of normal rights and safeguards, may confuse and embitter opinion in a way that actually works to the advantage of those against whom the special measures are directed.⁹⁶

For most of the Troubles, then, the EPA contained the more extreme powers related to anti-terrorist finance.⁹⁷

Second, despite reductions in violence related to Northern Ireland, the powers included in both statutes steadily expanded. If anything, an inverse relationship between the level of violence and state focus on terrorist funding seemed to exist. In part this may be due to the influence of drug trafficking and money laundering provisions in the final decades of the twentieth century. I will return to this below. It may also reflect the state's approach of countering rising levels of violence not with financial provisions but, first and foremost, with measures implicating life and liberty.

This section begins with a brief discussion of the evolution of powers in the EPA and PTA, focusing on the grant of authority to the state to interfere with property rights writ large, the ability of the judiciary to

95. Editorial, *A Special Powers Act?*, THE TIMES (London), Mar. 1, 1972, at 15.

96. *Id.*

97. The only real exception to this came in 1989, when the PTA introduced the offense of financing terrorism and associated forfeiture provisions. Within two years, however, the EPA not only adopted these powers, but, as the Article later discusses, it expanded them in important ways.

order the forfeiture of property, and the creation of offenses related to terrorist finance. Both statutes, particularly in their later years, also included significant shifts in burdens of proof and expansions in state investigatory powers to obtain financial and other, related records. Most of these provisions are general; on only one occasion does either statute target a particular form of terrorist financing: protection rackets and the “security industry.”

i. Property Rights and Asset Forfeiture

The 1973 EPA provided the British government substantially broader powers to interfere with property in Northern Ireland than it could exercise in the rest of the United Kingdom. Drawing heavily from the 1922–1943 SPAs, under the 1973 EPA, “A constable may seize anything which he suspects is being, has been or is intended to be used in the commission of a scheduled offence”⁹⁸ The legislation authorized any member of Her Majesty’s forces to enter any premises to detain, destroy, or move any property, or to “do any other act interfering with any public right or with any private rights of property”⁹⁹ Although the statute also required that the state pay compensation for real or personal property taken, occupied, destroyed, or damaged, this provision did *not* apply when issues related to public order or terrorist violence presented themselves.¹⁰⁰ These powers remained untouched through the turn of the century.¹⁰¹ The Prevention of Terrorism Act, in contrast, did not include an equivalent right to state interference with property, nor did subsequent iterations of the statute build one into the law.

The 1973 EPA also had special financial provisions related to proscribed organizations. The legislation allowed the court to demand the forfeiture of assets where an individual, convicted of membership in an illegal organization, controlled money or property that benefited the list of banned entities: Sinn Féin, the IRA, Cumann na mBan, Fianna na

98. Northern Ireland (Emergency Provisions) Act, 1973, 21 & 22, ch. 53, § 11(3) (taken directly from reg. 23 of 1922 SPA) [hereinafter 1973 EPA].

99. *Id.* § 17 (taken directly from reg. 2 of the Restoration of Order in Ireland Regulations, reg. 8 of the 1922 SPA).

100. See 1973 EPA, *supra* 98, § 25 (taken directly from reg. 11 of the 1922 SPA).

101. The only amendment came in 1987, when Parliament set a time limit for filing for compensation where no offense against the legislation might be involved. See Northern Ireland (Emergency Provisions) Act (Amendment), 1975, ch. 62; Northern Ireland (Emergency Provisions) Act, 1978, ch. 5. It is possible to trace the sections through the different Acts, e.g., § 11(3) became § 13(3); § 17 became § 19(1); and § 25 became § 28. Northern Ireland (Emergency Provisions) Act 1987, ch. 30; Northern Ireland (Emergency Provisions) Act, 1991, ch. 24. § 19(1) became § 24(1); in addition, the right to compensation previously in § 28 is enumerated in § 63(1). Northern Ireland (Emergency Provisions) Act, 1996, ch. 22; Northern Ireland (Emergency Provisions) Act, 1998, ch. 9.

hÉireann, Saor Éire, and the UVF.¹⁰² The legislation made it an offense to solicit or invite financial or other support for a proscribed organization, or to knowingly make or receive any contribution to the resources of the same. Criminal penalties applied.¹⁰³

An important point here is that, under the 1973 EPA, charges of contributing to a proscribed organization amounted to a scheduled offense: those accused of this crime automatically entered the Diplock Court system, losing their right to trial by jury. Other important legal restrictions applied, such as limits on bail and the use of *in camera* and *ex parte* proceedings.¹⁰⁴

Unlike the 1973 EPA, the 1974 PTA did *not* initially allow the court to order the forfeiture of proscribed organizations' assets. And, while it also made it an offense to fundraise for, or contribute to, a proscribed organization, only one group graced the list: the IRA.¹⁰⁵ In 1976, however, the new PTA added a forfeiture provision that allowed the state to seize any money or other property controlled by an individual convicted of membership, where such resources were intended for use in Northern Ireland terrorism.¹⁰⁶ Similarly, the statute made it an offense to solicit contributions for a proscribed organization, intending, knowing, or suspecting that the resources would be funneled to terrorist ends.¹⁰⁷ Although the 1976 statute limited this provision to solicitation within the United Kingdom, Westminster dropped this requirement in 1984—while still restricting its application to proscribed organizations.¹⁰⁸ Five years later, however, a significant broadening of state powers occurred.

ii. Anti-Drug Trafficking and Counterterrorism

Although not directly related to counterterrorist provisions, British alarm at growing drug abuse resulted in a series of statutes aimed at upset-

102. By 1991 this list included: the IRA, Cumann na mBan, Fianna na hÉireann, Red Hand Commando, Saor Éire, UFF, UVF, INLA, and the Irish People's Liberation Organisation. See Northern Ireland (Emergency Provisions) Act 1991, ch. 2, schedule 2. The Terrorism Act, 2000, schedule 2 proscribed: the IRA, Cumann na mBan, Fianna na hÉireann, Red Hand Commando, Saor Éire, Ulster Freedom Fighters, Ulster Volunteer Force, Irish National Liberation Army, Irish People's Liberation Organization, Ulster Defence Association, Loyalist Volunteer Force, Continuity Army Council, Orange Volunteers, and Red Hand Defenders.

103. Summary conviction yielded six months' imprisonment and a £400 fine. Indictment resulted in up to five years' imprisonment plus fine. See 1973 EPA *supra* note 98, § 19(1). In 1978 Westminster increased imprisonment on indictment to 10 years; but these powers otherwise remained largely constant through the twenty-first century.

104. See 1973 EPA, *supra* note 98, schedule 1(12) for inclusion of contributions as a scheduled offense and the remainder of statute for special Diplock proceedings.

105. The state added the INLA to the list of illegal organizations in 1984. Prevention of Terrorism (Temporary Provisions) Act, 1984, ch. 8, § 1.

106. Prevention of Terrorism (Temporary Provisions) Act, 1976, ch. 8, § 10.

107. *Id.*

108. *Id.* § 10(4).

ting the flow of money in drug trafficking. These laws set new standards for inroads into individual property rights, which quickly seeped over into efforts to interrupt the flow of funds to terrorist organizations. These initiatives began in May 1985, when the House of Commons Home Affairs Committee warned that unless the United Kingdom took immediate, preventative measures, within five years the country would face a drug crisis on par with that in the United States.¹⁰⁹

Within weeks, Leon Brittain, Home Secretary, unveiled extraordinary powers to stem the flow of illicit substances. Commentators immediately labeled the new measures Draconian. They had a point: the legislation authorized courts to seize assets, required a reform of banking law to allow the state to undertake a closer examination of financial records, reversed the burden of proof (requiring drug barons to prove that any assets *not* subject to forfeiture were obtained in a manner unrelated to trafficking), and created a new offense of handling assets made from trading in hard drugs.¹¹⁰ By autumn a new bill sat before Parliament.¹¹¹

Perhaps the most controversial aspect of what became the Drug Trafficking Offences Act grew from the seizure of assets. The legislation empowered the court to impose a confiscatory fine equal to the proceeds of trafficking and then hold the debt against all the accused's property, unless she could prove that the items did *not* come into her possession through drug money. The legislation granted law enforcement and customs the authority to gather new information and gave the state the ability to freeze assets, even *prior* to arrest, for anyone "reasonably suspected of involvement in drug trafficking or money 'laundering.'" Sentence enhancements of up to 10 years imprisonment applied.¹¹²

The 1989 PTA drew inspiration from these anti-drug laws. It severed the dependence of the financial provisions on a list of proscribed organizations and created a new offense of financial contributions to acts of terrorism. This included Northern Ireland-related violence as well as international terrorism, where such acts constituted triable offenses within the United Kingdom. (The legislation, however, specifically exempted other acts of terrorism related to British

109. Richard Evans, *Tough Powers in Bill to Tackle Drug Traffickers*, THE TIMES (London), July 30, 1985, at 1.

110. *Id.* This article is the first time the words "money laundering" ever appeared in the newspaper.

111. See Drug Trafficking Offences Act, 1986.

112. See *Onslaught on Drug Barons Wins Applause*, THE TIMES (London), Oct. 10, 1985, at 4.

domestic matters.¹¹³) Simultaneously, the statute expanded judicial forfeiture powers.¹¹⁴

The 1989 PTA divided financial assistance to terrorism into four offenses: the first, as discussed, focused on contributions toward acts of terrorism writ large. The second preserved the previous offense of contributing resources to a proscribed organization. But it broadened this to include entering into an arrangement making money or property available to an illegal group.¹¹⁵ The third offense targeted the mass of accountants, fund managers, and other professionals employed by terrorist organizations, placing any assistance with the management of terrorist funds beyond the pale.¹¹⁶ The statute significantly increased the penalties associated with the first three offenses.¹¹⁷ As to the fourth offense, where previously the PTA required disclosure of information related to *acts* of terrorism, the 1989 PTA expanded this requirement to criminalize failure to disclose information about terrorist *funds*.¹¹⁸ Shortly thereafter, the British government extended this to include mere *suspicion of financial assistance* for terrorism.¹¹⁹ This section essentially removed any contractual obligations that might otherwise apply to parties engaged in interactions with terrorist entities.

Conviction for any of these offenses carried with it the possibility of court-ordered forfeiture of assets. Like the drug laws, an important shift in the burden of proof applied: where before the state would have to prove the defendant *intended* the resources under his control to benefit a proscribed organization, from 1989 the court became entitled, as under the 1986 Drug Trafficking Offenses Act, to assume “in the absence of evidence to the contrary . . . that any money or property” in the defendant’s control could be used for terrorist ends. The statute only required

113. See Prevention of Terrorism (Temporary Provisions) Act, 1989, §§ 9–13. Labour abstained on the second reading of the Prevention of Terrorism Bill instead of voting against it. The party strongly opposed the powers related to detention without trial and exclusion, but it equally strongly supported the confiscation provisions. Conflict over how to handle the situation led to a backbench revolt and, later in the week, the resignation of two front-bench spokespeople. Charles Hodgson, *Dispute on Anti-terror Stance Defused*, FIN. TIMES (London), Dec. 8, 1988, at 14.

114. These changes came in an entirely new section of the statute, which focused on financial assistance for terrorism writ large.

115. Prevention of Terrorism (Temporary Provisions) Act, 1989, § 10.

116. *Id.* § 11.

117. From five years’ imprisonment and a fine on indictment (the penalty previously applied, e.g., to the second offense), the penalty increased to fourteen years’ imprisonment plus fine. *See id.*

118. *Id.* § 12.

119. *Id.* § 18A.

the court to give the owner of the property “an opportunity to be heard.”¹²⁰

In 1991 the EPA followed suit—and went one further. A new section retained the provisions related to proscription but added a new set of powers and offenses dealing with terrorism. The statute incorporated the four offenses of the 1989 PTA and added two more. The first made it illegal to help anyone retain the proceeds of terrorist-related activities.¹²¹ The second outlawed concealing or transferring the proceeds of terrorist-related activities.¹²² Each new offense became scheduled, moving related cases into the Diplock realm.

Where the forfeiture provisions of the PTA *allowed* the court to demand assets, new confiscation powers in the EPA *required* the court to make confiscation orders. Instead of narrowly tying its provisions to resources actually linked to acts of terrorism, the EPA allowed the court to *assume* that whatever resources arrived into the defendant’s possession in the six years prior to conviction, or any time that had elapsed since conviction (above a £20,000 minimum), could be seized. Realizable property included *any* property held by the defendant, plus any property held by someone else to whom the defendant had directly or indirectly made a gift. The statute placed the burden on the defendant to refute the prosecution’s claims regarding which assets applied and to demonstrate that such an order would be unfair or oppressive.¹²³ Schedule 4 of the act further provided for the court to issue a restraint order, prior to conviction, on any specified realizable property. Courts could conduct these procedures *ex parte*. Violation could result, on indictment, in up to 14 years’ imprisonment plus fine.¹²⁴

The 1991 EPA also expanded the state’s investigatory powers, allowing the Secretary of State to appoint an individual to report on terrorist financing. The act required suspects, when requested, to produce information to investigators, except where legal privilege or banking obligations of confidence applied.¹²⁵ In 1996 investigators became authorized to remove any requested documents, unless reasonable cause existed that such information might be subject to legal privilege.¹²⁶

120. *Id.* § 13.

121. Northern Ireland (Emergency Provisions) Act 1991, *supra* 102, § 53.

122. *Id.* § 54.

123. *Id.* §§ 47–52.

124. *Id.* § 9, schedule 4.

125. *Id.* § 57, schedule 5, §§ 2–3.

126. Northern Ireland (Emergency Provisions) Act, 1996, § 24.

iii. Northern Irish Emphasis on Racketeering

Coinciding with the influence of drug provisions on the broader counterterrorist considerations was a shift in the state's approach to terrorism. Prior to this time, despite the presence of legislative authorities granted to prosecutors and the court, the Northern Ireland bureaucracy did not treat stemming the flow of funds as a matter central to state security. On the contrary, in 1977 a Housing Executive memorandum showed that far from cracking down on paramilitary funding, during the 1975 ceasefire government ministers actually ordered the protection of PIRA members' jobs—regardless of claims of fraud.¹²⁷

In the late 1970s and early 1980s, the state took some steps to counter specific schemes: for instance, the Northern Ireland Housing Executive, particularly vulnerable to tax exemption certificate fraud, began to require that sublet work be approved by a supervising officer and that subcontractors register with the Executive. The introduction of licenses for drinking clubs and slot machines similarly attempted to interrupt these sources of income.¹²⁸ Yet not all of these measures were properly enforced.

In 1983 the provincial focus began to shift. In February of that year, an important Northern Ireland Office study drew attention to paramilitary financial flows. The report noted that PIRA's resources derived from bank robberies on both sides of the border, extortion rackets, tax exemption frauds, and gaming machines. Overt streams of cash arrived from clubs, social functions, shops, direct collections, subscriptions, and overseas sympathetic contributions. The Royal Ulster Constabulary (RUC) responded by creating a general racketeering squad, labeled "C19" and known locally as the "Al Capone squad." But this unit, responsible for all racketeering, had only fifteen officers and two supervisors.¹²⁹ In 1988 the RUC further reformed its bureaucratic structure, forming a specialist unit to track terrorist financing.

Reflecting these changes, in 1987 Westminster introduced provisions specifically targeted at preventing paramilitaries from running protection rackets. The EPA prohibited security services from operating without first obtaining a certificate from the Secretary of State. It required companies to supply the government with the identities of their employees, partners, and officers. Businesses had to report any new hires, officers, or partners. The Secretary of State retained the authority to withdraw the

127. *MPs to Raise Secret Ulster Memo in Commons*, THE TIMES (London), Jan. 22, 1977, at 2.

128. *See* Betting, Gaming, Lotteries and Amusements (N.I.) Order 1985 S.I. No. 1204 (N.I. 11); Registration of Clubs (N.I.) Order 1987 S.I. No. 1278.

129. ADAMS, *supra* note 3, at 178–82.

certificate, which was renewed annually, at any time. The 1987 EPA made it illegal to promote or employ any security firm that did not have a special certificate. Criminal penalties on summary conviction of six months plus fine applied.¹³⁰ The state continued its effort to target this type of fundraising by strengthening its protections for victims to encourage them to come forward with more information.¹³¹

iv. Counterterrorism and Anti-Drug Trafficking

In 1993 Westminster revisited the issue of drug trafficking and passed measures that further limited property rights. Part III of the Criminal Justice Act provided for confiscation orders to be issued either by a prosecutor or the court.¹³² It also allowed the court to postpone determinations for up to six months from the date of the conviction.¹³³ The 1991 EPA, in turn, influenced drug law: the Criminal Justice Act strengthened assumptions about the proceeds of drug trafficking; instead of providing that the court *may* assume property derives from trafficking, it *required* the judiciary to assume all property flowed from illicit proceeds, unless the defendant could prove otherwise or injustice would result.¹³⁴ The statute expanded the number of people who could have their assets frozen or confiscated to anyone who knowingly acquired or used property related to drug proceeds.¹³⁵ Like § 18A of the 1989 Prevention of Terrorism Act, the legislation created an offense in connection with money laundering, making it illegal for *anyone* to fail to disclose knowledge or suspicion of money laundering—or to notify suspects that they are under investigation.¹³⁶ The legislation gave the Commissioners of Customs and Excise the power to initiate prosecution for drug offenses.¹³⁷

Critically, Part III of the legislation amended the 1988 Criminal Justice Act to create a new and weaker standard of proof. It adopted a civil, not criminal, standard to determine whether a person benefited from drug proceeds and thus forfeited their possessions.¹³⁸ This shift, from “beyond reasonable doubt” to “a balance of probabilities,” proved critical in later European Court of Human Rights (ECHR) proceedings:

130. Northern Ireland (Emergency Provisions) Act, 1987, §§ 17–20.

131. See generally Organized Crime Task Force, Extortion, <http://www.octf.gov.uk/index.cfm/section/article/page/extortion>.

132. Criminal Justice Act, 1993, ch. 36, § 7.

133. *Id.* § 8.

134. *Id.* § 9.

135. *Id.* § 16. It is a sufficient defense to argue that the state gained possession for adequate consideration.

136. *Id.* § 18.

137. *Id.* §§ 29–32.

138. *Id.* § 27.

because of it, the ECHR standard requiring the presumption of innocence did not apply.

Part IV of the legislation addressed, specifically, the financing of terrorism and further signaled a merger between counterterrorist law and drug trafficking law. It amended the 1991 EPA to give courts more flexibility to confiscate whatever amount they might consider appropriate. Bringing counterterrorist law into line with drug trafficking law, the legislation changed the standard of proof to the “balance of probabilities” for determining: (a) whether a person benefited from terrorist-related activities; (b) the value of the proceeds of those activities; and (c) the amount of the required payment under a confiscation order.¹³⁹ Instead of the six months’ postponement allowed for ordinary crime, the legislation allowed the court to postpone any final decision on assets already confiscated for “such period as it may specify.”¹⁴⁰ The legislation lifted any barrier to self-incrimination, requiring the defendant to provide the court with any information it requested.¹⁴¹ And it created a duty of disclosure, requiring certain professionals to inform a constable when they know or suspect an individual is acting in a proscribed manner.¹⁴²

Within a year, yet another important statute entered the books. The 1994 Drug Trafficking Act consolidated the 1986 Drug Trafficking Offenses Act and provisions in the 1990 Criminal Justice (International Cooperation) Act dealing with illicit trafficking. Part I again addressed confiscation orders, expanding court authority to confiscate without a prosecutor’s complicity. The statute required the court to determine, first, whether the defendant benefited from drug trafficking (defined broadly as receiving any payment or other reward at any time in connection with drug trafficking). The court could then order the defendant to pay the requested amount. The standard of proof for determining both whether the individual benefited and the amount to be recovered again lay in the civil realm: the balance of probabilities.¹⁴³ The statute required the court to assume that any property received six years prior to the date of conviction came free of other interests in it and that all expenditures during that time derived from drug proceeds.¹⁴⁴ These provisions essentially expanded the drug trafficking powers to equal those that the Proceeds of Crime Act had introduced for terrorist offenses.

139. *Id.* § 36.

140. *Id.* § 36(4).

141. *Id.* § 39.

142. *Id.* §§ 48, 51. The statute also amended the 1989 PTA, making it irrelevant whether property used for consideration or not.

143. Drug Trafficking Act, 1994, ch. 37, § 2.

144. *Id.* § 4.

The legislation, however, went further: like the 1991 EPA, it included tainted gifts as seizable items.¹⁴⁵ And, again drawing from the 1991 EPA, a prosecutor's signed statement, asserting the defendant benefited from drug trafficking and estimating the value of the proceeds, became sufficient to reverse the burden of proof, forcing the defendant to answer the charges and indicate evidence on which he would rely to refute them. In further keeping with counterterrorist law, where mere reasonable cause sufficed to establish that a defendant had benefited from drug trafficking, the statute authorized the High Court to issue a restraining order to prohibit any person from dealing with any realizable property held by a specified person either before or after the date of the order.¹⁴⁶

In addition to these changes, the 1994 Drug Trafficking Act gave HM Customs and Excise officers the authority to seize cash if any reasonable grounds existed for suspecting the money directly or indirectly represented drug proceeds. In the event of such a seizure, the magistrates' court would make a forfeiture order, which the affected individual had to appeal within 30 days.¹⁴⁷

The final section of the statute laid out a series of offenses connected to the proceeds of drug trafficking: it criminalized concealing or disguising any property, or converting or removing property from British jurisdiction, to avoid prosecution or the enforcement of a confiscation order. If a third party knew, or had reasonable grounds to suspect, that certain property related to drug proceeds, he became barred from acquiring, using, or taking possession of it. Criminal penalties applied to these offenses, as well as to the failure of any professional to report incidents of actual or suspected drug money laundering.¹⁴⁸

In the mid-1990s, with the potential end of political violence looming large, the British government began contemplating the introduction of permanent counterterrorist law. Lord Lloyd's report, issued in 1996, became a basis for the subsequent 2000 Terrorism Act. Before the government could introduce the legislation, however, in 1998 the Real IRA killed 28 people in Omagh. Prime Minister Tony Blair angrily announced in Parliament, "we must take exceptional measures to mop up the last recalcitrant and renegade terrorist groups that are prepared to threaten the future of Northern Ireland."¹⁴⁹ The subsequent 1998 Criminal

145. *Id.* § 8.

146. The restraint order, which could only be made on application by a prosecutor, could be presented *ex parte* to a judge *in camera*, but it still had to provide notice to all persons affected by the order. *Id.* §§ 25–26.

147. *Id.* § 42.

148. *Id.* § 52.

149. Tony Blair, 317 PARL. DEB., H.C. (6th ser.) (1998) 705.

Justice (Terrorism and Conspiracy) Act gave the court the power to order the forfeiture of *any* property used in connection with the activities of the Real IRA or other similar groups. This caught both deliberate and unwitting aid in its remit. In other words, if the Real IRA buried a steel drum containing weapons in a ditch on the edge of a farm, the farmer could technically lose the land. Moreover, the statute increased already severe penalties in order to emphasize the “gravity of the offense.”¹⁵⁰ It left the forfeiture decision entirely to the discretion of the courts. Introducing the provisions, Jack Straw suggested that, because the new provisions retained judicial discretion, they actually were not that extreme compared to those simultaneously under consideration in Ireland.¹⁵¹ The act applied throughout the United Kingdom, with its provisions subject to annual renewal.

Members of Parliament expressed concern at the time about the measure’s interference with property running afoul of the European Convention on Human Rights (ECHR). Simply allowing someone to appear before a judge did not ensure a balanced trial. Moreover, “Where people have different interests in a piece of property—land, a house or a car—one cannot just seize it under the European convention if that will punish another person.”¹⁵² Nevertheless, the legislation flew through Parliament under extraordinary procedures, attracting the most attention not for its financial provisions but for its extraterritorial powers and the relaxed rules of evidence it imposed for convicting defendants of terrorist offenses.

Finally, in the year 2000, the Terrorism Act became the first permanent counterterrorist law in the United Kingdom. The financial clauses maintained the importance of an actor’s intent in finding an offense warranting forfeiture.¹⁵³ These measures also included judicial checks and balances on the determination to seize assets.¹⁵⁴ Although the legislation broadened the number of people authorized to confiscate cash at the bor-

150. Jack Straw, 317 *PARL. DEB.*, H.C. (6th ser.) (1998) 747.

151. *Id.*

152. Kevin McNamara, 317 *PARL. DEB.*, H.C. (6th ser.) (1998) 783.

153. Part III of the statute focused on terrorist property and largely followed along the lines of the 1991 EPA. It incorporated five offenses, making it illegal to fundraise for terrorist organizations or to use or possess terrorist funds. Terrorism Act, 2000, ch. 11, §§ 15–16. The legislation outlawed entering into funding arrangements with terrorists. *Id.* § 17. It made it illegal to engage in the money laundering of terrorist assets. *Id.* §§ 18, 19. The criminal penalties for these offenses mirrored those of the 1991 EPA: up to 14 years imprisonment plus fine on indictment. All of these offenses, if committed outside the United Kingdom, became punishable by law. The statute also placed a duty of disclosure on anyone who believed or suspected that money or property related to terrorism. *Id.* § 63. The legislation also amended the Extradition Act 1989 to encompass the UN Convention for the Suppression of the Financing of Terrorism.

154. *Id.* § 23.

ders, it required HM Customs and Excise to apply to a magistrate's court immediately for an order to detain the money for up to three months, after which officials would either return or permanently seize the assets. The court could only grant the request if reasonable grounds existed to suspect the cash related to terrorism and continued retention was necessary pending further investigation. The legislation required the court to serve notice on anyone affected by the subsequent order, granting an opportunity for appeal within 30 days.¹⁵⁵ The statute also attached interest requirements to offset the disadvantage created by the temporary suspension of property rights for ultimately exculpated individuals. Although the statute placed a duty of disclosure on individuals, it made a professional exemption for legal advisors who obtained relevant information in privileged circumstances. And while law enforcement could approach financial institutions for customer information, the legislation inserted a warrant process and limited the type of information they could obtain.¹⁵⁶

The statute also avoided some of the most extreme measures previously in place, dropping the EPA's broad powers regarding the suspension of property rights and eliminating the 1998 Criminal Justice (Terrorism and Conspiracy) Act provisions allowing the state to seize property unwittingly related to terrorist crime.

The entire package derived in large part from the lengthy and public consultation process that preceded the statute's introduction. This is not to say that the measures were optimal, but the effort to balance state power with judicial protections reflected the importance of due process considerations.

v. Confluence: The Organized Crime Umbrella

While permanent counterterrorist law allowed the state to respond to international terrorism and recalcitrant groups that splintered from the mainstream paramilitary organizations, the United Kingdom still faced the problem of paramilitary participation in ordinary criminal enterprises. The professionalism and strength of these organizations presented a particular challenge, for which ordinary criminal law appeared insufficient. The numbers here are significant: approximately 230 organized criminal gangs operate in Northern Ireland, two-thirds of whom have ties to paramilitaries.¹⁵⁷ Some 97 percent of the population considers organized

155. *Id.* §§ 26–27.

156. *Id.* § 5, schedule 6.

157. OCTF 2004 REPORT *supra* note 41; Mervyn Wilson & Brian French, Northern Ireland Office, Statistics and Research Branch, *Views on Organised Crime in Northern Ireland: Findings from the Apr. 2004 Northern Ireland Omnibus Survey*, RES. & STAT. BULL. 1 (2004).

crime a severe threat.¹⁵⁸ Indeed, approximately 85 of the identified gangs conduct what intelligence refers to as top-level activities.¹⁵⁹

In September 2000, Adam Ingram, the Minister of State for the Northern Ireland Office, announced that the government had to look beyond terrorism to organized crime more generally. He announced a new bureaucratic entity, the Organized Crime Task Force (OCTF), to address the legacy of the Troubles. The group would include government, law enforcement, and various other agencies working to drain criminals' financial resources.¹⁶⁰ In May 2004, the group identified its top priorities as: (a) reducing extortion, intimidation, and blackmail; (b) disrupting the supply of illegal drugs; (c) reducing the loss to the Exchequer from fuel smuggling and dilution; and (d) interrupting alcohol and tobacco smuggling. The task force also targeted money laundering and the forfeiture of criminal assets and singled out intellectual property crime and in-transit robberies for special attention.¹⁶¹

To provide the statutory authority, in March 2001 the Home Secretary announced a new instrument specific to Northern Ireland: the Financial Investigations (Northern Ireland) Order. The draft Proceeds of Crime Bill would apply to the United Kingdom more broadly.¹⁶² These legal instruments transferred powers previously reserved to counterterrorist law and drug forfeiture provisions to the broader criminal realm.

Prior to this time, the main Northern Ireland legislation addressing criminal—as opposed to terrorist—finance was the 1996 Proceeds of Crime (Northern Ireland) Order. Article 49 allowed the state to appoint a financial investigator to assist the police in determining the proceeds related to criminal activities. The financial investigation powers, set out in schedule 2, included the ability to issue a general bank circular to identify accounts held by named individuals. Such authority could only be exercised following a county court judge's ruling that the appointment of

158. See OCTF 2003 REPORT, *supra* note 58.

159. See OCTF 2004 REPORT, *supra* note 41.

160. See Financial Investigations (Northern Ireland); Northern Ireland Grand Committee, Mar. 22, 2001, Westminster, Financial Investigations (N.I.) Order, Session 2000–01 (Statement of Adam Ingram, Minister of State, Northern Ireland Office), available at <http://www.publications.parliament.uk/pa/cm200001/cmstand/nilrelg/st010322/pm/10322s01.htm> (last visited Mar. 9, 2006).

161. The task force meets regularly and is supported by sub-groups, such as those focused on alterations in the law and publicity, as well as expert groups. See What We Do, <http://www.octf.gov.uk/index.cfm/section/article/page/WhatWeDo> (last visited Mar. 9, 2006).

162. See Financial Investigations (Northern Ireland), Northern Ireland Grand Committee, Mar. 22, 2001, Westminster, Financial Investigations (N.I.) Order, Session 2000–01 (Statement of Adam Ingram, Minister of State, Northern Ireland Office), available at <http://www.publications.parliament.uk/pa/cm200001/cmstand/nilrelg/st010322/pm/10322s01.htm> (last visited Mar. 9, 2006) (requesting that the committee consider a proposal for draft Financial Investigations (N.I.) Order 2001).

a financial investigator would substantially enhance the investigation. Between August 1996 and December 2000, judges used this power modestly, appointing financial investigators in only 28 cases. These investigators issued 23 general bank circulars which, in turn, identified more than 1,200 previously unknown accounts linked to people under investigation.

In 2001 the Financial Investigations (Northern Ireland) Order further expanded these powers. The new order granted HM Customs and Excise the ability, previously reserved for the police, to apply for the appointment of a financial investigator to assist with investigations into proceeds of crime. Investigators received the same access to material under production orders as was previously available only to law enforcement.¹⁶³ The statutory instrument widened the range of financial institutions to which investigators could issue a general bank circular, making it possible for the state to demand information from anyone possibly engaged in business with the accused.¹⁶⁴ Customs officers could now issue general circulars to financial institutions and solicitors, demanding information.¹⁶⁵

Most controversially, one portion of the order granted the state the entirely new power to issue a general solicitors' circular, directly impacting client-attorney privilege.¹⁶⁶ Ingram suggested that this measure addressed quirks unique to Northern Ireland, where two systems for registering land exist. Registration of title is not compulsory, and any inquiry regarding land ownership can only be made in reference to the property itself—not the owner. The Law Society of Northern Ireland and the Human Rights Commission, however, took a different view of the suspension of client-attorney privilege. Ingram responded angrily to these claims, asserting that no client-attorney privilege exists where an issue relates to furthering criminal intent. He cited drug trafficking statutes as precedent for the move:

The obligation on solicitors to report to the police or NCIS any suspicious transactions as defined by our current money laundering offenses has effectively weakened the duty of confidentiality that solicitors owe to their clients. Therefore, there has already

163. 2001 Financial Investigations (N.I.) Order, art. 4.

164. *Id.* art. 5. Prior to the order, the scope was restricted to banks and building societies. The state wanted to extend it to securities, futures, options, and insurance markets, so as to include investment firms, insurance companies, and others in the regulated financial sector.

165. *Id.* art. 3.

166. *Id.* art. 6.

been an acceptance in law of the need to tackle organized crime.¹⁶⁷

Even if the law did recognize a need to address organized crime, however, Ingram's answer avoided the key issue, which was that the new powers essentially suspended client-attorney privilege prior to any finding of wrongdoing by a court.

The proposed powers generated heated debate. Ingram acknowledged the individual rights concerns, but he suggested they were overridden by the right of British subjects not to suffer from organized crime.¹⁶⁸ Ingram cited the insertion of a county court judge into the process for appointing a financial investigator as a safeguard, as well as the requirement that investigators have reasonable grounds to believe a person had benefited from serious crime before issuing a circular. Ingram noted that the power to issue a solicitors' circular would be unique to Northern Ireland—unwittingly emphasizing the two-tiered system of justice within the United Kingdom.

The issue of rights figured significantly in the Northern Ireland Grand Committee. Although the Ulster Democratic Unionist Party (DUP), Sinn Féin, and the SDLP did not show up for the hearing, William Ross of the Ulster Unionist Party welcomed the order. He announced, "The Minister was right to declare that there is always a conflict between the protection of individual rights and what is good for the community." Although this was *not* what the minister had said, Ross went on to suggest that "even the European convention on human rights recognizes that the prevention of crime is sufficient reason for interfering with the right of criminals to a private life." Ross saw the issue as a conflict of entitlements: "[T]he right of society to fight crime successfully is pitted against an individual's right to privacy in his legal affairs." He ended his address with:

I appreciate that the Government wants to tread cautiously because of the conflict—it is at the heart of the matter—between freedom, the necessity of privacy and the need to investigate crime and prosecute those who are engaged in it in a proper manner that will give confidence to people.¹⁶⁹

The existence of the solicitors' circular underscores the growing pressure on the legal profession. What began as an indemnity under counterterrorist law for a solicitor to come forward morphed into a duty

167. Financial Investigations (N.I.), Northern Ireland Grand Committee, Mar. 22, 2001, Westminster, Financial Investigations (N.I.) Order, Session 2000–01.

168. *Id.*

169. *Id.*

to disclose information not obtained under legal privilege. With the 2001 Financial Investigations (Northern Ireland) Order, this expanded further to allow the state to request specific information from a solicitor. In March 2003, the Home Secretary issued yet another White Paper, this time entitled: “One Step Ahead: a 21st Century Strategy to Defeat Organised Criminals.” In this document, the state explained that because defendants could exploit legal safeguards, the government wanted to turn the tide. In practice this meant the state saw financial institutions and lawyers, both considered the “regulated” financial sector, as an extension of its intelligence-gathering arms. If they refused to participate, they would be found guilty of an offense. This approach creates problems, such as what advice an attorney can give clients under state scrutiny without “prejudicing an investigation.”

b. Post-September 11 Developments

Despite the careful consideration legislators gave to anti-terrorist finance in preparation for the 2000 Terrorism Act, September 11 resulted in further expansion of counterterrorist law. The 2001 Anti-terrorism, Crime and Security Act (ATCSA) enabled the state to confiscate any money it believed to be related to terrorist operations, *whether or not a court had brought proceedings in regard to an offense connected with the cash*.¹⁷⁰ The statute completely blocked the judiciary from playing a role in the freezing of assets of non-U.K. entities. When Treasury reasonably believed a non-U.K. person posed a threat to the British economy, British nationals, or United Kingdom residents, the Secretary of the Treasury could issue a statutory instrument seizing the individual’s assets. At the end of 28 days, each House of Parliament had to pass a resolution for the order to continue.¹⁷¹ The legislation also expanded the function of freezing orders: Not only did their issuance result in a suspension of access to funds, but they could also require persons to disclose information. Criminal penalties of up to two years’ imprisonment for failing to abide by the order—or provide the requested data—applied.¹⁷²

The legislation, however, did not stop there. It expanded the number of people who could seize cash beyond HM Customs & Excise and related functions to any authorized officer.¹⁷³ The statute also amended the 2000 Terrorism Act by allowing law enforcement to apply for an open

170. Anti-Terrorism, Crime and Security Act, 2001, ch. 24, Part I. The new provisions replaced § 24 with § 31 of the Terrorism Act 2000.

171. *Id.* ch. 24, Part II.

172. *Id.* schedule 3.

173. *Id.* schedule 1. Detention of the money beyond the initial 48 hours, however, would still require the approval of a magistrate’s court.

warrant, essentially giving the state the ability to conduct ongoing account monitoring rather than requiring the appropriate officer to seek judicial approval each time she sought information related to a terrorist investigation. The order can only be in place for 90 days, although renewal is possible. Applications may be made *ex parte*.

The ATCSA further amended the Terrorism Act by making it an offense for any person in the “regulated sector” to fail to inform law enforcement promptly where reasonable grounds exist for suspecting another person committed an offense relating to terrorism and laundering terrorist funds. While the duty of disclosure overrode statutory or professional limits,¹⁷⁴ failure to disclose was excusable where the person “is a professional legal adviser and the information or other matter came to him in privileged circumstances.”¹⁷⁵

i. Assets Recovery and Statutory Authorities

In the area of the monitoring and interception of criminal finance, September 11 did not so much create new measures as accelerate a process already in motion. In June 2000, a government report argued the state had hitherto dramatically under-utilized its potential to recover criminal assets.¹⁷⁶ As was previously mentioned, Ingram soon thereafter announced the introduction of legislation to address this problem. The resultant 2002 Proceeds of Crime Act (POCA) essentially applied extraordinary state powers, previously limited to terrorist and drug activity, to mainstream criminal behavior.¹⁷⁷ Simultaneously, it rejected pursuing terrorist funds through the criminal law system, opting instead for the civil domain and its softer protections of individual rights.

The legislation granted the Executive broad powers and limited judicial intervention. Where the courts did become involved, the legislation turned them into a “one-stop shop,” allowing the prosecution to “‘purchase’ pre-trial restraint of assets, criminal conviction, sentence, and, ultimately, confiscation of the restrained assets.”¹⁷⁸ It severed assets re-

174. *Id.* Part III.

175. *Id.* schedule 3A, Part 1(1), § 21.

176. In June 2000 the Performance and Innovation Unit issued a report, *Recovering the Proceeds of Crime*, available at <http://www.strategy.gov.uk/downloads/su/criminal/crime.pdf> (last visited Mar. 9, 2006).

177. For example, the statute defines Money Laundering Offenses strictly in relation to the crime: “A person commits an offense if he (a) conceals criminal property; (b) disguises criminal property; (c) converts criminal property; (d) transfers criminal property; (e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.” Proceeds of Crime Act, 2002, Part VII, § 327.

178. EDWARD REES & RICHARD FISHER, 4 BLACKSTONE’S GUIDE TO THE PROCEEDS OF CRIME ACT 2002 (2005). See also Proceeds of Crime Act 2002, Part IV, §§ 189–191, 199.

covery from any sort of criminal conviction,¹⁷⁹ and it adopted the more lenient civil standard of proof—a “balance of probabilities”—instead of “beyond reasonable doubt.” By consciously sidestepping criminal law, the state did *not* have to presume the innocence of the accused. (The House of Lords, Privy Council, and European Court of Human Rights had all previously held similar civil confiscation provisions outside the scope of criminal law—and thus not subject to the presumption of innocence as embodied in article 6(2) of the ECHR.¹⁸⁰)

Previously the 1996 Drug Trafficking Act had *required* the court to consider any property received in the six years prior to a case to be derived from crime. In contrast, the 1988 Criminal Justice Act had *allowed* for judicial discretion in that determination. POCA combined and extended these regimes, creating the universal assumption that the defendant benefited from crime. The statute reversed the burden of proof, creating the “criminal lifestyle” standard and requiring self-incrimination under production and disclosure orders.¹⁸¹ The statute obliged the court to assume that all expenditures in the six years prior to the case came from property obtained through criminal conduct.¹⁸² On appeal, the court could confirm, quash, or vary a confiscation order¹⁸³—making the decision to appeal a bit like Russian Roulette. Jane Kennedy, the Minister of State for the Northern Ireland office, hailed the legislation as “a formidable addition to our arsenal.”¹⁸⁴

To administer this new regime, the statute created the Assets Recovery Agency (ARA), a non-ministerial department that reports to the Home Secretary, although it maintains operational independence. The organization operates throughout the United Kingdom, with its main branch located in Great Britain and a subsidiary office in Northern Ireland.¹⁸⁵ Its strategic aim is to interrupt criminal activity by recovering criminal assets and to promote financial investigations as a key element of criminal cases. The agency takes on cases referred by the police, HM Customs and Excise, the prosecution authority, and other law enforcement. The system creates an alternative to criminal law: the state must have attempted and failed to prosecute through the criminal system or

179. *Id.* Part V, ch. 3, §§ 281–9.

180. REES & FISHER, *supra* note 178, at 2.

181. *Id.*

182. Proceeds of Crime Act, 2002, Part IV, § 160.

183. *Id.* § 182.

184. Jane Kennedy, After Dinner Speech to the Ulster Society of Chartered Accountants and Law Society for Northern Ireland, Sept. 25, 2002, *available at* <http://www.octf.gov.uk/index.cfm/section/News/page/archivelist/> (follow “September 2002” hyperlink; then follow “After Dinner Speech by Jane Kennedy to Ulster” hyperlink). *See also Identification Rules are Over the Top, Say IFAs*, INVESTMENT ADVISER, Apr. 21, 2003.

185. Proceeds of Crime Act, 2002, Part I.

else prosecution must be non-feasible. The minimum amount of recoverable property is set at £10,000, and it must include items other than cash or negotiable instruments (although these could be included if other property also is of issue). The organization is staffed by lawyers, accountants, ex-police investigators, forensic accountants, and customs and excise and Inland Revenue personnel. External advisors drawn from the private sector and the Treasury Solicitor's Office also assist.

The agency opened for business in January 13, 2003. Between February of that year and the following May, it received 142 referrals from other agencies. But when asked in March 2005 which assets of PIRA, Real IRA, Continuity IRA, Official IRA, Irish National Liberation Army, Ulster Defence Association, and Ulster Volunteer Force had been seized or frozen by the Assets Recovery Agency, Ian Pearson, the Parliamentary Under-Secretary of State for Northern Ireland, provided less than impressive figures: he put Loyalist assets under interim receiving orders at £350,000, with another £1.25 million agreed for recovery; Republican cases, in turn had only netted £173,332 in frozen funds and £225,000 agreed for recovery.¹⁸⁶ David Burnside, from South Antrim, pointed out in response, "If ever there were a description of the tip of an iceberg, that is it." Slab Murphy's empire alone was worth some £40 million—making the paltry £225,000 recovered from Republicans almost meaningless.¹⁸⁷ Pearson replied that it was, as yet, early in the program. He had a point: not only was the organization in its infancy, but initially only 10 people worked there (as opposed to 40 in its southern counterpart).¹⁸⁸ Indeed, considerable incentives exist for the agency to pursue more, rather than fewer, funds: the statute made ARA self-financing, thereby creating an incentive for aggressiveness in the organization. To some degree, this seems to have worked: by March 31, 2004, although its business plan only targeted £10 million, the ARA had frozen £14.8 million. But its overall "success" in the paramilitary realm leaves much to be desired.

Going by the ARA's public press releases, only two cases, both Loyalist, appear thus far to relate directly to paramilitaries: in the first, a UDA case in South-East Antrim, the agency obtained assets held by David and Pauline Hill in the United Kingdom and United States. In March 2005, the agency wrestled about £4.8 million in assets from Colin Armstrong and Geraldine Mallon, both of whom had links to the Ulster Volunteer Force and later the Loyalist Volunteer Force, when the organi-

186. Northern Ireland Grand Committee, House of Commons, Session 2004–05, Column Nos. 10–11 (2005).

187. *Id.*

188. Gavin Hinks, *Numbers Game*, ACCOUNTANCY AGE, July 17, 2002, at 3.

zation split.¹⁸⁹ They were linked to drug trafficking between Belgium and Northern Ireland.

The United Kingdom's embrace of this agency reflected a growing international consensus that asset recovery is an appropriate way to address global money laundering and organized crime. Indeed, the ARA borrows heavily from the Criminal Assets Bureau in the Republic of Ireland and, as of the time of writing, works closely with its Irish counterpart.¹⁹⁰

ii. Summary

The approach that currently dominates the United Kingdom's anti-terrorist financing dialogue—a broad, strategic approach that focuses on stemming the flow of funds—is a relatively recent creation. In large part it started with the drug war and the expansion of asset forfeiture and money laundering regulations, which spilled over into the counterterrorism realm. A symbiotic relationship, however, quickly developed, wherein expansions in terrorist finance authorities seeped back into drug trafficking. With September 11 came the transfer of these powers to the broader criminal realm—not without consequence for individual rights.

The anti-terrorist finance regime in the United Kingdom has moved from criminal law to civil law standards, with the forfeiture of property ultimately divorced from conviction on any underlying criminal offense. The presumption of innocence no longer applies. The burden shifted to those seeking to *prevent* the state from claiming their assets to prove that such property does not relate to criminal activity. Simultaneously, the standard for determining guilt weakened: instead of beyond reasonable doubt, a balance of probabilities applies. And the number and range of offenses related to the financing of criminal activity has rapidly expanded.

Not only has the United Kingdom eroded these entitlements and, consequently, property rights, but the state has created institutions with a vested interest in aggressively wielding investigatory powers and pursuing forfeiture proceedings. While, in one sense, these initiatives are meant to strengthen the state's ability to respond to a very real threat, their transfer to the ordinary criminal system means their repercussions

189. See press releases available at <http://www.assetsrecovery.gov.uk>; see also IRA "Laundering Stolen Cash in UK Housing Market," THE GUARDIAN (London), Mar. 30, 2005, at 7.

190. For discussion of anti-terrorist finance provisions in the Republic of Ireland, see AN GARDA SÍOCHÁNA/POLICE SERVICE OF NORTHERN IRELAND, A CROSS BORDER ORGANISED CRIME ASSESSMENT 2004, available at http://www.nio.gov.uk/cross_border_organised_crime_assessment_2004.pdf (last visited Mar. 9, 2006). See also HOGAN & WALKER, *supra* note 73, at 271–72.

emanate beyond the terrorist realm. Yet little focus has been given to the broader impact of these authorities. Perhaps of greatest concern has been the suspension, in Northern Ireland, of client-attorney privilege as part of the state's investigatory powers. If the history of anti-terrorist finance is any indication, this shift may eventually extend throughout the United Kingdom.

Instead of stopping to question the significant expansion in state powers, British efforts to address the flow of criminal funds generally, and terrorist finance in particular, continue apace. In 2003, the government issued Money Laundering Regulations, which entered into force on April 1, 2003.¹⁹¹ The regulations require that every individual in the course of relevant business comply with identification procedures,¹⁹² record-keeping procedures,¹⁹³ internal reporting procedures,¹⁹⁴ and training.¹⁹⁵ All money service operators and high value dealers must register with HM Customs & Excise,¹⁹⁶ which can impose civil fines and penalties to noncompliant entities.¹⁹⁷ In the legislative realm, a consultation paper issued in March 2004 floated new proposals looking at witness compellability, evidentiary standards, sentencing, and license conditions. Conspiracy law and proposals for a National Witness Protection Program also graced the text. And the administrative structure continues to evolve: In February 2004, the government announced the formation of the Serious Organised Crime Agency. This entity draws from responsibilities divided between the National Crime Squad, the National Criminal Intelligence Service, HM Customs & Excise, and the Immigration Service. Chaired by the Home Secretary, the Serious Organised Crime Agency focuses on developing national strategies and

191. These regulations replaced the Money Laundering Regulations 993 and 2001. The idea was to bring them into line with Directive 2001/97/EC of the European Parliament and of the Council, amending Council Directive 91/308/EEC on the prevention of the use of the financial system for money laundering.

192. Statutory Instrument 2003 No. 3075: The Money Laundering Regulations 2003, reg. 4 (sets £15,000 as the threshold after which identification procedures are required).

193. *Id.* reg. 6 (requires that records be retained for five years after the relationship or one-off transaction ends; requires the business to retain a copy of identification records or information as to where they can be obtained).

194. *Id.* reg. 7 (details internal reporting measures).

195. *Id.* reg. 3 (requires businesses to train employees on how to recognize and deal with transactions that may be related to money laundering; also requires that employees are familiar with the 2002 POCA and the 2000 Terrorism Act §§ 18, 21A. Failure to do so carries a criminal penalty.).

196. *Id.* reg. 9. A money service operator is anyone who accepts deposits, carries out long-term insurance contracts, deals in investments as principal or agent, arranges deals in investments (manages them, safeguards, or administers them), establishes collective investment schemes, advises on investments, or issues electronic money. A "high value dealer" is anyone dealing in goods by way of business when the transaction involves more than £15,000.

197. *Id.* regs. 14, 20.

encouraging communication across bureaucratic barriers. In Part III of this Article, I discuss aspects of this regime that have proven unhelpful or even counterproductive in the effort to prevent terrorist organizations from raising money and transferring funds.

B. *The United States*

Unlike the United Kingdom, where September 11 merely accelerated a contemporary trend, in the United States it abruptly changed the course of anti-terrorist finance policy. Prior to the attacks, the U.S. administrative structure all but ignored terrorist finance: the Department of Justice tended not to bring criminal charges for contributions to terrorist organizations.¹⁹⁸ Terrorism did not require much money, and so popular belief suggested that more efficient ways of preventing attacks existed. Not a single unit at FBI headquarters focused on the financing of terrorist organizations; nor did the Criminal Division of the Department of Justice have a national terrorist financing program.¹⁹⁹ As a result, the FBI lacked the detailed intelligence necessary to conduct a successful anti-finance campaign. And turf battles, the scourge of the bureaucratic state, compounded the issue.

The CIA, for its part, had precious little insight into the financial underpinnings of groups associated with al Qaeda. Like the FBI, the CIA did not consider interrupting the flow of money a high priority, but it had different reasons: the general belief within the Agency was that, at least in regard to al Qaeda, the money came from bin Laden. (They were wrong.)²⁰⁰ Plus, the complicated manner in which terrorists obtained and transferred funds made efforts to follow the money less effective than other approaches to addressing the threat. The CIA did have a virtual station (ALEC station), initially named the Counter Terrorism Center (CTC)—Terrorist Financial Links, but it only dealt with financial matters connected to other Agency efforts. The ALEC Station Director, moreover, strongly believed that money did not reveal much about an organization's plans. The Office of Transnational Issues, within the Directorate of Intelligence, ran an Illicit Transaction Group that addressed terrorist finance. It was not, however, considered part of the CTC.²⁰¹

198. Successful prosecution required the state to trace donor funds to particular terrorist attacks. DOJ found it easier to use minor charges to disrupt operations. On the more serious cases, the FBI was concerned that if it opened a criminal investigation, it would not be able to use broader powers under the Foreign Intelligence Surveillance Act to place suspects under surveillance. The FBI also claimed (after the fact) that the political climate would not have allowed them to go after religious charities. STAFF REPORT, *supra* note 1, at 32.

199. *Id.* at 33.

200. See STAFF REPORT, *supra* note 1, at 20, 34.

201. *Id.*

Other bureaucratic entities with a vested interest in the matter shared a similar story: The National Security Agency (NSA) did have a handful of people addressing terrorist finance, but its foreign language capabilities left something to be desired. The Treasury Department's Office of Foreign Assets Control (OFAC) ran the Foreign Terrorist Asset Tracking Center (FTATC), but Herculean battles with the CIA following the 2000 Bremer Commission report limited OFAC's effectiveness—which in any event was bounded by U.S. borders. FinCEN, Treasury's Financial Crimes Enforcement Network, born in 1990, tended to focus on Russian money launderers and other high-profile crimes. The only federal organization seriously addressing the issue was the National Security Council (NSC): After the 1998 East Africa bombing, Richard Clarke started an NSC-led interagency group on terrorist financing, which also included Treasury, CIA, FBI, and the State Department. The task force initially focused on determining bin Laden's asserts. (It was this group that later discredited the CIA's assumption regarding al Qaeda funding.)

The administrative structure was not alone in exhibiting malaise; the legal framework arose rather late in the game. In the mid-1990s, the first efforts to address nonstate actors' funding emerged. These initiatives narrowly focused on specific actors. The financial regulatory regime, for its part, existed quite separately and almost wholly in the realm of drug trafficking and money laundering.

September 11, however, heralded a dramatic shift in approach. Title III of the USA PATRIOT Act and Executive Order 13,224 led the charge. The administrative structure suddenly began to focus on the issue, placing increased pressure on both allied and non-allied states to introduce new structures for stemming the flow of funds to international terrorist organizations.

Part III.A looks at legislative authorities and the judicial interpretation of these powers prior to September 11. Part III.B then takes a step back and examines, specifically, al Qaeda funding. The terrorist network provides a case study that in some ways mirrors, and in others departs, from the Northern Ireland situation. Part III.C then focuses on U.S. measures introduced following September 11 and highlights the inroads into individual entitlements generally—and property rights in particular—that mark the current U.S. anti-terrorist finance regime.

1. U.S. Anti-terrorist Finance Provisions Pre-September 11

Three legislative streams flowed into the United States' anti-terrorist finance regime. The first originated with the 1917 Trading with the Enemy Act (TWEA), which gave the president the ability to “investigate, regulate . . . prevent or prohibit . . . transactions” during war or national

emergencies.²⁰² The statute reflected congressional intent to prevent individuals located within the United States from conducting transactions with declared enemies. Although initially viewed as an instrument of war, in 1933 Congress amended the statute to apply during any national emergency. Abuses during the Nixon era led to its revocation and replacement with the 1977 International Emergency Economic Powers Act (IEEPA).²⁰³ In the final decade of the twentieth century, the Executive issued an order under this statute that created a list of Prohibited Persons and Specially Designated Terrorists with whom financial transactions could be banned. The second legislative source, the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), created two lists of entities against which financial strictures applied: state sponsors of terrorism and designated foreign terrorist organizations. Statutes related to drug trafficking and anti-money laundering constitute the third legislative stream. This section briefly traces the evolution of each.

a. OFAC List of Prohibited Persons and the
Specially Designated Terrorist List

The 1977 IEEPA required that any economic regulation introduced by the President arise from extraordinary threats located wholly, or mostly, outside the United States. In such circumstances, the President can declare a national emergency in regard to the specific threat. A broad range of powers then goes into effect. The President can designate individuals or entities he considers a national security threat, freeze their assets, and block transactions between them and every U.S. person by making it illegal to make or receive any contribution of funds, goods, or services to or from those included in the list.²⁰⁴ Once the President makes the order, he must report it within 10 days to the Office of Foreign Assets Control (OFAC). OFAC then informs banks, whose refusal to comply may result in criminal or civil penalties.²⁰⁵ Like the 2001 ATCSA in the United Kingdom, banks hold all blocked assets in interest-bearing accounts that maintain a rate roughly commensurate to the market average. These accounts cannot be debited (although they can be credited). Early uses of the IEEPA applied to Libya and Cuba; in the 1990s, however, the

202. 50 U.S.C.S. appendix § 3. Prior to that time, however, the Executive could exercise its foreign affairs power to exert control of non-U.S. persons. *See* *United States v. Curtis-Wright Export Corporation*, 299 U.S. 304 (1936) (finding a joint congressional resolution authorizing the President to ban sale of weapons to states enmeshed in conflict in Bolivia constitutional under the President's foreign affairs power).

203. Trading With the Enemy Act, 50 U.S.C. § 1702(a)(1) (1977). In times of war, the Trading with the Enemy Act remains in force.

204. 50 U.S.C. § 1702(a)(1)(B) (2001).

205. The criminal penalties run up to \$500,000 for corporations and up to \$250,000 and/or 10 years in jail for individuals. The legislation caps civil penalties at \$11,000.

Executive began to go after nonstate actors: first, Palestinian organizations, and later, drug traffickers like the Cali cartel in Colombia.

In January 1995 President Clinton issued Executive Order 12,947 under the IEEPA. The instrument blocked all U.S. assets of specified terrorists or groups threatening to use force to disrupt the Middle East peace process.²⁰⁶ It prohibited all U.S. persons from engaging in transactions with entities included on the “Specially Designated Terrorist List.” The justification for the provision was the centrality of peace in the Middle East to U.S. national security. The Clinton Administration did not originally include Osama bin Laden on this list. After the 1998 East Africa bombings, however, Executive Order 13,099 added bin Laden and a number of his key aides.²⁰⁷ In 1999, in retribution for their protection of bin Laden, the Executive authorized OFAC to block financial transactions with the Taliban.²⁰⁸

Two cases in the 1980s tested Executive authority to act under both TWEA and the IEEPA. In the first, the Supreme Court upheld Executive authority to freeze assets to create a bargaining chip for foreign relations.²⁰⁹ From this case it became clear that although Congress intended the IEEPA to limit the President’s power during peacetime, the statute actually did not reduce overall Executive power to control foreign assets. In the second, the Court held that the sanctions regime against Cuba had properly moved from the Trading with the Enemy Act to the IEEPA.²¹⁰ These two decisions, in addition to the removal of the legislative veto in *INS v. Chadha*,²¹¹ afforded the Executive significant discretionary power. As long as the President declares a national emergency, he has the power to place sanctions on recalcitrant actors and request that OFAC issue regulations. These decisions suffer little scrutiny from the courts.²¹²

b. Designated Foreign Terrorist Organizations

The second stream of authorities stems from the 1995 Oklahoma City bombing. Although U.S. nationals planned and carried out the attack, many of the counterterrorist provisions Congress subsequently

206. Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (Jan. 23, 1995), *reprinted as amended in* 50 U.S.C.A. § 1701 (2003).

207. Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 20, 1998).

208. Rudolph Lehrer, *Unbalancing the Terrorists’ Checkbook: Analysis of U.S. Policy in its Economic War on International Terrorism*, 10 TUL. J. INT’L & COMP. L. 333, 345 (2002).

209. *Dames & Moore v. Regan, Sec’y of the Treas., et al.*, 453 U.S. 654, 660 (1981).

210. *Regan, Sec’y of the Treas., et al. v. Wald, et al.*, 468 U.S. 222, 232 (1984).

211. *INS v. Chadha*, 462 U.S. 919 (1983).

212. Lehrer, *supra* note 208, at 341–44; *see also* *Havana Club Holding, S.A. v. Galleon S.A.*, 961 F. Supp. 498, 500 (S.D.N.Y. 1997); *Milena Ship Mgmt Co. v. Newcomb*, 995 F.2d 620, 625 (5th Cir. 1993).

incorporated into AEDPA dealt with foreign threats. Two sections related to anti-terrorist finance.

Section 321 made it a criminal offense for U.S. persons, except as approved by Treasury in consultation with the State Department, to engage in financial transactions with the governments of states designated under the 1979 Export Administration Act as international state sponsors of terrorism. Criminal penalties applied. Until recently, Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria found themselves on the list. (Prior to September 11, Afghanistan was on a special “not cooperating fully” list.) The beginning of the U.S. occupation of Iraq coincided with that state’s removal from the list.

Section 302(a), which provided a legislative supplement to Executive Order 12,947, created another set of powers particularly relevant to the current discussion.²¹³ This measure made it a crime to provide “material support or resources to a foreign terrorist organization.” U.S. law defined “material support” rather broadly to include currency or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, or any other physical assets, except medicine or religious materials.²¹⁴ A federal court later determined that material support also included food and shelter.²¹⁵ In order for a group to qualify, it must be foreign, engage in terrorism or terrorist activity, and threaten national security or the safety of U.S. nationals. Terrorism is understood as “premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents.”²¹⁶ “Terrorist activity” does not get off so lightly, with an incredibly lengthy definition that hinges on using a range of illegal, violent, criminal acts as a way to compel others to act or abstain from acting.²¹⁷ Criminal penalties

213. Anti-terrorism and Effective Death Penalty Act § 302(a), *codified in* 18 U.S.C. § 2339B.

214. 18 U.S.C § 2339A(b). The court later held that the terms “personnel” and “training” in the definition of material support were impermissibly overbroad and thus void for vagueness under the First and Fifth Amendments; but these could be severed from the statute. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1205 (C.D. Cal. 1998). *See also* *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001) (upholding the district court decision); *Humanitarian Law Project v. U.S. Dep’t of Justice*, 352 F.3d 382 (9th Cir. 2003) (again affirming the lower court’s ruling on this point).

215. *Charangeet Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004).

216. 22 U.S.C. § 2656(f)(d)(2).

217. 18 U.S.C. § 1182(a)(3)(B). For discussion of the procedure followed, see State Department Office of Counterterrorism, *Fact Sheet on Foreign Terrorist Organizations*, Aug. 9, 2002, available at <http://www.state.gov/s/ct/rls/fs/37191.htm>.

for violations apply.²¹⁸ In October 1997, Secretary of State Madeline Albright issued a list of 30 entities. Two years later, State reissued the list, reducing it to 27. It was not until late October 1999 that al Qaeda joined the other designated groups.²¹⁹

By May 2000, it was clear that, according to the courts, these extraordinary powers lay firmly within the Executive domain. For non-U.S. persons, the judiciary could only speak to an extremely narrow set of issues: whether the entities listed were “foreign” and “engaged in terrorist activities.” In regard to the former, the U.S. Court of Appeals for the Fourth Circuit explained, “[A] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.”²²⁰ As to the latter, as long as it *appeared* that the Secretary of State came to her conclusions based on some sort of information, the court had no power to review the actual decision.

The Fourth Circuit seemed concerned that its decision not be taken as an endorsement of the Executive’s findings: “In so deciding we are not . . . allowing the reputation of the Judicial Branch to be ‘borrowed by the political Branches to cloak their work in the neutral colors of judicial action.’ *We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true.*”²²¹ The court appeared uncomfortable with AEDPA’s procedures and the manner in which the Executive implemented them: “*As we wrote earlier, the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected.*”²²² Nevertheless, “*As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and en-*

218. *State Department Releases Facts on Foreign Terrorist Organizations*, 79 INTERPRETER RELEASES 1240 (2002).

219. In 2000 the State Department added the Islamic Movement of Uzbekistan; then in 2001 Secretary of State Powell added the Real IRA and the United Self-Defense Forces of Columbia. On October 8, 2001, Secretary of State Colin Powell redesignated 25 of the 28 foreign terrorist organizations whose designations were set to expire. *State Department Redesignates 25 Groups as Foreign Terrorist Organizations*, 78 INTERPRETER RELEASES 1603 (2001); Powell combined Kahane Chai and Kach into one group. The two groups removed, the Japanese Red Army and Tupac Amaru Revolutionary Movement (Peru), were dropped because they had not committed any “significant” acts of terrorism since the last designation. Over the next eight months Powell added five new organizations: al-Aqsa Martyrs Brigade, Asbat al-Ansar, Jaish-e-Mohammed, Lashkar-e Tayyiba, and Salafist Group for Call and Combat.

220. *People’s Mojahedin Org. of Iran v. United States Dep’t of State*, 182 F.3d 17 (4th Cir. 1999). The court looked to *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) for precedent. It found that INA § 219 did not deprive the organization of due process (thus distinguishing the case from *Joint Anti-Fascist Refugee Committee v. McGrath*).

221. *People’s Mojahedin Org. of Iran*, 182 F.3d at 25.

222. *Id.*

gaged in terrorism.”²²³ Thus, while the Secretary of State might be wrong, it did not lay within the court’s purview to exonerate foreign organizations. The question as to whether U.S. persons could fall within the statute’s remit, for the moment, remained open. But not for long.

In a rare exception to judicial deference on these matters, in June 2001 *National Council of Resistance v. State* suggested that the truncated procedures adopted in AEDPA *did* deny U.S. persons due process.²²⁴ Under the existing procedures, organizations could be designated on the basis of classified information immune to challenge, with an extremely limited scope of subsequent judicial review.²²⁵ The court, however, again left open a significant question: What procedures, at what point, *would* satisfy due process? Only broad guidelines, involving notice and an opportunity for meaningful review followed. The court hedged even these guidelines, though, with language recognizing “the privilege and prerogative of the executive” and the desire of the court “not . . . to compel a breach in the security which that branch is charged to protect.” This case came down three months before September 11. The Supreme Court has yet to determine exactly which procedural devices the Executive must grant to designated groups or individuals to protect their interests and at what point such devices must be given.²²⁶ Courts have repeatedly, however, upheld the narrow interpretation of the judicial role.²²⁷

The courts also view political advocacy for foreign regimes as outside the remit of the First Amendment.²²⁸ Similarly, it is not up to the judiciary to consider whether the humanitarian efforts of designated organizations stand separate from their violent activities.²²⁹ Nevertheless, for “material support or resources” to designated foreign entities to be a crime, the Executive must supply proof that individuals charged with violating AEDPA know about either the organization’s designation or the unlawful activities that led to its inclusion on the list:²³⁰

223. Emphasis added and internal citations omitted.

224. *National Council of Resistance of Iran v. State* 251 F.3d 192 (D.C. Cir. 2001).

225. *Id.* at 208–09 (Sentelle, J.).

226. *But see* *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (explaining that it may be necessary to postpone notice or a hearing “to meet the needs of a national war effort”). *See also* *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002) (holding that the statutory scheme for FTO designation derived supporters their right to due process and any meaningful opportunity to be heard); *Due Process: Constitutional Violation in Terrorism Designation Process*, 16 CRIM. PRAC. REP. 13, July 24, 2002.

227. *See, e.g.,* *United States v. Mohamad Youssef Hammoud*, 381 F.3d 316 (4th Cir. 2004); 65 FED. R. EVID. SERV. 338.

228. *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

229. *Humanitarian Law Project v. U.S. Dep’t. of Justice*, 352 F.3d 382 (9th Cir. 2003).

230. *Scales v. United States*, 367 U.S. 203 (1961).

[G]uilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause.²³¹

Because Congress included the word “knowingly” in the statute, the court had to read the law to include a *mens rea* requirement; conduct regulated by statute did not fall into the “public welfare” category of conduct excepted from a scienter requirement:

Thus, to sustain a conviction under § 2339B, the government must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization’s unlawful activities that caused it to be so designated.²³²

c. Money Laundering

The third stream of legislative authority stemmed from efforts to prevent money laundering, particularly as it related to drugs. These provisions tended to focus on creating a paper trail to help the state detect and investigate violations of the tax and criminal law. Together with the 1998 Money Laundering and Financial Crimes Strategy Act, which required Treasury to work with state and local officials to write a national money laundering strategy, three pieces of legislation—the Bank Secrecy Act, the Anti-Drug Abuse Act, and the Housing and Community Development Act—created the due diligence standard to which banks were held prior to September 11.²³³

The first of these measures, the 1970 Bank Secrecy Act and Regulations, emphasized money laundering and the use of secret foreign accounts.²³⁴ The legislation required financial institutions (defined by Treasury) to file Suspicious Activity Reports (SARs) for questionable transactions. The rationale ran thus: private industry stood in a better

231. *Id.* at 224–25.

232. *Id.* at 403 (emphasis added).

233. Money Laundering and Financial Crimes Strategy Act of 1998, Pub. L. 105–310, 112 Stat. 2941.

234. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in parts of 12 U.S.C., 15 U.S.C., 18 U.S.C., and 31 U.S.C.). *See also* Cal. Bankers Ass’n v. Shultz, 416 U.S. 21, 47–49, 61 (1974) (upholding record-keeping as a way to detect criminal activity); United States v. Miller, 425 U.S. 435 (1976) (focusing on the justifications for the record-keeping requirements).

position than the state to detect illicit movement of money. And having a nongovernment entity file the reports protected customer privacy. The statute required that the financial entity “know” its customers—i.e., the beneficial owner of the account, the source of the funds, and whether the transaction reflected the customer profile. The bank, in turn, could more effectively limit its exposure to risk. Criminal penalties, civil fines, and administrative sanctions could accompany the failure to file SARs within 30 days or to have an appropriate system in place. The SAR scheme made it more difficult for money launderers, drug dealers, and fraudsters to use the U.S. banking system.²³⁵

Constitutional challenges to the statute on grounds of privacy and a Fourth Amendment property interest in bank records failed.²³⁶ Legislators responded with the 1978 Right to Financial Privacy Act, which limited the state’s ability to request and obtain financial records.²³⁷ It required investigators, for the most part, to make requests in writing and compelled banks to provide notice to customers when the state requested their records. The regulatory scheme in the Bank Secrecy Act can nevertheless be viewed as a way around these procedures or, for that matter, grand jury subpoena.

In 1986 the second important piece of legislation, the Anti-Drug Abuse Act, included in its auspices a set of provisions aimed at further emasculating money laundering schemes.²³⁸ Three new criminal offenses made it illegal to knowingly assist in laundering, to handle transactions of more than \$10,000 derived from criminal proceeds, or to structure transactions to dodge statutory reporting requirements. The statute upped the ante on the criminal and civil penalties, including the forfeiture of “any property, real or personal, involved in a transaction or attempted transaction” that violated the reporting rules.²³⁹ The legislation also gave Treasury the authority to require financial organizations to file geographically-focused reports on suspect regions.

The third significant measure emerged in 1992: Title XV of the Housing and Community Development Act gave regulators the ability to close accounts and seize the assets of financial institutions that violated

235. STAFF REPORT, *supra* note 1, at 54–56.

236. *United States v. Miller*, 425 U.S. 435 (1976).

237. Financial Institutions and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, 3697–3710 (1978) (codified as amended at 12 U.S.C. §§ 3401–3422); *See also* H.R. Rep. No. 95-1383, at 34 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9306.

238. Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986)(codified as amended at 18 U.S.C. §§ 1956–1957); *see also* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in different parts of the United States Code).

239. 31 U.S.C. § 5317(c) (2003).

money laundering statutes.²⁴⁰ This legislation essentially expanded the application of SARs to an even broader range of financial institutions.²⁴¹ Outside of general guidelines, though, the legislation left the determination of what amounted to suspicious activity to the banks. The financial industry vigorously opposed the bill. Nevertheless, the final statute required institutions to maintain records of wire transfers so that the state could produce such information later as evidence in court. As a compromise, Congress made the rules on the format and content of such records rather vague, leaving their exact structure up to the individual institutions. Subsequent regulations from Treasury and the Federal Reserve proved equally broad. The statute also introduced an interesting administrative penalty, forbidding anyone convicted of money laundering from engaging in business with a federally-insured entity without explicit authorization from the state.²⁴²

The concessions made sense in light of the goal of the legislation: to create a tighter relationship between the state and private industry. A statutorily-required advisory board to oversee the Bank Secrecy Act similarly reflected this aim, drawing as it did from Treasury, Justice, the Office of National Drug Control Policy, and financial institutions.

These shifts proved to be an iron fist in a velvet glove: the statute gave Treasury the ability to interfere in the running of financial institutions, requiring them to institute anti-money laundering programs, designate compliance officers, train employees on a regular basis, and assent to an independent audit. The legislation created an indemnity from any civil suits, thus meeting a long-standing concern of the American Bankers' Association, which was uncomfortable about the legal implications of such inroads into personal privacy. The legislation also made it illegal for employees to discuss any grand jury subpoenas with customers; again, criminal penalties, civil fines, and administrative penalties applied. Prior to September 11, the general trend in the use of these powers was toward giving prosecutors more discretion in using them. Courts, in turn, tended increasingly to decide ambiguities in favor

240. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992). Title XV is also known as the Annunzio-Wylie Anti-Money Laundering Act.

241. Since 1985, regulatory authorities had required SARs for the Federal Reserve Board and Office of the Comptroller of the Currency. See U.S. DEP'T OF THE TREAS., ANNUAL MONEY LAUNDERING STRATEGY 85 n. 21 (2000).

242. Bruce Zagaris, *The Merging of the Anti-money Laundering and Counter-terrorism Financial Enforcement Regimes After Sept. 11, 2001*, 22 BERKELEY J. INT'L L. 123 (2003). See also Bruce Zagaris, *The Merging of the Counter-terrorism and Anti-Money Laundering Regimes*, 34 LAW & POL'Y INT'L BUS. 45 (2002).

of prosecutors.²⁴³ Unlike the pre-September 11 terrorist measures, money laundering statutes required only that the money be traceable to a specified unlawful activity—not that the defendant be tied to the commission of the act.

Even though these measures had teeth, and were steadily becoming more extreme, when held against the dramatic changes post-September 11, they appear almost mild. The financial industry had managed to fend off stronger attempts by the state to involve itself in the financial world. In 1994, for instance, Congress directed Treasury to begin regulating “money services businesses” (e.g., check cashers, wire money transfers, money orders, and traveler’s checks). Three years later the Department drafted regulations, but the rules did not issue until 1999, with implementation set for December 31, 2001. The Bush Administration planned to follow in the Clinton Administration’s footsteps, delaying implementation once more until late 2002 to give the government the opportunity to “educate” these businesses about their obligations.²⁴⁴ Where Treasury attempted to imbed itself further into the already regulated financial industry, it came up short: In 1998 Treasury proposed stronger “know your customer” requirements, which would have required banks to obtain extensive, private information, such as where money came from and to whom it was going. More than 200,000 negative responses bombarded the Department, stretching from left to right on the political spectrum.²⁴⁵ Congress began openly contemplating rolling back the current controls, and so Treasury abandoned ship.²⁴⁶ Efforts to get the Money Laundering Control Act of 2000 through Congress also failed. This statute would have given the Treasury Department control of foreign banks with accounts in the United States.

These measures, then, provided a general framework for regulatory and investigative powers prior to the attacks. Before moving to those introduced post-September 11, it is worth a brief detour into al Qaeda funding to help evaluate the effectiveness of the U.S. response.

2. Al Qaeda Funding

It is hard to get a grasp on al Qaeda’s funding. For one, the name refers to a network—loosely-affiliated groups that more closely resemble a

243. Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, J. CRIM. L. & CRIMINOLOGY 311, 351 (2003).

244. Stephen Fidler & Haig Simonian, *IMF Chief Urges United Response to Slowdown*, FIN. TIMES (London), Oct. 6, 2001, at 4.

245. STAFF REPORT, *supra* note 1.

246. See *Know Your Customer*, 64 Fed. Reg. 14845 (withdrawn Mar. 29, 1999); Robert O’Harrow, Jr., *Disputed Bank Plan Dropped*, WASH. POST, Mar. 24, 1999, at E1.

movement than an organized entity. For another, attention to al Qaeda's funding—even bin Laden's direct operations—came rather late in the game: it was not until 1998, following the East Africa bombings and the listing of al Qaeda as a terrorist organization, that the White House asked the National Security Council and the CIA's Illicit Transactions Group to find out how the network operated.²⁴⁷ As mentioned above, up until that point, the CIA and others mistakenly assumed that most of the money came from bin Laden's pocket.²⁴⁸ Successive administrations, moreover, turned a blind eye to the Saudi role in funding jihadist organizations generally and al Qaeda in particular. While the Africa bombing trials in early 2001 generated more information about al Qaeda's funding streams,²⁴⁹ it was not until September 11 that the U.S. Administration became resolute about finding the money. Yet, even months later, Kenneth Dam, Deputy Secretary of the Treasury, admitted that the United States lacked a complete picture of how al Qaeda managed its finances.²⁵⁰

Various characteristics of al Qaeda itself make understanding the network's financial structure, even with significant resources, particularly difficult: prior to September 11, some al Qaeda funding operations—particularly those close to bin Laden—appear to have been organized. A finance committee seems to have reported to bin Laden himself. But the extent of financing even then appears for the most part to have been limited to actual operational expenses.²⁵¹ Outside of this limited assistance, entities associated with the network financed themselves, creating multiple and diverse forms of funding as well as methods of moving currency worldwide. As this Article later discusses, measures implemented following September 11 reinforced the decentralized nature of the network, making it even more difficult to follow the money trail. Resultantly, the numbers ascribed to al Qaeda's operational expenses vary widely. For instance, in 2002, the United Nations floated a

247. See Robert Clow, Andrew Edgecliffe-Johnson, Adrian Michaels & Richard Wolffe, *Team Set Up to Block Terrorist Funds; Asset Breakers New Group of Intelligence Agents and Law Enforcement Officials to be Headed by U.S. Treasury*, FIN. TIMES (London), Sept. 17, 2001, at 6.

248. STAFF REPORT, *supra* note 1, at 20, 34. For the previous assumption, see, e.g., FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, GUIDANCE FOR FINANCIAL INSTITUTIONS IN DETECTING TERRORIST FINANCING 4 (Apr. 24, 2002); FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES, 2001–2002 2 (Feb. 1, 2002).

249. *Id.*

250. Mark Huband, Gwen Robinson & John Willman, *US Urges Allies to Step up Efforts to Track Down Terrorist Cell Assets*, FIN. TIMES (London), Nov. 28, 2001, at 1. *But see* Michael Mann & Richard Wolffe, *US Accuses Africa Banks of Failing to Assist Search*, FIN. TIMES (London), Oct. 3, 2001, at 4.

251. STAFF REPORT, *supra* note 1.

ballpark figure of between \$16 million and \$50 million, but it could provide little information to back up the numbers or increase their specificity.²⁵² In 2003, the September 11 Commission put the estimated annual al Qaeda budget at some \$30 million per year.

Putting these considerations aside for the moment, what *has* become increasingly evident since 1998 is that, as William Wechsler, director of the task force examining bin Laden's finances, put it, the network is "a constant fundraising machine."²⁵³ Like the paramilitary organizations in Northern Ireland, money comes from donations and legitimate business enterprises, as well as illicit activities that reach across national boundaries. This section briefly considers the source of funds to al Qaeda and the manner in which they are transferred.

a. Money Flows to al Qaeda

Government expenditures and independent donations from Saudi Arabia appear to play a critical role in al Qaeda's funding and development. The Staff Report to the September 11 Commission suggested that, "Over the past 25 years, the desert kingdom has been the greatest force in spreading Islamic fundamentalism, while its huge, unregulated charities funneled hundreds of millions of dollars to jihad groups and al Qaeda cells around the world."²⁵⁴ After five months of analyzing documents and interviewing government officials, *U.S. News and World Report* came to a similar conclusion. The magazine found that Saudi money flowed to 20 different states, where training camps, weapons purchases, and recruiting activities occurred.²⁵⁵ In 2002, the United Nations Security Council reported that jihadists had secured \$300–\$500 million over the previous decade, the bulk derived from Saudi donors and charities.²⁵⁶

As noted in the September 11 Commission Staff Report and elsewhere, Saudi money has not just gone to militants. Between 1975 and 2002, Saudi Arabia spent more than \$70 billion on foreign aid—more

252. RENESSELAER LEE, CONGRESSIONAL RESEARCH SERVICE, TERRORIST FINANCING: THE US AND INTERNATIONAL RESPONSE 12, 27 (Dec. 6, 2002), available at <http://www.boozman.house.gov/UploadedFiles/WOT%20%20Terrorist%20Financing%20The%20U.S.%20and%20International%20Response.pdf> (citing Second Report of Monitoring Group).

253. STAFF REPORT, *supra* note 1, at 6. See also COUNCIL ON FOREIGN RELATIONS, TERRORIST FINANCING 5 (2002) [hereinafter TERRORIST FINANCING].

254. STAFF REPORT, *supra* note 1. The Staff Report to the September 11 Commission found that no foreign government directly funded al Qaeda, but it went into detail on many of the Saudi links highlighted above and classified the sections of the final report that deal directly with Saudi Arabia. STAFF REPORT, *supra* note 1, at 4, 22–24.

255. David E. Kaplan, Monica Ekman & Aamir Latif, *The Saudi Connection: How Billions in Oil Money Spawned a Global Terror Network*, U.S. NEWS & WORLD REPORT, Dec. 15, 2003, available at http://www.usnews.com/usnews/news/articles/031215/15terror_2.htm.

256. *Id.*

than two thirds of which went to spreading the (fundamentalist) Wahhabi sect worldwide.²⁵⁷ Alex Alexiev, a former CIA consultant on religious conflict, referred to the program as “the largest worldwide propaganda campaign ever mounted.”²⁵⁸ In 2002, *Ain al-Yageen*, a weekly Saudi paper, claimed that the money helped to build approximately 1,500 mosques, 210 Islamic centers, 202 colleges, and 2,000 schools outside of Islamic states.²⁵⁹

Charitable organizations run and funded by Saudis further round out the picture. Many of these provide important resources to hospitals, orphanages, and disadvantaged communities. But some also funnel money to violent struggles. A 1996 CIA report found that of the 50 Islamic charities engaged in global assistance, approximately one-third had links to terrorist organizations. The grand mufti of Saudi Arabia has overseen some of the largest Islamic charities, such as the Muslim World League (with 30 branches worldwide) and International Islamic Relief Organization (with offices in more than 90 different states).²⁶⁰ *U.S. News and World Report* tied these organizations directly to terrorist movements.²⁶¹ The New York Council on Foreign Relations put the point strongly: “[I]t is worth stating clearly and unambiguously what official U.S. government spokespersons have not: For years, individuals and charities based in Saudi Arabia have been the most important source of funds for al Qaeda; and for years, Saudi officials have turned a blind eye to this problem.”²⁶²

With some \$600 billion in Saudi money in U.S. banks and the stock market, and substantial benefits distributed around Washington, D.C., successive administrations have indeed avoided looking too closely into the Saudi role.²⁶³ The Carlyle Group, for instance, advised by former President George H.W. Bush, former Secretary of State James Baker, and former Secretary of Defense Frank Carlucci, has made millions from its Saudi links.²⁶⁴ The CIA instructed its station chief in Riyadh not to focus on Islamic extremists—even after East Africa—because of political sensitivities.²⁶⁵

The 1998 NSC report provided a breakthrough of sorts—but the Clinton Administration made only meager attempts to follow the money. Vice President Al Gore met with Saudi Crown Prince Abdullah in Wash-

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. TERRORIST FINANCING, *supra* note 253, at 8.

263. Kaplan et al., *supra* note 255. See also STAFF REPORT, *supra* note 1 at 39.

264. Kaplan et al., *supra* note 255.

265. *Id.*

ington D.C. and set up a visit for U.S. counterterrorist specialists to meet with Saudi officials in Riyadh.²⁶⁶ The NSC's William Wechsler and Treasury's Richard Newcomb subsequently traveled to Saudi Arabia and met with top security and banking officials.²⁶⁷ But Saudi Arabia had sharp divisions between law enforcement and the banking industry and minimal regulation of its financial sector. On the U.S. side, the State Department, concerned about the impact of ending the organizations' legitimate charitable efforts, argued against freezing their assets.²⁶⁸ As George W. Bush took office, the NSC lobbied the new administration for a terrorist asset tracking center. The Treasury Secretary, Paul O'Neill, tried to prevent it.²⁶⁹

Saudi Arabia, however, did not provide the only source of funding that strengthened what became al Qaeda.²⁷⁰ Money flowed from the Persian Gulf, Egypt, South Asia, Africa—and the United States. Direct governmental support for jihadists, as well as individual charitable donations, had an impact. During the Cold War, for instance, the United States and Saudi Arabia put a \$3.5 billion package together to back the mujahideen in Afghanistan.²⁷¹ When the Soviets left Afghanistan in 1992, one of these mujahideen, Osama bin Laden, traveled to Sudan. There, he established a corporate shell, Wadi al-Aqiq, parent to a number of subsidiary firms.²⁷² Jamal Ahmed al-Fadle, the Chief Financial Officer of Wadi al-Aqiq, reports that the parent company's bank accounts stretched from Sudan to Hong Kong and Malaysia, with several accounts in London at Barclays Bank.²⁷³

Bin Laden's personal business, however, proved to be far less important to the provision of money to al Qaeda than did charitable organizations located in Saudi Arabia and elsewhere. In drawing from these sources, al Qaeda benefited from one of the five pillars of Islam: *zakat*, or charitable giving. The religious doctrine requires that adherents give at least 2.5 percent of their income to charity and humanitarian causes and that they do it anonymously.²⁷⁴ As a legal matter, the net effect of this, where charities were indeed focused on humanitarian assistance

266. STAFF REPORT, *supra* note 1 at 34.

267. Kaplan et al., *supra* note 255; STAFF REPORT, *supra* note 1 at 34.

268. Kaplan et al., *supra* note 255.

269. *Id.*

270. STAFF REPORT, *supra* note 1, at 21.

271. *See id.*

272. Taba Investment, a currency trading firm, was located in Kenya, where the company dealt in gems. Ladin International Co. focused on import-export business. Al-Hijra Construction built bridges and roads. Other businesses traded in commodities like palm oil and sugar. Robert Clow, Andrew Edgecliffe-Johnson, Adrian Michaels & Richard Wolffe, *Team Set Up to Block Terrorist Funds*, FIN. TIMES (London), Sept. 17, 2001, at 6.

273. *Id.*

274. STAFF REPORT, *supra* note 1, at 21.

with money skimmed at the end of the cycle, was that those donating lacked the intent to support violent causes and thus a certain amount of culpability. Simultaneously, the anonymity requirement made it difficult to trace the origins of the donations. These charitable organizations also yielded cyclical funding sources: they became particularly active once a year, during Ramadan, although the sporadic nature of the influx of funds does not seem to have influenced the terrorist cycle.²⁷⁵

Setting aside for a moment formal state support for jihadist groups and Wahhabist ideology and the role played by charitable organizations, in examining the funding for September 11, the September 11 Commission found “no persuasive evidence” that the drug trade provided an important source of revenue for al Qaeda; nor did it determine that the network had substantial involvement with conflict diamonds. These conclusions, however, appear suspect and, in any event, do not necessarily hold for the post-September 11 environment.²⁷⁶ Indeed, Islamist groups appear to be increasingly interested in this realm. For example, from April to September 2001, Syed Mustajab Shah, Muhammad Abid Afridi, and Ilyas Ali negotiated with undercover law enforcement for six hundred kilos of heroin and five metric tons of hashish, as well as four Stinger anti-aircraft missiles to sell to al Qaeda in Afghanistan. In September they were arrested in Hong Kong, and by March they had been extradited to the United States, charged with conspiracy to import and distribute drugs and provide material support to al Qaeda.²⁷⁷

Reported links between al Qaeda and Sierra Leonean diamond smuggling also repeatedly surface.²⁷⁸ Frank Wolf, the chair of the House Commerce-Justice-State and Judiciary Appropriations Committee expressed surprise that the September 11 Commission would be skeptical of such a link, saying that he had seen “pretty definite” evidence that it

275. See *id.*; see also Madeline Gruen, *White Ethno-Nationalist & Political Islamist Methods of Fundraising and Propaganda on the Internet*, in *TERRORISM AND COUNTERTERRORISM* 289 (Russell D. Howard & Reid L. Sawyer eds., 2003).

276. Various treatments of the subject point to the end of the Cold War (and the drying up of funds to insurgent groups) as the impetus for increasing links to the drug industry. See, e.g., Rex A. Hudson, *A Global Overview of Narcotics-Funded Terrorist and Other Extremist Groups* (Library of Congress Report, May 2002), available at http://www.loc.gov/frd/pdf-files/NarcsFundedTers_Extrems.pdf; see also *Moving Target*, *ECONOMIST* (U.S. Edition), Sept. 14, 2002 (discussing al Qaeda's use of drug trafficking); Terrence Henry, *Al Qaeda's Resurgence: The Ever Resilient Terrorist Group Continues to Adapt—and is Rapidly Breeding a Full-Fledged Movement*, *ATLANTIC MONTHLY*, June 1, 2004, at 54 (reporting al Qaeda's drug activities in Kandahar, Afghanistan as yielding some \$24 million per year).

277. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, at 36. What is perhaps notable about the movement of al Qaeda and other terrorist organizations into the drug trade is the potential corruption that may thereby result. Hudson, *supra* note 276.

278. See, e.g., Thomas Catan & Michael Peel, *U.S. Suspects al-Qaeda African Diamond Link*, *FIN. TIMES* (London), June 30, 2004, at 11.

exists.²⁷⁹ To head off increasing public criticism that the diamond trade provided a rich source of income to terrorist organizations, the World Diamond Council adopted a system of warranties.²⁸⁰

In sum, with multiple and diverse sources of funding, it has been difficult to gain a handle on all of al Qaeda's revenue streams. Money from legitimate business mingles with illegitimate funds. The network also appears to move resources quickly and through various unregulated means.²⁸¹ Alternative remittance systems (ARS), also known as informal value transfer systems, provide one substitute for the increasingly regulated Western banking system.

b. Alternative Remittance Systems and the Transfer of Funds

It appears that regulations introduced in the Western banking sector since the attacks have increased the importance of ARS in the transfer of Islamist funds. Although no broad agreement exists on a definition of ARS, common elements mark them: most systems developed along ethnic and historical lines, providing a way of moving money well before the West adopted a formal banking structure. Although it is nearly impossible to nail down the total value transferred through such systems, the IMF and World Bank estimate the number in the tens of billions of dollars.²⁸² The defining feature appears to be the ability to move value without moving currency, primarily through netting or book transfers.²⁸³ Perhaps because of higher rates of immigration, such systems are now fairly widespread, providing, for many ethnic groups, their primary financial service. They are reliable and efficient and available 24 hours a day, seven days a week. With minimal paperwork, they offer anonymity, and they cost less than formal banking.

In the United Kingdom, for instance, where Western Union would charge £10 to send just £50 to Bangladesh, hawaladars charge only £0.50.²⁸⁴ They also offer a way for customers to circumvent limits in currency exchange regulations.²⁸⁵ Such remittances, moreover, are becoming

279. *Id.*

280. Mark Huband, "Conflict" *Diamonds Spur Code of Practice*, FIN. TIMES (London), Oct. 30, 2002, at 13.

281. To fund September 11, for instance, the organization used approximately a dozen hawaladars, as well as wire transfers, physical deposits of traveler's checks, physical movement of cash, and access to foreign funds via debit and credit cards. None of the individual transactions exhibited particularly unusual traits. STAFF REPORT, *supra* note 1, at 13.

282. SEC'Y OF THE U.S. DEP'T OF TREAS., A REPORT TO CONGRESS IN ACCORDANCE WITH SECTION 359 OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 5 (2002).

283. 2003 FINANCIAL ACTION TASK FORCE REPORT, *supra* note 1, at 4.

284. *Small World*, ECONOMIST (U.S. Edition), Oct. 18, 2002.

285. 2003 FINANCIAL ACTION TASK FORCE REPORT, *supra* note 1, at 4-8.

an increasingly important source of money for poorer regions, where formal banking systems have yet to be established: "Total global remittances from migrants in rich countries are estimated to be at least \$100 billion (£53 billion) a year, 1 ½ times the level of all foreign aid, with remittances from the United Kingdom reckoned to be £2.3 billion in 2001."²⁸⁶ As of the time of writing, the extent of the alternative remittance system in the U.S. remains unknown.²⁸⁷ The Inter-American Development Bank, however, puts the total in family remittances just from Latin American immigrants in the U.S. at approximately \$30 billion for 2004. Most of these transfers involve between \$150 and \$250.²⁸⁸

Hawala, which means "transfer" in Arabic, provides one form of ARS. Sometimes used as a synonym for "trust," hawala relies upon personal connections to transfer money frequently across international lines.²⁸⁹ Hawalas originated in South Asia hundreds of years before the Western banking system even gained ground. They have now spread to Europe, the Middle East, eastern and southern Africa, North and South America, and other regions of Asia. Some states outlaw hawalas, but they continue to thrive. India, for instance, estimates that up to half of the Indian economy goes through the system (a number roughly equivalent to the entire Canadian economy). Pakistan puts its national total at around \$7 billion.²⁹⁰ While many of the exchanges represent minute amounts of money, others routinely run in the tens of thousands of dollars. Hawaladars operate worldwide, although the greatest number of transactions is probably in the United Arab Emirates.²⁹¹

An important characteristic of hawaladars is that significant variation exists among them. In some cases, they keep better records than commercial banks, share them more readily, and carefully screen their customers. With others, their record-keeping, amenability to state access, and due diligence falls dramatically short of the more formal banking standard. One important consideration weighing on the following discussion is whether new legal tools create the wrong motivations for hawaladars. If incentives to further cloak operations and keep minimal records exist, then the state's ability to trace money through the system

286. Alan Beattie, *Informal Foreign Cash Transfers Cheaper, Says Study*, FIN. TIMES (London), Apr. 1, 2005, at 5.

287. SEC'Y OF THE U.S. DEP'T OF TREAS., *supra* note 282, at 5.

288. Ronald R. Wilson, *Positive Trends in the Fight Against Money Laundering: work of the Financial Crimes Enforcement Network*, 169 AM. BANKER 12 (2004).

289. Looney, *supra* note 2.

290. Estimates from Pakistani officials suggest that more than \$5 billion goes into Pakistan alone, each year, through the hawaladars. This makes the system the largest source of hard currency. Interpol suggests that hawala provides approximately 40% of India's gross domestic product. Roughly \$680 billion passed through the state in this manner in 1998. *Id.*

291. *Id.*

becomes more difficult—an objective increasingly important as alternative remittance systems become the preferred mode of transferring terrorist funds.

3. U.S. Initiatives Post-September 11

Unlike in the United Kingdom, where September 11 accelerated a trend already in place, the attacks on New York and Washington, D.C., suddenly recast the United States' anti-terrorist finance framework. Three of the five central National Security Strategy documents subsequently issued by the Bush Administration addressed the matter.²⁹² Although the National Money Laundering Strategies had previously omitted discussion of terrorism finance altogether, from 2002 onward it became a central focus of the report.²⁹³ And a sudden concern about the funding of terrorist organizations operations swept through federal agencies; gone was the malaise that previously marked the system. In the administrative realm, the DOJ immediately created what became the Terrorist Financing Unit to coordinate a “national effort to prosecute terrorist financing.” The FBI, in turn, established a Financial Review Group to centralize the investigation into the money behind September 11. Renamed the Terrorist Financing Operations Section (TFOS) and housed in the FBI's counterterrorist division, the unit included staff from Customs, the IRS, banking regulators, FinCEN, and OFAC. This organization represented the first single-office coordinating effort on terrorist finance.²⁹⁴ In addition to TFOS, the Bureau ramped up its joint terrorism task forces (JTTF): first created in 1980, the FBI doubled their number post-September 11 and established a national JTTF in Washington, D.C. The Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), and the IRS Criminal Investigative Division took part in JTTF meetings, which increasingly focused on terrorist finance.

Other organizations followed suit. The CIA formed a new section focused on terrorist financing. The FBI, NSA, DoD, and CIA all participated, with the aim of collecting intelligence, understanding financial

292. These include the National Security Strategy of the United States of America, available at <http://www.whitehouse.gov/nsc.nss>; the National Strategy for Combating Terrorism (focuses on interdicting and disrupting material support for terrorists); and the National Strategy for Homeland Security, available at <http://www.whitehouse.gov/homeland/book> (which includes eliminating terrorist financing). In the classified realm, the National Military Strategic Plan for the War on Terrorism goes into detail on how the U.S. military should confront state sponsors of terrorism, disrupt and destroy terrorist organizations, and create a global environment hostile to terrorism.

293. U.S. DEP'T OF THE TREAS., ANNUAL MONEY LAUNDERING STRATEGY, reports for 2001–2003, available at http://www.treas.gov/offices/enforcement/money_launders.shtml.

294. STAFF REPORT, *supra* note 1, at 41.

networks, finding terrorist money, and disrupting operations. Immediately following September 11, FinCEN set up a Financial Institutions Hotline (1-866-556-3974), so that financial institutions voluntarily could report any suspicious transactions to law enforcement where terrorist activity might be of issue.²⁹⁵ Treasury also formed the Financial Action Task Force (FATF) to identify and prioritize which groups should fall subject to blocking orders. In March 2003, Treasury formed a new Executive Office for Terrorist Financing and Financial Crimes (EOTF/FC).²⁹⁶ This office works with other agencies at Treasury and other Executive Branch agencies, as well as with the private sector and foreign governments, to prevent terrorists from taking advantage of the international financial system.

Despite the incessant Kumbayaa refrain emanating from federal corridors, however, in some instances cooperation proved short-lived. Perhaps the best example of this is Operation Green Quest. U.S. Customs created the program to identify patterns in counterfeiting, credit card fraud, drug trafficking, cash smuggling, illicit charities, and formal and alternative financial institutions.²⁹⁷ The bureaucratic barriers—at least for the moment—appeared to come down, as prosecutors from Justice and investigators from IRS, Customs, the FBI, and other agencies came together in common cause.²⁹⁸ But the cowboy-like approach of the new entity, underscored by a series of raids in March 2002, quickly alienated federal agencies, civil rights organizations, and the U.S. Muslim community. Green Quest's expansionist tendencies raised further hackles: in January 2003, the program doubled in size, utilizing some 300 agents and analysts nationwide. Three months later, it followed Customs into the DHS fold. DOJ, keen to reign in the maverick organization, objected. Michael Chertoff, chief of the Criminal Division, and Deputy Attorney General Larry Thompson pushed the White House to relocate Green Quest to DOJ. DHS angrily pushed back and alleged

295. U.S. DEP'T OF THE TREAS. & U.S. DEP'T OF JUSTICE, 2002 NATIONAL MONEY LAUNDERING STRATEGY, 20 n.22 (2002).

296. Press Release, U.S. Dep't of the Treas., U.S. Treasury Department Announces New Executive Office for Terrorist Financing and Financial Crimes (Mar. 3, 2003), available at <http://www.ustreas.gov/press/releases/js77.htm>.

297. See *Hearing on the Administration's National Money Laundering Strategy for 2001 Before the Senate Banking Committee*, at 10, 107th Cong. (2001) (testimony of Hon. Jimmy Gurule, Undersecretary for Enforcement, U.S. Dep't. of the Treas.); Jason Peckenpau, *Building a Behemoth: The Challenge of Constructing a Homeland Security Department May Make the Epic Struggle to Create the Defense Department Look Easy*, GOVERNMENT EXECUTIVE, Sept. 1, 2002, at 34; Zagaris, *supra* note 242, at 6.

298. Peter Spiegel, *U.S. Team Created to Target al Qaeda Finances*, FIN. TIMES, Oct. 26, 2001, at 5.

that the FBI was trying to sabotage investigations by refusing to turn over information.²⁹⁹

Bickering between the two agencies ultimately led, in May 2003, to the signing of a formal memorandum of agreement between the Attorney General and the Secretary of DHS. In a nutshell, DOJ won, becoming the lead federal law enforcement agency in the national effort to interrupt terrorist finance.³⁰⁰ DHS could only play ball according to the rules set by the FBI.³⁰¹

DHS, however, did not take defeat lying down. Although the Memorandum of Understanding required that Operation Green Quest cease as of June 30, 2003, and that DHS only investigate matters related to terrorist finance with the consent of the FBI, by July 2003 ICE had launched its own initiative: Operation Cornerstone.³⁰² The basic premise was to find and eliminate financial system vulnerabilities that either attract criminals or provide a target for terrorists. DHS called it “a new financial crimes investigative initiative,” whose aim was to “[i]dentify vulnerabilities in financial systems through which criminals launder their illicit proceeds, bring the criminals to justice and work to eliminate the vulnerabilities.” DHS also announced a new initiative meant to build bridges with private industry: SHARE (Systematic Homeland Approach to Reducing Exploitation).³⁰³ In addition to these initiatives, DHS complained to Congress that the memorandum hurt their ability to conduct investigations into financial crime.

The Senate responded by directing the Government Accountability Office (GAO) to evaluate the impact of the memorandum on the Secret Service. GAO dodged the administrative bullet, responding that since the agreement only related to the FBI and ICE, questions involving the Secret Service were irrelevant. As for the other claims, GAO could not determine that ICE’s mission or role in investigating non-terrorism-related

299. Michael Isikoff & Mark Hosenball, *Terror Watch: Whose War on Terror?* NEWSWEEK, Apr. 9, 2003.

300. Memorandum of Agreement and Collaborative Procedures Concerning Terrorist Financing Investigations, reprinted in Richard M. Stana, Director, Homeland Security and Justice Issues, Letter to the Hon. Thad Cochran, Chair and the Hon. Robert C. Byrd, Ranking Minority Member, Subcommittee on Homeland Security Committee on Appropriations, United States Senate; Subject: Investigations of Terrorist Financing, Money Laundering, and Other Financial Crimes, General Accounting Office, GAO-04-464R, Financial Crimes Investigations, Feb. 20, 2004, Enclosure II, at 14–18, ¶ 2 [hereinafter Memorandum of Understanding].

301. *Id.* ¶ 4.

302. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, at 22.

303. Bureau of International Information Programs, U.S. Dep’t of State, U.S. Boosts Money Laundering Investigation Capabilities, Secretary Ridge Announces New Financial Investigations Initiatives, July 8, 2003, <http://www.useu.be/Categories/Justice%20and%20Home%20Affairs/July0803USMoneyLaundering.html>.

crimes had been harmed.³⁰⁴ GAO also noted, albeit with politically-guarded administrative language, that the Memorandum of Understanding had served to make things worse: “Shifting priorities and large-scale reorganizations in these agencies produced a certain amount of turmoil and anxiety, which initially was exacerbated by the Agreement, particularly for ICE agents, who may have perceived the Agreement as minimizing their role in terrorist financing investigations.”³⁰⁵ The report continued, “Our interviews with FBI and ICE officials . . . indicated that long-standing jurisdictional and operational disputes regarding terrorist financing investigations may have strained interagency relationships to some degree and could pose an obstacle in fully integrating investigative efforts.”³⁰⁶

Continued administrative infighting aside, the fact that federal agencies cared enough to fight over these new initiatives illustrates the sudden focus placed on interrupting financial flows. The Executive, however, was not alone in its response. The USA PATRIOT Act and the wide-ranging powers contained therein allowed the federal government, on the one hand, access to private financial information and, on the other, the ability to suspend property rights without reference to the judiciary. This section evaluates the USA PATRIOT Act and Executive Order 13,224, issued under the authority of IEEPA.

a. USA PATRIOT Act

The 2001 USA PATRIOT Act represented an abrupt about-face by the Bush administration. Just two months before, Paul O’Neill announced that he would *ease* the United States’ regulatory regime and depend upon international cooperation, rather than threats of sanctions, for success in combating illicit money flows.³⁰⁷ As previously mentioned, when the NSC tried to set up a terrorist asset tracking center, O’Neill tried to kill it.³⁰⁸ The USA PATRIOT Act turned the administration’s policy 180 degrees. The sheer breadth of measures—and, indeed, focus of an entire section on the matter—emphasized the centrality of anti-terrorist finance in the state’s counterterrorist strategy.³⁰⁹ Simultaneously, the statute collapsed the anti-money laundering and counterterrorist fi-

304. Senate Report 108-86 (July 2003), Title I of Senate Appropriations Committee report on the DHS Appropriations Bill for 2004.

305. Memorandum of Understanding, *supra* note 300, at 9.

306. *Id.* at 5.

307. Stephen Fidler & Haig Simonian, *IMF Chief Urges United Response to Slowdown*, FIN. TIMES (London), Oct. 6, 2001.

308. David E. Kaplan, Monica Ekman & Aamir Latif, *The Saudi Connection*, U.S. NEWS & WORLD REPORT, Dec. 15, 2003, at 18.

309. Title III: The International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001.

nancial enforcement regimes, bringing the three streams that previously marked the anti-terrorist finance realm crashing together.³¹⁰ The length of the statute and the rate at which it flew through Congress meant that even years later, the private sector was still struggling to come to grips with its implications.³¹¹ The legislation made changes in four key areas: it broadened Executive powers under the IEEPA; it significantly expanded the state's regulatory regime; it strengthened forfeiture powers and shifted the burden of proof; and it introduced a range of extraterritorial authority. The legislation also required Treasury to submit a series of reports, most of which contemplated the introduction of further measures.³¹²

i. Expanded Powers Under the IEEPA

The USA PATRIOT Act made three important changes to the IEEPA.³¹³ First, it amended the previous statute to allow the Executive Branch to submit classified evidence *in camera* and *ex parte*. Second, it allowed the state to block assets during the pendency of an investigation—which in practical terms meant indefinitely. This gave the state an important bargaining tool to use against the accused during the investigation. The statute included neither humanitarian exceptions nor provision to set funds aside for legal defense. Third, it authorized the President, “when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals,” to “confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States.”³¹⁴ It thus neither required any link between the assets and any particular act of violence nor any proportionality between the amount of property seized and the crime. The language also had the effect of removing the judiciary from the proceedings altogether,

310. Zagaris, *supra* note 242.

311. Bruce Zagaris, *The Money Laundering Provisions of the USA PATRIOT Act of 2001*, 323 *PLI/EST* 417 (2003).

312. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001* 215, *codified in* 50 U.S.C. 1861 [hereinafter *USA PATRIOT Act*]; *Id.* § 314 (semi-annual report on suspicious activity); *Id.* § 324 (general report on Title III); *Id.* § 326(b) (ways to improve the ability of financial institutions to identify foreign nationals); *Id.* § 356(c) (joint Treasury, Federal Reserve, and SEC report on how to apply bank secrecy act requirements to investment companies); *Id.* § 357 (role of IRS in administration of Bank Secrecy Act); *Id.* § 359 (additional measures for alternative remittance systems); *Id.* § 361 (how to improve compliance with the regulatory requirements in the USA PATRIOT Act); *Id.* § 366 (exemptions to currency transaction reports).

313. *Id.* § 106.

314. *Id.*

concentrating power in the Executive. Part III.C.2 of this Article goes into detail on the use of IEEPA writ large post-September 11.

ii. Beefed-up Regulatory Regime

Perhaps the most significant—and certainly the most extensive—shift came in the increased regulatory powers imposed by the state. The USA PATRIOT Act required banks, savings associations, credit unions, securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers to enhance their customer identification measures.³¹⁵ They became required to use the full and accurate name of each customer and to record their date of birth, social security number, and passport number.³¹⁶ Such lists had to be maintained for five years. Their existence made it easier to link up different accounts and transactions at different entities. These requirements fell just short of the “know your customer” proposal defeated two and a half years before. *All* financial institutions in the United States (the above, plus casinos, money services businesses, mutual funds, and operators of credit card systems), as well as a slew of businesses (insurance companies, unregistered investment companies, investment advisers, commodity trading advisers, dealers in precious metals, stones, or jewels, travel agents, vehicle sellers, and all those involved in real estate closings and settlements) became required to institute anti-money laundering programs.³¹⁷

The statute expanded the number of entities required to file SARs.³¹⁸ Where before the Bank Secrecy Act of 1970 required banks and credit unions to report \$10,000 or more in cash transfers, now “any person who is engaged in a trade or business” that received more than \$10,000 in cash must file an SAR. Here, it is worth noting that \$10,000 in the 1970s is the equivalent of \$2,625 today—which means that, together with the documentation that accompanies credit card purchases, a significant portion of consumers’ buying habits and purchases can now be traced by the government.³¹⁹

315. *Id.* § 318 (expanding the definition of financial institution to include those operating outside the United States).

316. *Id.* § 326. On May 9, 2003, Treasury issued the final regulations governing this section. *See* 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, appendix G, at 50.

317. USA PATRIOT Act *supra* note 312, § 352.

318. *Id.* § 356(a)-(b) directs the Secretary of the Treasury, in consultation with SEC and Federal Reserve Board of Governors, to require securities broker-dealers, futures commission merchants, commodity trading advisers, and commodity pool operators to file SARs. The proposed rule for securities broker-dealers was issued on December 31, 2001, and the final rule was issued on July 1, 2002; for others, the proposed rule was issued on May 5, 2003. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, appendix G, at 51.

319. Jay Stanley, *The Surveillance-Industrial Complex: How the American Government is Conscribing Businesses and Individuals in Construction of a Surveillance Society*, AMERI-

The statute required non-financial trades or businesses to file currency transaction reports with FinCEN.³²⁰ And all unlicensed money-transmitting businesses were brought into the regulatory tent.³²¹ The legislation further required that all financial institutions conduct due diligence for transactions that bore a resemblance to money laundering schemes.³²² All financial institutions that establish, maintain, administer, or manage any private banking account, or correspondent account, for any non-U.S. person had to apply due diligence procedures to detect and report money laundering activity.³²³

Concerned that offshore banking, subject to minimal supervision, provided potential terrorists and criminals with too much anonymity (making it difficult to trace the proceeds of crime), Congress amended the Bank Secrecy Act and gave the Secretary of the Treasury discretionary authority to place restrictions on foreign jurisdictions, institutions, or types of account if they posed a “primary money laundering concern” to the United States.³²⁴ (No terrorist link need be found.) Treasury could require financial institutions to maintain additional records for certain transactions, to identify foreign beneficial owners of accounts located at U.S. financial institutions, and to identify customers using foreign accounts at banks within the United States. (Treasury has only used these powers twice since September 11: both in support of the U.S. FATF Non-Cooperative Countries and Territories process for Ukraine and Nauru—neither tied directly to terrorism.³²⁵) The statute essentially forbade correspondent accounts—defined broadly to include most relationships a U.S. financial entity can have with a foreign financial institution—with shell banks (unregulated entities with no physical presence in any jurisdiction), where such banks were not recognized or regulated by depository institutions.³²⁶

CAN CIVIL LIBERTIES UNION, Aug. 2004, at 17. Although not specifically required by the legislation, subsequent rules issued by Treasury required, amongst other entities, that casinos file SARs. *See also* Zagaris, *supra* note 311, at 448.

320. USA PATRIOT Act, *supra* note 312, § 365. Interim final rule issued Dec. 31, 2001; 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, appendix G, at 52.

321. USA PATRIOT Act, *supra* note 312, § 373.

322. *Id.* § 314(b).

323. *Id.* § 312; 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, appendix G, at 49. The statute defined due diligence to include internal, written anti-laundering policies, procedures, and controls, the designation of an employee responsible for compliance with the law, ongoing employee training programs, and submission to an external audit. For discussion of existing controls and the options being considered for regulatory action, see *id.* at 50.

324. USA PATRIOT Act, *supra* note 312, § 311.

325. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, at 13.

326. USA PATRIOT Act, *supra* note 312, § 313. The United States issued interim guidance almost immediately following passage of the USA PATRIOT Act on Nov. 27, 2001, proposed a rule on Dec. 27, 2001, and issued a final rule on Sept. 18, 2002. 2003 NATIONAL

Such regulations served a dual purpose: not only were they meant to alert Treasury to possible criminal activity, but they provided law enforcement with a paper trail for use in investigations. To assist in this second aim, Title III further allowed Treasury to specify any region, entity, person, or account; financial institutions could then be required to search their records to determine if they contained any information relevant to the target.³²⁷ The legislation demanded that entities report any positive matches within two weeks or, in an emergency, within two days. Law enforcement could then file a subpoena to obtain the information. Criminal and civil penalties for failure to disclose information applied.

This power, used extensively after passage of the statute, quickly became known in some circles as a “Google search.”³²⁸ The statute set no bounds on who could make such requests, allowing everyone from law enforcement to the Postal Service to file to obtain information where any offense related to money laundering lay at stake. Some 200 different crimes qualified. This power immediately created a problem for banks, which were inundated with requests—often several each day, addressed to the wrong people, and vaguely worded. The American Bankers Association complained and said Treasury should narrow the scope of the requests, create standardized forms, and specify the time period within which it needs the information to distinguish between urgent and non-urgent requests.

On November 19, 2002, only 15 days into the operation of this power, FinCEN announced a moratorium on requests directly to financial institutions.³²⁹ FinCEN inserted itself into the process, requiring a form from law enforcement requesting customer account information and asserting that it relates to money laundering or terrorist investigations. FinCEN then would go to banks to obtain the information. (This meant, in effect, that FinCEN had become an information broker.³³⁰) By 2003, FinCEN had supported more than 2,600 terrorism investigations and received more than 2,600 SARs on possible terrorist financing.³³¹ In

MONEY LAUNDERING STRATEGY, *supra* note 5, appendix G, at 49. Soon after passage of the USA PATRIOT Act, Treasury listed al-Taqwa, “fear of god” in Arabic, to demonstrate that terrorists use shell banks. Zagaris, *supra* note 242, at 133; Isikoff & Hosenball, *supra* note 299.

327. USA PATRIOT Act, *supra* note 312, § 314.

328. STAFF REPORT, *supra* note 1, at 60. Treasury issued regulations under this section on Sept. 26, 2002, encouraging public/private cooperation and permitting the sharing of information between government agencies. 31 C.F.R. §§ 103.100, 103.110 (2002).

329. Zagaris, *supra* note 311.

330. Proposed rule issued Mar. 4, 2002; final rule issued Sept. 18, 2002. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, appendix G, at 49.

331. Zagaris, *supra* note 242, at 135 (citing *Counter-terror Initiatives in the Terror Finance Program: Hearing Before the Senate Committee on Banking, Housing, and Urban*

2003, FinCEN forwarded such searches on 962 suspects, two-thirds of whom appeared to have no relation to terrorism.³³²

iii. Expansion of Asset Forfeiture Provisions

In addition to new powers under the IEEPA and the introduction of a more extensive regulatory system, Title III of the USA PATRIOT Act expanded the list of predicate offenses for the freezing and forfeiture of property. New “specified unlawful activities” for criminal money laundering provisions included foreign criminal offenses, foreign public corruption, extraditable offenses, some export control offenses, computer offenses, customs and firearm offenses, and felony violations of the Foreign Agents Registration Act of 1938.³³³ Foreign predicate offenses occurring inside the United States fell under the new rubric.³³⁴ The aim of adding these offenses was to prevent corrupt foreign officials from taking advantage of the U.S. banking system.³³⁵ The statute also included illegal money remission business³³⁶ and bulk cash smuggling greater than \$10,000 across domestic bounds.³³⁷ Penalties included forfeiture of the amount smuggled, plus up to five years’ imprisonment. Where the money may not be available, the state can essentially bill the individual for the total—this is known as “value” forfeiture. Civil forfeiture penalties also applied. This provision responded to press reports highlighting the physical movement of cash by suspected members of al Qaeda.³³⁸ Charges of racketeering in response to suspected terrorist activity also became eligible for an application of civil penalties.³³⁹

The statute *did* provide an opportunity for individuals to contest the forfeiture of assets; however, it shifted the burden of proof. The target could file a claim under the Federal Rules of Civil Procedure and assert an affirmative defense—either that the property was not subject to confiscation or that the owner was innocent. But the statute simultaneously allowed the court to consider evidence otherwise inadmissible under the Federal Rules of Evidence, where the judiciary considered it reliable and

Affairs, 108th Cong. 5 (2003) (statement of David D. Aufhauser, General Counsel, U.S. Dep’t of the Treas.).

332. Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity: Final Rule, 67 Fed. Reg. 60,579 (Sept. 26, 2002) (Final Rule); 67 Fed. Reg. 9874 (Mar. 2002) (Interim Rule and Proposed Rule). See also Michael Isikoff, *Show Me the Money: Patriot Act Helps the Feds in Cases With No Tie to Terror*, NEWSWEEK, Dec. 1, 2003, available at <http://www.msnbc.com/news/997054.asp>.

333. USA PATRIOT Act, *supra* note 312, § 315.

334. *Id.* § 320.

335. Zagaris, *supra* note 311.

336. USA PATRIOT Act, *supra* note 312, § 373.

337. *Id.* § 371.

338. Zagaris, *supra* note 311.

339. USA PATRIOT Act, *supra* note 312, § 806.

compliance with the Federal Rules would jeopardize U.S. national security. This provision essentially shifted the burden to individuals whose assets had been confiscated to demonstrate that the state should not have seized their property or that they were innocent owners—while simultaneously allowing evidence to be used against them that normally would be impermissible in a court of law.

iv. Extraterritorial Jurisdiction

The USA PATRIOT Act also provided extraterritorial jurisdiction. It brought foreign persons laundering money in the United States, foreign banks, and other entities within the reach of the judiciary.³⁴⁰ The statute empowered the courts to seize assets pending trial for use in any final judgment. The statute also amended the existing forfeiture law to give the government control over assets deposited overseas.³⁴¹ The mechanism employed essentially allowed the state, where a foreign bank has a correspondent account in the United States, to seize it, requiring the bank to debit the terrorist account located overseas. Critically, the state could block such assets during the pendency of an investigation. Although meant to address an emergency, the state could exercise the procedures indefinitely. This quickly became a source of much concern. Where a potential conflict of laws existed between foreign jurisdictions and the United States, the statute granted the Attorney General, as opposed to the court, discretion to determine the most appropriate course of action. The same section required both U.S. and foreign banks to maintain and make certain records available to the courts. Severe penalties for noncompliance with requests for information applied. In addition to the above, the statute required the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to take reasonable steps to encourage foreign governments to include originator information in wire transfer instructions. The United States subsequently pursued this aim through the Financial Action Task Force (FATF).³⁴²

b. Exercise of IEEPA Powers Post-September 11

Less than two weeks after the attacks, under the authority of the IEEPA, President Bush issued Executive Order 13,224—an initiative he

340. *Id.* § 317.

341. *Id.* § 319. Interim guidance issued Nov. 27, 2001; proposed rule issued Dec. 27, 2001; final rule issued Sept. 18, 2002. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, appendix G, at 50.

342. By November 2003 the United States had proposed and obtained FATF's commitment to ensuring originator information was included in wire transfers. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, appendix G, at 50.

proudly referred to as “Draconian.”³⁴³ It essentially replaced a criminal law standard with an intelligence standard and made it illegal for anyone to attempt to alleviate any humanitarian suffering resulting from the seizure of assets.³⁴⁴ The instrument began innocuously enough: it declared a national emergency and created a “Specially Designated Global Terrorists” (SDGT) list, blocking “all property and interests in property” of designated terrorists and individuals contributing material support to terrorism.³⁴⁵ This included al Qaeda and its associated groups, Osama bin Laden, and supporters. The order provided a list of specified foreign persons the Secretary of State determined posed a risk to national security, foreign policy, the economy, or U.S. citizens.

From there, however, the order became considerably more extreme: it incorporated a list of persons the Secretary of the Treasury determined to be acting for or on behalf of the persons listed under the order (or subject to it) or assisting in, sponsoring, or providing financial, material, or technological support for those listed—and *any persons Treasury determined to be otherwise associated with those listed*. This meant that any business that did not cease interacting with the listed entities could themselves be listed and have their assets frozen. It also meant that mere association—and not demonstrated material support—would be sufficient for the state to confiscate all property. Moreover, once blocked, the Executive Order made it illegal for anyone to deal in blocked property or

343. Brian Groom, John Willman & Richard Wolffe, *Bush Targets Terrorist Funds*, FIN. TIMES (London), Sept. 25, 2001, at 1.

344. Exec. Order No. 13,224, 3 C.F.R. 786, 790 (2001), *reprinted as amended in* 50 U.S.C.A. § 1701 (2002). The order also issued under the authority of the National Emergencies Act (50 U.S.C. § 1601 (2001)), the United Nations Participation Act of 1945 (§ 5, 22 U.S.C. § 287(c) (1945) (amended 2001)), and 3 U.S.C. § 301 (1951) (amended 2005). In addition, Bush cited S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998), S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999), S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000), and S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001).

345. Thereafter, the White House continued the emergency on an annual basis. The first extension issued Sept. 18, 2003. Notice of Sept. 18, 2003, Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 68 Fed. Reg. 55,189 (Sept. 22, 2003). The second issued Sept. 24, 2004. Message from the President of the United States transmitting Notification that the National Emergency Declared with Respect to Persons who commit, threaten to commit, or support terrorism is to continue in effect beyond Sept. 23, 2004, pursuant to 50 U.S.C. 1622(d), H.R. Doc. No. 108-217, at 3 (2004); Continuation of the National Emergency with Respect to Persons who Commit, Threaten to Commit, or Support Terrorism, H.R. Doc. No. 108-217, at 1. Also note that on Jan. 23, 1995, Executive Order 12,947, President Clinton declared a national emergency under the IEEPA for a threat to the Middle East; this was modified Aug. 20, 1998, by Executive Order 13,099 (which added four additional people, including bin Laden). Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995); Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 25, 1998). President Bush continued this emergency on Jan 16, 2004, for another year. Notice of Jan. 16, 2004, Continuation of the National Emergency With Respect to Terrorists who Threaten to Disrupt the Middle East Peace Process, 69 Fed. Reg. 2,991 (Jan. 21, 2004), available at <http://www.whitehouse.gov/news/releases/2005/01/20050118-7.html>.

for any U.S. entity to try to avoid or conspire to avoid the prohibitions—*or to make donations to relieve human suffering to persons listed under the order or determined to be subject to it.* Any foreign banks who refused to provide information to the U.S. government risked having their assets and transactions within the United States frozen.

Executive Order 13,224 centered on two goals: stopping the money flow to al Qaeda and convincing the public that something was being done.³⁴⁶ In regard to the former, OFAC could already target Osama bin Laden and al Qaeda under Executive Order 12,947.³⁴⁷ Executive Order 13,224, however, divorced the terrorist list from the Middle East peace process. It also made it illegal for *all* U.S. actors, and not just financial institutions, to engage in business with the listed entities.

In regard to the latter goal, the signing of this document turned into a public relations exercise *extraordinaire*: “At 12:01 a.m. this morning, a major thrust of our war on terrorism began with the stroke of a pen. Today, we have launched a strike on the financial foundation of the global terror network.” Bush continued, “Just to show you how insidious these terrorists are, they oftentimes use nice-sounding, non-governmental organizations as fronts for their activities. We have targeted three such NGOs.” He threw the gauntlet: “If you do business with terrorists, if you support or sponsor them, you will not do business with the United States of America.” Paul O’Neill echoed this sentiment:

If you have any involvement in the financing of the al Qaida organization, you have two choices: cooperate in this fight, or we will freeze your U.S. assets; we will punish you for providing the resources that make these evil acts possible. We will succeed in starving the terrorists of funding and shutting down the institutions that support or facilitate terrorism.³⁴⁸

Despite the bellicosity of these remarks, the administrative structure designed to implement the measures fell somewhat short of the promise. An OFAC report in April 2004, for instance, showed only four staff members dedicated to terrorist finance—as opposed to, for instance,

346. STAFF REPORT, *supra* note 1, at 45.

347. Exec. Order No. 12,947, 31 C.F.R. 595 (2001), *reprinted as amended in* 50 U.S.C.A. § 1701 (2003); Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. § 597 (2001), *reprinted as amended in* 50 U.S.C.A. § 1701 (2003); STAFF REPORT, *supra* note 1, at 78–80; Zagaris, *supra* note 242, at 130.

348. Such strong, presentational remarks continued. *See, e.g.*, U.S. DEP’T OF THE TREAS., CONTRIBUTIONS BY THE DEPARTMENT OF THE TREASURY TO THE FINANCIAL WAR ON TERRORISM: FACT SHEET 6 (Sept. 2002) (“The war on terrorism is only beginning, and it is certain to demand constant vigilance. In the year since that terrible day, we have hit them hard. Our goal is to bankrupt their institutions and beggar their bombers.”) *See also* Levitt, *supra* note 3.

twelve people enforcing trade embargos on Cuba.³⁴⁹ Although a sudden surge of names graced the list, the average number added monthly quickly dwindled.³⁵⁰ By May 2002, the Department of Treasury had blocked the assets of 210 groups and people, freezing \$34 million. Allied countries blocked another \$82 million.³⁵¹ On average, the Executive added six people a month thereafter, bringing the total to 397 by January 2005.³⁵²

Not all of these on the list related to September 11: Continuity IRA, the Loyalist Volunteer Force, GRAPO (the First of October Anti-Fascist Resistance Group), the Communist Party of the Philippines, and the Communist Party of Nepal, for instance, found themselves included. The bulk of them, however, bore some link to Arab states or the Islamic faith. According to the *Washington Post*, by September 2002 the government was monitoring more than 500 hundred Arab and Muslim businesses in the United States.³⁵³ This scrutiny, and the federal government's rather loose standards, led to a drop in contributions to Islamic charities.³⁵⁴ Treasury issued "voluntary best practices guidelines" containing a thinly veiled threat: they called for "rigorous, self-imposed financial oversight; high levels of disclosure and transparency; and immediate severing of all ties to any foreign recipient associated with a terrorist organization." The

349. Between 1990 and 2003, only 93 terrorism-related investigations took place at OFAC, as opposed to some 10,683 Cuba-related investigations during the same time period. And fines for Cuba-related offenses amounted to \$8 million dollars; those charged with terrorism paid only \$9,425. Mark Frank & Richard Lapper, *U.S. Squeeze Angers Cubans: Bush Clampdown is Seen as Blow to Family Ties*, FIN. TIMES (London), May 10, 2004, at 4.

350. The initial register froze the assets of 27 people and groups suspected of terrorist finance. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001), available at <http://www.treas.gov/offices/enforcement/ofac/sanctions/terrorism.html>. See also Mike Allen & Steven Mufson, *U.S. Seizes Assets of Three Islamic Groups*, WASH. POST, Dec. 5, 2001, at A1. Of these, 12 were individuals and 15 were organizations. Less than a month later the Administration added another 39 names to the list. U.S. DEP'T OF THE TREAS., OFFICE OF FOREIGN ASSETS CONTROL, TERRORISM: WHAT YOU NEED TO KNOW ABOUT U.S. SANCTIONS (2005), available at <http://www.treas.gov/offices/enforcement/ofac/sanctions/terrorism.html>. See also Joseph Kahn & Judith Miller, *U.S. Freezes More Accounts: Saudi and Pakistani Assets Cited for Ties to Bin Laden*, N.Y. TIMES, Oct. 13, 2001, at A1; Richard Wolffe, *U.S. Freezes Assets Linked to Terror Network*, FIN. TIMES (London), Oct. 13, 2001, at 1. Roughly a fortnight later another 22 names issued, and within five days 62 more individuals and entities found their assets blocked. The pace continued, but the number of entities added each time diminished. By May 2002, 210 names and groups found themselves on the list.

351. U.S. DEP'T OF THE TREAS., OFFICE OF PUBLIC AFFAIRS, U.S.-EU DESIGNATION OF TERRORIST FINANCIERS FACT SHEET (PO-3070) (May 3, 2002), available at <http://www.treas.gov/press/releases/po3070.htm>.

352. U.S. DEP'T OF THE TREAS., TREASURY DESIGNATES INDIVIDUAL FINANCIALLY FUELING IRAQI INSURGENCY, AL QAIDA (JS-2206) (Jan. 25, 2005), available at <http://www.ustreas.gov/press/releases/js2206.htm>. The complete lists are available from OFAC online. See also Allen & Mufson, *supra* note 350.

353. *U.S. Investigates Scams for Terrorist Ties*, 104 BUSINESS CREDIT, Sept. 1, 2002, at 1.

354. STAFF REPORT, *supra* note 1, at 48-49.

government continued, “Although wholly voluntary, if implemented with sufficient resources and diligently adhered to in practice, the guidelines offer a means by which charities can protect themselves against terrorist abuse, enhance donor confidence, and significantly reduce the risk of a blocking order.”³⁵⁵ The standards the government used, and the basis on which it made its decisions, fell short of the democratic norms otherwise endorsed by the state. I return to this point in Part III.

C. International Initiatives

The United States spends more on its military than the next eight states combined, but it cannot go after terrorist finance on its own.³⁵⁶ The United States and the United Kingdom depend upon mutual legal aid treaties, formal requests between intelligence services, instruments of international law, and diplomatic pressure to make headway in this realm. Well aware of the importance of international assistance,³⁵⁷ both states are pushing for global norms. Several obstacles stand in the way.

In the regulatory realm, FATF members, for instance, cannot even agree on the definition of “charity.” And each state tends to view its regulatory system as preferable: the United Kingdom sees its Charity Commission as “superior to anything in America, where charities are overseen chiefly for tax purposes.”³⁵⁸ In contrast, Americans brag that they are “light years ahead of the rest of the G7” in regulating their financial sector.³⁵⁹ In regard to the freezing of assets, states are divided over which organizations they should allow charities to support: Britain and, indeed, Europe more generally tend to see only the military arms of Hamas and Hezbollah as terrorist organizations, whereas the United

355. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, at 14.

356. Martin Wolf, *Exporting the National Interest: Getting the Objectives of U.S. Foreign Policy Right Matters Far More Than the Dispute Over Multilateralism Versus Unilateralism*, FIN. TIMES (London), July 24, 2002, at 17.

357. See, e.g., Stephen Fidler, Carola Hoyos & Richard Wolffe, *Bush Tells Iraq to Allow UN Arms Inspections*, FIN. TIMES (London), Nov. 27, 2001, at 1; Alan Beattie, *Changing the Guard: International Monetary Fund*, FIN. TIMES (London), Nov. 30, 2001, at 4; Edward Alden, *The Money Trail: How a Crackdown on Suspect Charities is Failing to Stem the Flow of Funds to al Qaeda*, FIN. TIMES (London), Oct. 18, 2002, at 19. See also TERRORIST FINANCING, *supra* note 253, at 2 (echoing the importance of international political will); Kenneth Dam, *Hunting Down Dirty Cash: The International Coalition Must Step Up its Efforts to Stem the Flow of Terrorist Funds or Risk Further Attack*, FIN. TIMES (London), Dec. 12, 2001, at 17; *Weapons Against Terrorist Funds*, FIN. TIMES (London), Sept. 28, 2001, at 20.

358. *The Iceberg Beneath the Charity*, THE ECONOMIST (U.S. Edition), Mar. 15, 2003, at 85.

359. *Id.*

States wants to collapse the distinction to ban both the military and political branches.³⁶⁰

Perhaps the biggest impediment, however, to gaining practical cooperation lies in the realm of intelligence: claiming protection of its sources and methods of collecting information, the United States in particular is loath to provide evidence to other states of those individuals and entities whose assets it wants frozen.³⁶¹ As a result, most of those subject to blocking orders have been U.S.-based.³⁶² I will return to this point in the policy discussion. For now, I will simply paint, in broad brushstrokes, the general international structure for anti-terrorist finance, highlighting the British and U.S. roles in its development. What quickly becomes apparent is that, in connection with the strong role the United Kingdom and the United States have adopted in the international realm, the developing international structures tend to mirror the two states' approaches. The attendant problems echo the issues raised in the second part of this Article.

Three points are worth emphasizing at the outset: First, like the domestic measures in both states, it was not until very recently that the international structures began to focus on international anti-terrorist finance. Second, many of the mechanisms applied derive from anti-money laundering efforts and tend to collapse the anti-money laundering, anti-terrorist finance, and anti-organized crime efforts into one stream. Third, relatively few multilateral efforts on terrorist financing are underway; the United States and United Kingdom have largely driven existing efforts, with strong support from other members of the G7.³⁶³ In this section I briefly consider actions taken by the United Nations, the Financial Action Task Force, and other multilateral and regional bodies.³⁶⁴

360. *Id.*; Harvey Morris & Gareth Smyth, *Lebanon Set to Refuse to Freeze Terror Assets*, FIN. TIMES (London), Nov. 8, 2001, at 8.

361. Alden, *supra* note 357.

362. *The Iceberg Beneath the Charity*, *supra* note 358.

363. *See, e.g.*, John Authers, *G20 Meeting Upbeat Over Outlook for World Economy*, FIN. TIMES (London), Oct. 28, 2003, at 11; Alan Beattie, *Harmony Rules as G7 and IMF Delegates Set Agenda*, FIN. TIMES (London), Apr. 22, 2002, at 3; Stephen Fidler & Haig Simonian, *IMF Chief Urges United Response to Slowdown*, FIN. TIMES (London), Oct. 6, 2001; Stephen Fidler & Haig Simonian, *G7's Sights Fixed on Slowdown, Terror Cash*, FIN. TIMES (London), Oct. 6, 2001, at 4.

364. I omit discussion of the IMF, which proves rather ineffective in the anti-terrorist realm. The main IMF instrument is the Financial Sector Assessment Program, but participation in the program and publication of the results is voluntary. Fewer than 30 states participated in 2001. The IMF maintains a separate program to analyze offshore financial centers, which also is voluntary. Poorer states, and indeed, staff members at the IMF, point out that significant terrorist funds pass through G7 states. While the IMF indicated it would incorporate the FATF's recommendations, it lacks any mechanism to ensure compliance. *See* Alan Beattie, *Money-laundering Focus Stirs Feelings of Disquiet*, FIN. TIMES (London), Nov. 17, 2001, at 8.

1. The United Nations

Three UN treaties relate to illicit money flows: first, the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances required signatories to criminalize money laundering and freeze the assets of those involved in drug trafficking.³⁶⁵ Just over a decade later similar provisions crossed over into the counter-terrorist realm: the International Convention for the Suppression of the Financing of Terrorism made it an offense to provide or collect funds intending or knowing that they would be used for terrorist offenses.³⁶⁶ It also made it possible to freeze the assets of those involved. Article 18(1) of the Treaty delved into the regulatory realm, with a “know your customer” and SAR requirement.³⁶⁷ As in the United Kingdom, not only did the measures move from anti-drug trafficking and money laundering to anti-terrorist finance, but then the whole regime transferred over into the criminal realm writ large. Finally, the Palermo Convention against Transnational Organized Crime synchronized national definitions of crime associated with money laundering and required signatories to extradite suspects, protect witnesses, strengthen international cooperation, and establish strong regulatory regimes (including customer identification, record-keeping, and the filing of SARs).³⁶⁸ To supplement these initiatives, the United Nations developed model laws related to money laundering and terrorist finance, which are remarkably similar to their British and U.S. counterparts.³⁶⁹

Outside of the General Assembly, the UN Security Council made minor efforts in 1999 to address the flow of funds to the Taliban and al Qaeda. Following September 11, though, the Security Council suddenly focused its efforts on the issue.³⁷⁰ Security Council Resolution 1368, issued September 12, 2001, called on all states to bring perpetrators and those “responsible for aiding, supporting or harbouring the perpetrators” to justice.³⁷¹ It expressed the Security Council’s desire to take “all neces-

365. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 28 I.L.M. 493 (1989).

366. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000) (entered into force Apr. 10, 2002).

367. Ben Brandon, *Playing Hard Ball*, LEGAL WK. GLOBAL, Apr. 8, 2003.

368. United Nations Convention Against Transnational Organized Crime, Dec. 12, 2000, U.N. Doc. A/55/383 (entered into force Sept. 29, 2003).

369. See U.N. Office on Drugs and Crime, Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime (1999), <http://www.imolin.org/imolin/ml99eng.html>. See also U.N. Office on Drugs and Crime, Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill (2003), http://www.unodc.org/pdf/report_money_laundering_2003_09.pdf.

370. See S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (calling on the Taliban to give up bin Laden or face an asset freeze).

371. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

sary steps to respond to the terrorist attacks . . . and to combat all forms of terrorism.” This included the swift implementation of all conventions related to terrorism, including the 1999 treaty focused on the Suppression of the Financing of Terrorism.³⁷² Just over a fortnight later, Security Council Resolution 1373 required all member states to create laws designating supporters of terrorism and to freeze their assets.³⁷³ The language of the resolution is noteworthy. The Security Council:

Decides that all States shall: (a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; [and] (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts.³⁷⁴

The resolution also announced the Security Council’s decision that all states shall “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts.” The resolution’s assertions earned for it the description within the UN of being “one of the most expansive resolutions in the history of the [Security] Council.”³⁷⁵ The resolution itself did not include any names, nor did it define terrorism. But it established a new bureaucratic entity to ensure that all member states of the UN satisfied the requirements.

The newly-formed Counterterrorism Committee (CTC) incorporated one member from each state. Five-member subcommittees each oversaw one-third of the UN member states. The CTC required member states to submit reports on their efforts to implement the resolution. By 2002, more than 100 states had complied, passing new laws to deal with terrorist finance and money laundering, with approximately 170 states

372. By 2001, 19 global or regional treaties addressed international terrorism. See The Secretary-General, *Measures to Eliminate International Terrorism*, 18–19, U.N. Doc. A/56/160 (July 3, 2001).

373. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

374. *Id.*

375. Policy Working Group, *Report on the United Nations and Terrorism*, ¶ 32, U.N. Doc. S/2002/875, A/57/273 (Sept. 10, 2002), available at <http://www.un.org/terrorism/a57273.htm> [hereinafter *Report on the United Nations and Terrorism*]. See also Press Release, Security Council, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls for Suppressing Financing, Improving International Cooperation, U.N. Doc. SC/7158 (Sept. 28, 2001), available at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.

maintaining the ability to seize assets.³⁷⁶ The CTC revamped the model legislation explicitly to address terrorist finance.³⁷⁷

In addition to these steps, the UN Security Council adopted Resolution 1455, which was directed at terrorists and terrorist supporters linked to al Qaeda, Osama bin Laden, and the Taliban. The instrument established and provided for the update of a list of individuals and entities and obliged all member states to freeze the assets of those on the list. The United States provided most of the names subsequently included.

In October 2001 the Secretary-General established the Policy Working Group on the United Nations and Terrorism “to underline the depth of shared international commitment to an effective, sustained and multi-lateral response to the problem of terrorism.”³⁷⁸ The underlying aim was to contextualize the UN’s role, to prioritize UN activities regarding terrorism, and to come up with recommendations on the best way to proceed. In 2002 the working group issued a report, stating that the UN ought to focus on areas where the organization has a comparative advantage. It suggested a three-pronged approach: to dissuade disaffected groups from embracing terrorism; to deny groups or individuals the means to carry out acts of terrorism; and to sustain broad-based international cooperation in the struggle against terrorism. The report suggested that the CTC would serve as the primary vehicle to deny opportunities for terrorist acts to occur—particularly through promulgating model legislation.³⁷⁹ The Policy Working Group also emphasized the importance of ratifying and implementing the International Convention for the Suppression of the Financing of Terrorism, as well as the UN Convention against Transnational Organized Crime.³⁸⁰

Before moving to the Financial Action Task Force, one final aspect of the UN’s role in anti-terrorist finance bears mention: the Kimberly process. This UN-sponsored initiative focuses on preventing the use of diamonds as a form of terrorist finance. While much has been made of this, reports from Amnesty International and Global Witness suggest that the World Diamond Council’s efforts as of October 2004 represented little more than public relations maneuvers.³⁸¹

376. STAFF REPORT, *supra* note 1.

377. U.N. Office on Drugs and Crime, Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill, *supra* note 369.

378. *Report on the United Nations and Terrorism*, *supra* note 375, ¶ 1.

379. *Id.* at 1.

380. *Id.* ¶ 52, Recommendation 1.

381. Nicol Degli Innocenti, *Diamond Sellers “Slow to Clean up Their Industry,”* FIN. TIMES (London), Oct. 18, 2004, at 7. *See also* Nicol Degli Innocenti, *Retailers Face Flak Over “Blood Diamonds,”* FIN. TIMES (London), Mar. 30, 2004, at 1.

2. The Financial Action Task Force

In 1989 the G7 created the Financial Action Task Force, a multilateral government organization focused on setting international standards to prevent the laundering of criminal proceeds. Like the legislation sweeping through the United Kingdom and the United States at the time, the organization targeted drug trafficking.³⁸² The FATF included 33 direct members, with various regional bodies that reached out to more than 100 states worldwide.³⁸³ In the early 1990s the organization articulated 40 recommendations to prevent money laundering. FATF updated these in 1996 and again in 2003. Perhaps the most significant aspect of this international effort is the Non-Cooperative Countries and Territories Process (NCPT) adopted by the organization. Unlike the Vienna Convention, which lacks an enforcement mechanism, the FATF used the NCTP to ensure compliance and pressure states not already party to the agreement. It was not until very recently (2000) that the FATF began issuing its blacklist.³⁸⁴

Following the attacks of September 11, the FATF expanded its remit from money laundering to include international standards for terrorist finance. At a special meeting called in Washington, D.C., for October 29–30, 2001, the United Kingdom tabled a number of strong proposals that ranged from requiring all states to ratify the UN Suppression of Terrorism Financing Convention to demanding that the IMF and World Bank endorse the FATF anti-money laundering regime. Gordon Brown, the U.K. Chancellor, announced at the time: “The ready supply of finance is a lifeblood of modern terrorism. Those who finance terror are as guilty as those who commit it.”³⁸⁵ The Madrid bombings again generated support within the organization “to drive terrorists out of the financial system by strangling their funding sources.”³⁸⁶ The strategy mirrored that

382. Brandon, *supra* note 367.

383. The regional bodies include the Asia/Pacific Group Against Money Laundering, the Caribbean Financial Action Task Force, the Eastern and Southern African Anti-Money Laundering Group, Financial Action Task Force of South America Against Money Laundering, the Inter-Governmental Action Group against Money Laundering (West Africa), and Moneyval (Central and Eastern Europe).

384. The first list included 15 countries. See FINANCIAL ACTION TASK FORCE, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES (June 22, 2000), <http://www.fatf-gafi.org/dataoecd/56/43/33921824.pdf>. Since September 11, 20 countries have been removed from the non-cooperative country list following domestic reforms. Only three—Myanmar, Nauru, and Nigeria—remain on the register. See FINANCIAL ACTION TASK FORCE, ANNUAL AND OVERALL REVIEW OF NON-COOPERATIVE COUNTRIES OR TERRITORIES (June 10, 2005), <http://www.fatf-gafi.org/dataoecd/41/26/34988035.pdf>.

385. Andrew Parker, *Britain Wants UN Convention Ratified*, FIN. TIMES (London), Oct. 29, 2001, at 8.

386. Jaime Caruana & Claes Norgren, *Wipe Out the Treasuries of Terror*, FIN. TIMES (London), Apr. 7, 2004, at 1.

in Title III of the USA PATRIOT Act: strengthening the regulatory regime, more closely supervising Alternative Remittance Systems and charities, as well as cash couriers, and improving international cooperation and information-sharing.³⁸⁷

In June 2003, the FATF released an updated Forty Recommendations, with key changes expanding predicate offenses, introducing more stringent due diligence requirements, and extending the regulatory regime to a broader range of financial institutions.³⁸⁸ The new guidelines also introduced tighter requirements for correspondent banking, third party introducers, foreign political officials, and issuance of bearer shares, banned shell banks worldwide, and required states to establish financial intelligence units. FATF took additional steps to specifically address anti-terrorist finance. The Eight Special Recommendations followed, which focused on areas such as the criminalization of terrorist finance, powers for asset forfeiture, the licensing of money remitters, and regulation of NGOs.³⁸⁹ Together, the Forty Recommendations and the Eight Special Recommendations provide a laundry list of possible options for states who want to shut down terrorist finance. What gives the measures teeth is the enforcement mechanism in the agreement: the FATF can recommend economic sanctions against non-cooperating states and territories. The organization worked with the IMF and World Bank to develop a way to determine whether states or territories are in compliance.³⁹⁰ What is notable about the advice of the Forty Recommendations and the Eight Special Recommendations is that, like the measures in the United Kingdom and the United States post-September 11, it suggests both a normalization procedure and an extension of existing money laundering practices—assuming, of course, that they are appropriate for detecting terrorist activity.

3. Regional and Bilateral Efforts

The European Union does not represent the only regional body taking steps in this direction, but it appears to be the most active.³⁹¹ And like

387. *Id.*

388. FINANCIAL ACTION TASK FORCE, THE FORTY RECOMMENDATIONS (June 20, 2003), <http://www.fatf-gafi.org/dataoecd/7/40/34849567.pdf>.

389. FINANCIAL ACTION TASK FORCE, SPECIAL RECOMMENDATIONS ON TERRORIST FINANCING (Oct. 31, 2001), <http://www.fatf-gafi.org/dataoecd/5/16/34266142.pdf>.

390. *Id.*

391. In 2000 the OECD released a list of tax havens that refused to bring their practices into compliance with international norms. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TOWARDS GLOBAL TAX CO-OPERATION: REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE ON FISCAL AFFAIRS (2000), <http://www.oecd.org/dataoecd/9/61/2090192.pdf>. Asia-Pacific Economic Cooperation also has

the United Kingdom and the United States, its emphasis on terrorist finance has come rather late in the game: the Council of Europe's 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime required signatory states to cooperate with anti-money laundering rules.³⁹² In 1995 the EU created the Egmont group to address terrorist financing through the creation of national financial intelligence units.³⁹³ But it was not until the September 11 attacks that a pan-European focus on, specifically, counter-terrorist finance came into being.

On September 20, 2001, three senior EU officials traveled to Washington to consult on how to proceed in this area.³⁹⁴ The following day, the European Council met and approved over 30 measures to respond to terrorist finance and money laundering. These included a European-wide arrest warrant, a common definition of terrorism, a list of alleged terrorists, joint investigative teams, increasing the priority of responding to financing among law enforcement, the implementation of all international legal regimes as quickly as possible, and the creation of a Financial Intelligence Unit in each member state to interrupt money laundering.³⁹⁵ In December 2001 the European Parliament and Council amended Directive 91/308/EEC on the prevention of the use of the financial system for money laundering to include a "gatekeeper" requirement for all lawyers, accountants, and notaries to supply information on suspicious transactions to national authorities. The amended directive exempted attorneys from the reporting requirement where they simply act to ascertain a client's legal position or in connection with judicial proceedings.³⁹⁶ "Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counselor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is

taken steps in this direction. *See Not So Pacific*, THE ECONOMIST (U.S. Edition), Oct. 25, 2003, at 70.

392. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148 (entered into force Sept. 1, 1993).

393. Stephen Fidler, *The Human Factor: All is Not Well in Clandestine Intelligence Collection*, FIN. TIMES (London), July 7, 2004, at 15.

394. Peter Norman, *Europe Rallies Forces to Step Up Battle Against Global Terrorism*, FIN. TIMES (London), Sept. 20, 2001, at 1. *See also* Chris Patten, *In Defence of Europe's Foreign Policy*, FIN. TIMES (London), Oct. 17, 2001, at 21.

395. *See* Conclusions and Plan of Action of the Extraordinary European Council Meeting, 2001 O.J. (SN 140/01) (Sept. 21, 2001). *See also* Peter Norman, *Stage Set for Leaders to Show Solidarity*, FIN. TIMES (London), Sept. 21, 2001, at 4; Peter Norman, *Stronger Ties Urged Between Police Forces*, FIN. TIMES (London), Sept. 21, 2001, at 4.

396. European Parliament and Council Directive 2001/97/EC, preamble ¶ 17, 2001 O.J. (L 344/76) (amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering).

seeking legal advice for money laundering purposes.”³⁹⁷ This Directive provides only a guideline, imposing a general (albeit enforceable) duty. It is up to member states to implement the details into law, which the United Kingdom has done. The amended money laundering directive also expanded predicate offenses to include all serious crime.³⁹⁸ Efforts continued within the EU to establish the legal structure to allow the region to go after terrorist money: in June 2002, for instance, the European Council issued a Framework Decision, adopting a common definition of terrorism. In June 2005 the Council adopted the matter as one of its priorities for the second half of 2005.

In addition to these general measures, the EU immediately took steps to block specific individuals’ and organizations’ assets. Among these individuals were approximately 170 Taliban officials, including most government officials (governors of provinces, court officials, officials with visa and passport offices, and deputy ministers), the Head of the Olympic committee, representatives in organizations like the UN, ambassadors, the consulate general of Afghani provinces, and the like. The EU also froze the assets of numerous commercial entities, such as Afghan Airlines, various banks in Afghanistan, other international NGOs and humanitarian groups with ties to Afghanistan, and medical facilities in the state. By October 1, 2001, the EU had frozen approximately \$100 million in Taliban assets, \$88 million of which was located in the United Kingdom.³⁹⁹ In December 2001 the EU designated 42 more entities.⁴⁰⁰ On May 3, 2002, the EU issued a list of 18 suspected terrorist and terrorist groups. The action coincided with the U.S. issuance of freezing orders on groups and individuals associated with ETA.⁴⁰¹ Within a month the EU circulated another list of suspects linked to al Qaeda.⁴⁰² Unlike the United States’ listing process, however, Europe introduced more safeguards against the inclusion of the wrong people. The EU requires checks prior to listing, includes an appeals process, and sanctions states for entering names wrongly. The EU also excepts everyday living funds

397. *Id.* preambular ¶ 17. The United States lacks an equivalent reporting requirement; however, knowingly representing criminals can violate ethics codes, and communication between attorneys and clients that is directed towards furthering criminal activity is not privileged. Nicole M. Healy, *Public International Law: The Impact of Sept. 11th on Anti-Money Laundering Efforts and the European Union and Commonwealth Gatekeeper Initiatives*, 36 INT’L LAW. 733 (2002).

398. Directive 2001/97/EC, *supra* note 396, art. 1(E); *see also* Brandon, *supra* note 367.

399. Bruce Zagaris, *Counterterrorism and Economic Sanctions: U.S. Initiates Sanctions against Bin Laden and Associates*, 17 INT’L ENFORCEMENT L. REP. 480 (Nov. 2002).

400. U.S. DEP’T OF TREAS., U.S.-EU DESIGNATION OF TERRORIST FINANCIERS FACT SHEET (May 3, 2002), available at <http://www.treas.gov/press/releases/po3070.htm>.

401. *Id.*

402. Council Reg. 881/2002, Annex I, 2002 O.J. (L 139/9). *See also* Council Reg. 2580/2001, art. 1, 2001 O.J. (L 337/85).

from being frozen, as well as money required for legal costs. This sharply contrasts with the U.S. approach, which specifically forbids any assistance, even if directed at relieving humanitarian suffering.

Outside of these regional advances, both the United Kingdom and the United States have employed various bilateral mechanisms to encourage international assistance. The United States appears to be increasing its pressure, for instance, on Saudi Arabia and the UAE, while being careful at the same time to publicly praise them for any advances in this area.⁴⁰³ Other states, such as China and Switzerland, agreed to cooperate with U.S. initiatives in this area.⁴⁰⁴ By far the most outspoken U.S. ally in the post-September 11 environment has been the United Kingdom.⁴⁰⁵ The 2001 East Africa embassy bombing trials in the United States drew attention to the role of European financial institutions, including Barclays Bank, in transferring al Qaeda assets.⁴⁰⁶ By October 2, 2001, the United Kingdom had frozen \$88.4 million in assets linked to Afghanistan.⁴⁰⁷ Britain also played a key role in pushing through many of the EU measures.⁴⁰⁸ This led U.S. Treasury officials to describe the British government and banks as “incredible allies and a big help” in efforts to stop terrorist financing post-September 11.⁴⁰⁹

403. See, e.g., Michael Mann & Richard Wolffe, *U.S. Accuses Africa Banks of Failing to Assist Search*, FIN. TIMES (London), Oct. 3, 2001, at 4; Roula Khalaf & Richard Wolffe, *Bush Urges Arab Allies to Condemn Terrorism*, FIN. TIMES (London), Apr. 18, 2002, at 33; Cilina Nasser, *Saudi Arabia Works to Block Terror Funds: FATF Says Efforts are “Compliant,” but U.S. Treasury Says More Can be Done*, THE DAILY STAR (Lebanon), June 17, 2004; Edward Alden & Mark Huband, *Washington to Warn Saudis on Terror Financing*, FIN. TIMES (London), Nov. 27, 2002, at 12; J. Michael Waller, “Wahhabi Lobby” Takes the Offensive, INSIGHT ON THE NEWS, Aug. 5, 2002, at 16; J. Michael Waller, *FBI Polarized by “Wahhabi Lobby,”* INSIGHT ON THE NEWS, Aug. 4, 2003, at 27.

404. Gerard Baker, *Jiang and Bush Try for a Fresh Start*, FIN. TIMES (London), Oct. 20, 2001, at 5; Editorial, *Swiss Role*, FIN. TIMES (London), July 3, 2002, at 12.

405. See, e.g., Brian Groom, John Willman & Richard Wolffe, *Bush Targets Terrorist Funds*, FIN. TIMES (London), Sept. 25, 2001, at 1. For examples of individuals whose assets were frozen by the United Kingdom, see Bob Sherwood, *Six Arrested on Terror Charges*, FIN. TIMES (London), Dec. 16, 2002, at 2.

406. Robert Clow et al., *Team Set up to Block Terrorist Funds*, FIN. TIMES (London), Sept. 17, 2001, at 6.

407. Michael Mann, John Willman & Richard Wolffe, *U.S. Has Frozen \$ 6m Linked to al Qaeda*, FIN. TIMES (London), Oct. 2, 2001, at 4.

408. See, e.g., Judy Dempsey & Mark Huband, *Big States Back Idea of “Tsar” to Lead War on Terrorism*, FIN. TIMES (London), Mar. 19, 2004, at 9.

409. Richard Wolffe, *Transatlantic Relations Flourish in Time of Crisis*, FIN. TIMES (London), Oct. 4, 2001, at 7.

III. HOW EFFECTIVE?

The dirty little secret behind efforts to stem terrorist finance in the United Kingdom and the United States is that, to date, such initiatives have been spectacularly unsuccessful in making a significant dent in terrorist operations. From the vanquishing tone of language on both sides of the Atlantic, one might be forgiven for thinking otherwise: within months of Executive Order 13,224 and the USA PATRIOT Act, the Bush Administration claimed victory in the war against terrorist finance.⁴¹⁰ But the U.S. government has brought only a handful of related prosecutions. The only terrorist finance ring reported broken in the United States' 2002 National Money Laundering Strategy report related to the conviction of Mohammad Hammoud and the "cigarettes for Hezbollah" plan. The rest correlated to drugs and ordinary criminal activity.⁴¹¹ A substantial percentage of cases brought to court failed. Those cases the U.S. government cites as successes often rested on charges of fraud or false statements and not on terrorist finance.⁴¹² The only smoking gun so far appears to be the case of Mohammed Ali Hasan al-Moayad, who has been charged with providing material support to al Qaeda and Hamas.

410. See, e.g., U.S. DEP'T OF THE TREAS., CONTRIBUTION BY THE DEPARTMENT OF THE TREASURY TO THE FINANCIAL WAR ON TERRORISM, FACTSHEET 6 (Sept. 2002) (stating, "Our war on terror is working—both here in the United States and overseas . . . al Qaeda and other terrorist organizations are suffering financially as a result of our actions. Potential donors are being more cautious about giving money to organizations where they fear the money might wind up in the hands of terrorists. In addition, greater regulatory scrutiny over financial systems around the world in the future may identify those who would support terrorist groups or activities."); Victor Mallet, *Terrorist Funds "Being Squeezed,"* FIN. TIMES (London), Apr. 11, 2002, at 12 (quoting Paul O'Neill's assertions that the United States has been successful); U.S. *Says al Qaeda Hurting for Funds*, REUTERS, May 18, 2005, (Treasury Undersecretary Stuart Levey announcing that al Qaeda was in financial difficulties).

411. U.S. DEP'T OF THE TREAS., ANNUAL MONEY LAUNDERING STRATEGY, A15, appendix 7 (2002). The following year, Help the Needy stood out as an organization found guilty of forwarding money to Iraq in violation of the IEEPA. Generally, both states have tended to freeze assets without further court proceedings. See, e.g., U.S. DEP'T OF THE TREAS., OFFICE OF PUBLIC AFFAIRS, STATEMENT BY TREASURY SECRETARY JOHN W. SNOW ON TREASURY'S DESIGNATION OF IARA (JS-2026) (Oct. 13, 2004) (freezing assets connected with the Islamic African Relief Agency); Kahn & Miller, *supra* note 350 (discussing designation of al-Hamati Sweets Bakeries, al-Nur Honey Press Shops, and al-Shifa Honey Press); John Willman & Richard Wolfe, *U.S. Probe Takes Close Look at Trail of "Honey Money,"* FIN. TIMES, Oct. 13, 2001, at 3; David S. Hilzenrath & John Mintz, *More Assets on Hold in Anti-Terror Effort*, WASH. POST, Oct. 13, 2001, at A16 (discussing freezing of Human Concern International, a Canadian relief group, as well as Muwafaq Foundation, Society of Islamic Co-operation, and Rabita Trust, a major hawala dealer). In 2004, however, *United States v. Iyman Faris*, 388 F.3d 452 (4th Cir. 2004) presented an exception.

412. See, e.g., the case relating to Sami al-Hussayen, University of Idaho graduate student and Saudi citizen, indicted in Boise, Idaho on seven counts of visa fraud and four false statement offenses. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, at 34, appendix A.

His extradition from Germany is still pending.⁴¹³ The problem is not unique to the United States: the United Kingdom also has only had a few successful prosecutions in this realm.⁴¹⁴ As was previously mentioned, the Assets Recovery Agency press releases note only two cases that appear to be related to paramilitary organizations.⁴¹⁵

Nor is there any indication that these programs have harmed terrorist groups' ability to operate in substantial ways. To the contrary, a year after the September 11 attacks the United Nations released a report stating that al Qaeda sources remained intact, with between \$30 million and \$300 million available from legitimate business enterprises.⁴¹⁶ Various international intelligence and law enforcement bodies reached similar conclusions.⁴¹⁷ In the face of such claims, even the U.S. administration backpedaled: Alan Larson, the Undersecretary of State for Economic Affairs, confirmed in October 2002 it was "unquestionably true" that al Qaeda still had financial means to carry out devastating attacks on the United States. He continued, "I don't think lack of resources is a major impediment to the operations of terrorist organizations at this stage."⁴¹⁸ In December 2002, the Staff Report to the September 11 Commission determined that despite the broad measures implemented, "al Qaeda continues to fund terrorist operations with relative ease. The amounts of money required for most operations are small, and al Qaeda can apparently still draw on hard-core donors who knowingly fund it and sympathizers who divert charitable donations to it."⁴¹⁹ In the United Kingdom, the December 2004 Northern Bank raid—and the state's failure to recover *any* of the £26.5 million stolen by PIRA (except for the £50,000 voluntarily returned by those responsible)—speaks volumes.

Indeed, the level of crime in which paramilitaries engage in Northern Ireland appears to be growing—and diversifying. Similarly, the number

413. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, at 35. Similarly, in February 2005 the Department of Justice filed a 53-count indictment in the U.S. District Court for the Middle District of Florida against the Elehssan Society (designated by Treasury in May 2005 as a front for Palestinian Islamic Jihad). This case is still pending. See *U.S. Designates Elehssan Society Charity as Front for Palestinian Terrorists*, ARABICNEWS.COM, May 5, 2005, <http://www.arabicnews.com/ansub/Daily/Day/050505/2005050513.html>; U.S. DEP'T OF THE TREAS., TREASURY DESIGNATES CHARITY FUNNELING MONEY TO PALESTINIAN ISLAMIC JIHAD—ACTION MARKS 400TH DESIGNATION OF A TERRORIST OR FINANCIER (May 4, 2005).

414. See Jimmy Burns & Brian Groom, *UK Plans Clampdown on Bureaux de Change*, FIN. TIMES (London), Oct. 16, 2001, at 6.

415. See also IRA "Laundering Stolen Cash in UK Housing Market," THE GUARDIAN (London), Mar. 30, 2005, at 7.

416. Alden, *supra* note 357, at 19; see also *Still Flush*, ECONOMIST, Sept. 7, 2002.

417. Alden, *supra* note 357; see also Stewart Bell, *Muslim Donors Still Funding al Qaeda*, NAT'L POST, Sept. 11, 2002, at A3.

418. Alden, *supra* note 357.

419. 2003 FINANCIAL ACTION TASK FORCE REPORT, *supra* note 1; OCTF 2004 REPORT, *supra* note 41; STAFF REPORT, *supra* note 1.

of al Qaeda attacks worldwide has steadily increased over the past four years. Between September 2001 and June 2004, the network carried out nearly twice as many attacks as in the five years prior to September 11.⁴²⁰ For the first time since it began publication, in 2005 the U.S. State Department classified its report, *Annual Patterns of Global Terrorism*, avoiding the embarrassment of numbers that starkly demonstrated U.S. failure to limit al Qaeda's ability to operate worldwide.

Not only is the frequency of attacks increasing, but the network appears increasingly to be aiming at "soft" targets such as transportation systems, night clubs, and places of religious worship. Many of these operations require minimal funds: the Madrid bombing in March 2004, for instance, used ammonium nitrate and cell phones for its execution and is believed to have cost at most \$10,000.⁴²¹ The attacks in Istanbul in November 2003 cost less than \$40,000.⁴²² And Osama bin Laden continues to have widespread support in the Palestinian Authority, Indonesia, Jordan, Morocco, Pakistan, Egypt, Saudi Arabia, and elsewhere.⁴²³

Far from failing to stem the operational ability of terrorist groups, some of the measures have actually undermined the two states' counter-terrorist efforts through inefficiency and waste. Part III postulates that one reason such provisions have proven unsuccessful is because both the United Kingdom and the United States have effectively taken money laundering tools and applied them to terrorist finance. In many ways, such devices are ill-suited to this function: SARs have flooded the systems on both sides of the Atlantic, making it more difficult for officials to find the needle in the haystack. Recent changes in the United Kingdom and the United States are forcing terrorist money out of the regulated sector, and the money laundering metrics the states use to gauge success appear ill-suited to the challenge of terrorism.

Rights-based concerns also undermine the current regimes. In light of the states' goal of promoting democratic norms as a way to counter the terrorist threat, this result is of consequence. Using the United States as an example, Part III.B considers how anti-terrorist finance provisions affect free speech, freedom of association, privacy, property, and due process. Other administrative and regulatory rules also impact entitlements. But counterterrorism can be distinguished by the breadth of rights

420. Terrence Henry, *Al Qaeda's Resurgence: The Ever Resilient Terrorist Group Continues to Adapt—and is Rapidly Breeding a Full-Fledged Movement*, ATLANTIC MONTHLY, June 2004, at 54.

421. Stephen Fidler, *Al Qaeda Outsmarts Sanctions, Says UN: Decentralisation and Smaller Operations with Less Need for Funds Frustrate Counter-Measures*, FIN. TIMES (London), Aug. 28, 2004, at 1.

422. *Id.*

423. Henry, *supra* note 420.

affected, by the elimination of intent, by reliance on secret evidence and *ex parte* proceedings, and by the stigma it imposes when labeling entities sympathetic to terrorism. This Article emphasizes that disregard for individual rights and the humanitarian affects of the current provisions alienate important allies both at home and abroad, with black lists proving central in this regard. Part III briefly highlights an alternative to these white lists and raises an example of where the United Kingdom, in particular, has been more effective in addressing terrorist finance. It concludes with a discussion of the unique challenges posed by the Internet and warns against the wholesale transfer of money laundering techniques to this realm.

A. Money Laundering Versus Terrorist Finance

At a practical level, perhaps one of the most troubling aspects of the British and U.S. responses has been the transfer of many anti-money laundering tools into anti-terrorist finance. In the United States, for example, the 2002 and 2003 National Money Laundering Strategies claimed these instruments as central to the fight against terrorism, while the USA PATRIOT Act collapsed the two regulatory regimes into one. Although some similarities between the two phenomena exist, the differences are substantial and carry consequences for the efficiency of the system, the ability of the state to counter terrorist threats, and the fairness of the resultant regime.

The similarities are fairly obvious: money laundering and terrorist finance make use of similar methods to hide and move money. They depend on a lack of transparency and monitoring. And they make use of the same financial systems—such as wire transfers, alternative remittance systems, bulk currency shipments, money transmitters, money changers, and commodity-based trade. To some extent, both might be said to be political in nature: money launderers may support particular political candidates, make extensive use of the media, and sponsor social projects in poor areas. Terrorist organizations obviously seek political ends. And most have propaganda arms that deal with the media. PIRA, for instance, runs the Irish Republican Publicity Bureau. Al Qaeda too recognizes the importance of public dialogue. The so-called “Manchester Manual” writes, “Islamic governments . . . are established as they [always] have been by pen and gun, by word and bullet, by tongue and teeth.”⁴²⁴ Left-wing organizations in the United Kingdom and the United States in the 1970s issued lengthy, turgid prose that attempted to explain *why* they were doing *what* they were doing—an approach mimicked by

424. *Id.*

the Unabomber in his manifesto, "Industrial Society and Its Future."⁴²⁵ Terrorist organizations also provide economic aid to regions in need. The "no go" areas in Derry and Belfast and the creation of "incident centres" in the 1970s provide salient examples. And, as paramilitarism in Northern Ireland again demonstrates, there may be overlap between criminal money laundering and terrorist operations. Money laundering *depends* upon an underlying crime, whereas terrorist finance does not. Put somewhat crudely, the former tends to take dirty money and try to make it clean, whereas the latter often (although not always) uses clean money for illicit purposes. This makes it difficult to identify the entities raising the money for terrorist ends. A victim who might otherwise alert law enforcement to the presence of criminal activity is unlikely to report such efforts, and those involved are less likely to carry previous criminal convictions.

Although one solution might be to develop a profile of legitimate for-profit and not-for-profit enterprises likely to engage in terrorist activity, it is difficult, if not impossible, to discern patterns in financial transactions that would signify terrorist activity. Indeed, New York Clearinghouse, an organization of the largest money-center banks, concluded after a post-September 11 two-year study that it simply cannot be done.⁴²⁶ Despite repeated efforts to develop typologies appropriate to terrorist finance, the FATF reached a similar conclusion.⁴²⁷ The profiles developed, then, tend to rely on ethnicity and nationality, raising a slew of problems that range from inaccuracy and counter-productivity to the infringement of individual rights.⁴²⁸

To monitor the possible use of legitimate funds for terrorist ends, therefore, the state must involve itself deeply in the private sector. This means that the state must examine a huge amount of data in minute detail to detect the necessary information. Approximately 12 million currency transaction reports are filed annually in the United States; how ought law enforcement proceed to analyze the specifics?⁴²⁹ In the United Kingdom, the task falls to the National Criminal Intelligence Service (NCIS), itself a creature of the drug trafficking legislation in the mid-

425. Ted Kaczynski, *Unabomber's Manifesto: Industrial Society and Its Future*, N.Y. TIMES, Sept. 19, 1995.

426. STAFF REPORT, *supra* note 1, at 56.

427. 2003 FINANCIAL ACTION TASK FORCE REPORT, *supra* note 1, at 4, ¶ 10. *See also* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES: 2001–2002 6 (2002).

428. FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF TREAS., SAR BULL., Jan. 2002.

429. Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, J. CRIM. L. & CRIMINOLOGY 311, 437 (2003).

1980s. Following September 11, the organization established a Terrorist Finance Team. Its job is to review SARs, combine the information with intelligence and open source information to determine terrorist financing, and then refer the information to, *inter alia*, MI5, Inland Revenue, and the National Terrorist Financial Investigation Unit at Scotland Yard.⁴³⁰ Unlike the United States, which sets \$10,000 as the threshold reporting requirement, there is no *de minimis* limit for suspicious activity reports in the United Kingdom. Only common sense restricts the number of reports generated.⁴³¹ Effective analysis might create important leads, but in its absence, a proliferation of false alarms may undermine state security. The resources involved in finding the proverbial needle in the haystack, moreover, could be substantial and less effectively spent than on other approaches, such as human intelligence, more clearly tailored to terrorist means. And the white noise created by the deluge of data increases the difficulty of ferreting out real threats.

Simultaneously, issues of financial privacy come to the fore, with a possible impact well beyond the terrorist realm. In the United Kingdom, the Financial Services Authority issued guidelines requiring strict enforcement of the know-your-customer rules adopted post-September 11. Banks began requiring additional documents for second accounts, transferring money, and sometimes even routine customer use of checks. By mid-2003, some money laundering experts expressed frustration at the over-regulated environment and its impact on customers and business: as Kevin Tomlinson, the money laundering reporting officer at Virgin Money stated, "We feel that some of the proposed changes to money laundering regulation go too far, and the government is in danger of losing the good will of the industry in wanting to combat money laundering . . . There seem to be more and more hoops for everyone to go through." Lucy Warwick-Ching reported in the *Financial Times*, "Many consumers . . . who are upset by the threatening tone of these letters and the need to constantly prove who they are, have complained to their providers."⁴³²

The volume of money involved in each type of activity also differs: the International Monetary Fund puts the total money laundered globally

430. For more discussion of NCIS's role in anti-terrorist finance post-September 11, see Gavin Hinks, *On the Trail of the Terrorists*, ACCOUNTANCY AGE, Oct. 31, 2002, at 7.

431. Bob Reynolds, *By Appointment to the Spies*, ACCOUNTANCY, Jun. 1, 2004. See also Rosemary Bennett, Jimmy Burns & Brian Groom, *UK Plans Force to Track Down Terrorist Funds*, FIN. TIMES (London), Oct. 16, 2001, at 1; Burns & Groom, *supra* note 414; Edward Alden, Robert Shrimley & Mark Turner, *Closing Down Bank "Will Hit Somalis"*, FIN. TIMES (London), Nov. 9, 2001, at 8.

432. Lucy Warwick-Ching, *Drive Against "Dirty Money" is Attacked: Money Laundering Crackdown*, FIN. TIMES (London), July 12, 2003, at 28.

each year at around \$600 billion.⁴³³ In contrast, while the amount of money flowing to terrorist organizations overall is unknown, those whose finances have been documented appear to require much less money. As highlighted in the first Part of this Article, PIRA operates on a budget of some £1.5 million. The Real IRA and the Ulster Defence Association require only £500,000. To some extent this reflects the ends of the entities involved: profit primarily drives launderers, whereas terrorist organizations tend to be more interested in non-financial goals, such as obtaining political legitimacy or convincing a particular target population of their views. Relatedly, unlike ordinary criminals, terrorists tend to avoid living conspicuous lifestyles that would alert authorities to the presence of extra income. Terrorist organizations also tend to move what money they have in smaller amounts and in ways that are much harder to detect.

As Part II of this Article suggested, the movement of paramilitary organizations into the political realm may increase the demand for funds and, therefore, the amount of money such groups transfer. Yet the circumstances in which organizations have moved in this direction raise their own set of issues, particularly regarding whether states should encourage such political activity and, if so, whether the state should attempt to intercept the funds or, instead, encourage political arms to draw money from paramilitary activities. Here, money laundering provisions appear inadequate—indeed, counterproductive—as a way to pursue state aims.

1. Suspicious Activity Reports

Ironically, SARs did not, nor should they have, nor would they now, discover any of the financial activity in which the September 11 hijackers engaged.⁴³⁴ Nevertheless, Title III of the USA PATRIOT Act

433. USA PATRIOT Act, *supra* note 312, Title III, § 302(a)(1). In 2003 financial firms in Europe and the United States spent more than \$5 billion between them trying to prevent laundering activities. *Coming Clean; Money-laundering*, *ECONOMIST* (U.S. Edition), Oct. 16, 2004.

434. Al Qaeda moved the money to fund September 11 in three ways: \$130,000 was wired to hijackers in the United States from the UAE and Germany; members physically carried cash/traveler's checks to the United States; and some established overseas accounts, accessed via ATM or credit cards in United States. When they arrived in the United States, they opened bank accounts under their real names. They made use both of large national banks and smaller regional ones. While they lived in the United States, they made wire transfers of between \$5,000 and \$70,000, making the transactions virtually invisible in comparison to the billions of dollars moving daily through the international financial system. Their banking pattern—depositing a significant amount of money and then making smaller withdrawals—fit their student profiles. They did not use false social security numbers. And they did not seem to have a particularly sophisticated grasp of the U.S. banking system. STAFF REPORT, *supra* note 1, at 53. See also Michael Peel & John Willman, *The Dirty Money That is Hardest to Clean*

expanded the number of institutions required to file SARs to include not just depository institutions but also money services business, securities and futures industries, and, under subsequent regulations from Treasury, casinos and card clubs. This radically increased the number of SARs filed with FinCEN: from approximately 163,000 filings in 2000, by 2004 the number had leapt to nearly 670,000 (See Figure 1). The *Economist* reported, “[B]anks in America and elsewhere are trying to cover themselves by filing ever more ‘suspicious activity reports.’ Regulators are swamped with information. Alas, most of it is useless.”⁴³⁵

The United Kingdom too saw a sudden increase in suspicious activity reported to the state: In October 2001 the National Criminal Intelligence Service received 4,387 reports—more than four times the number filed in October 2000.⁴³⁶ By June 2003 NCIS was receiving around 7,000 SARs per month.⁴³⁷ Importantly, the cost of this expansion to either the United Kingdom and the United States in terms of administrative overhead and diversion of resources has yet to be determined; an independent audit by KPMG, however, raised concern about the low signal-to-noise ratio and the tendency of entities to over-report.⁴³⁸ The quality of information contained in such reports on both sides of the Atlantic, moreover, falls somewhat short of the ideal.⁴³⁹

Up: Financial Institutions are Keen to Eradicate Money-Laundering by Terrorists and to Freeze Assets, FIN. TIMES (London), Nov. 20, 2001, at 16.

435. *Coming Clean: Money-laundering*, *supra* note 433.

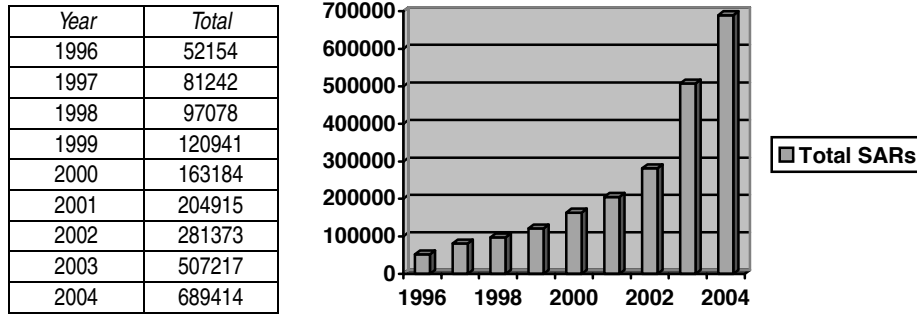
436. Jimmy Burns, *Rise in Reports of Dubious Financial Transactions*, FIN. TIMES (London), Nov. 23, 2001, at 2.

437. Gavin Hinks & Paul Grant, *Analysis; Pressure on to Beat Laundering*, ACCOUNTANCY AGE, June 19, 2003, at 5.

438. PRIVY COUNSELLOR REVIEW COMMITTEE, ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW: REPORT PRESENTED TO PARLIAMENT PURSUANT TO § 122(5) OF THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2002, Dec. 18, 2003, HC 100.

439. Compare Jimmy Burns, *UK Rethinks its Strategy on Fighting Money Launderers*, FIN. TIMES (U.S. Edition), July 2, 2003, at 4, with the December 2002 report of the U.S. Treasury Office of the Inspector General (stating that many of the half-million SARs filed between April 1996 and December 2000 had incomplete or wrong information and multiple duplications), *cited in* Zagaris, *supra* note 311, at 451.

FIGURE I
NUMBER OF SUSPICIOUS ACTIVITY REPORT
FILINGS IN THE U.S. BY YEAR⁴⁴⁰



a. Politics and Profiling

Whether resources are better spent on SAR analysis or criminal investigation remains, of course, a matter of speculation. If SARs were indeed unearthing more terrorist activity, then SAR analysis may be worth the expense. It appears, however, that financial institutions' tendencies to identify terrorist activity have less to do with actual movement of funds by illicit groups and more to do with political pressure. In September 2001, for instance, only 27 SARs filed in the United States mentioned terrorism. The following month, 446 reports suddenly suggested connections to violent organizations. While the numbers remained high for the next few months, they steadily declined and, by September 2002, were back down to 24.⁴⁴¹ The numbers remained low—until the advent of the United States' war on Iraq and some well-publicized reports on state investigations into financial institutions with customers possibly linked to international terrorism.⁴⁴² At that point, the number of SARs citing possible terrorist links again skyrocketed.

440. Statistical data for SAR report filings is continually updated as previous filings are processed and new reports are received; this may lead to some discrepancy between different sources. The numbers in this chart are taken from BANK SECRECY ACT ADVISORY GROUP, SAR ACTIVITY REVIEW: BY THE NUMBERS, Issue 4, at 1 (2005), available at <http://www.ots.treas.gov/docs/4/480204.pdf>.

441. BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS, AND ISSUES, Issue 5, at 22 (2003).

442. BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS, AND ISSUES, Issue 8 (2005).

In many ways, the reason for the apparent disconnect between financial institutions' ability to identify the flows of terrorist funds and the underlying terrorist threat is obvious: States, which are privy to classified intelligence material, are more likely than banks to know the identity of terrorist suspects. Without this information, and lacking a reliable profile on which to base their decisions, financial institutions tend to revert to racial profiling.

Whether motivated by a desire to improve national security or by concerns about running afoul of the measures adopted post-September 11, financial institutions in the United States have been rather aggressive about filing SARs. By 2005 these institutions were submitting approximately 20 percent of their SARs in response to law enforcement inquiries and name matches with OFAC's specially designated terrorist list.⁴⁴³ Eighty percent of SARs, however, were voluntary. Depository institutions tended to focus on charitable organizations and Islamic foundations, individuals presenting personal identification from Iraq, Afghanistan, and specific Middle Eastern states, and wire activity to or from suspect states.⁴⁴⁴ Casinos, in turn, focused on individuals connected with the Middle East—that is, individuals having Arab-sounding names or carrying passports from states considered suspicious.⁴⁴⁵

The filing of SARs based on these assumptions means that otherwise innocuous activity becomes suspicious merely on the basis of ethnicity. And suspects' names quickly ascend the reporting chain. In the United States, the number of names forwarded to federal law enforcement for further action correspondingly increased with the number of SARs filed: from just 9,112 in all of 2000, the total increased to 13,649 in just the first ten months of 2002.⁴⁴⁶ Many of these reports concerned wire transfers to or from the Middle East. SARs, however, and documents that would disclose the existence of an SAR, are privileged from discovery in civil litigation—even if the discovery is necessary for an affirmative defense.⁴⁴⁷ Moreover, from 2003, the United States began exchanging SARs with other states through the Financial Investigative Units. By

443. *Id.* at 10.

444. BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS, AND ISSUES, Issue 5, at 22–23 (2003). This trend continued. *See* BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS, AND ISSUES, Issue 8, at 15 (2005).

445. BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS, AND ISSUES, Issue 8, at 10, 13 (2005).

446. BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS, AND ISSUES, Issue 5, at 13 (2003).

447. *See* Cotton v. PrivateBank, 235 F. Supp. 2d 809 (N.D. Ill. 2002). The Bank Secrecy Act is the source of this authority, although FinCEN regulations and federal bank regulators' regulations establish absolute privilege. *See* BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS, AND ISSUES, Issue 5 (2003).

operating under international treaties, such as the UN Convention on the Suppression of Financing of Terrorism, and “soft law” (for instance FATF’s Forty Recommendations), the federal government can circumvent privacy laws that might otherwise block the transfer of financial data.⁴⁴⁸

The problem is that SARs, effectively hidden from view, may carry real consequences for those named on their pages. It is difficult to get one’s name removed from such lists when they are not even discoverable through judicial action. Yet “an individual or entity reported on a SAR may encounter problems subsequently with immigration or customs officials of the same or even a different jurisdiction.”⁴⁴⁹ What makes this of particular concern for issues of individual rights is that, at least in the United States, some of the reports appear to be filed solely on the basis of ethnicity.

b. Possible Ways to Address the Flood

Governments on both sides of the Atlantic are not unaware of the problem caused by the glut of SARs flooding the system. Indeed, the more than four-fold increase in reports in both states would be hard to ignore. Britain’s National Criminal Intelligence Service took the initiative to hold a series of seminars for private industry, laying out under what conditions reports ought to be filed. NCIS officials also began visiting various institutions to encourage them to use common sense. In the United States, by 2005 FinCEN had also taken concrete steps to reduce the sheer volume of filed information. To reduce duplicate reporting, in December 2004 FinCEN revised its guidelines to clarify that blocking reports filed with OFAC satisfied the SAR reporting requirement.⁴⁵⁰ In 2005 FinCEN lowered the information requirements of the SAR reporting forms by, *inter alia*, eliminating the “Continuation Sheet,” which recorded traveler’s checks, money orders, and wire transfer document numbers.⁴⁵¹

While these changes may help to address some of the difficulties to which the system gives rise, its general structural problem persists: SARs ineffectively address the ways in which terrorists, as opposed to money launderers, move money. And there is still no disincentive for financial institutions to file as many SARs as may possibly apply. They have nothing to lose by over-reporting but incur considerable risk (i.e.,

448. Bruce Zagaris, *supra* note 311.

449. *Id.* at 451–52.

450. BANK SECRECY ACT ADVISORY GROUP, THE SAR ACTIVITY REVIEW: TRENDS, TIPS, AND ISSUES, Issue 8, at 38 (2005).

451. Money Transmitter Regulators Association, *News—Streamline Suspicious Activity Reports*, <http://www.mtraweb.org/news.shtm> (last visited Apr. 19, 2006).

the forfeiture of their assets) if they neglect to report activity the state later deems suspicious. Indeed, the United States has indicated its willingness to go after such offenders: in 2002, Trustco Bank, N.A., in Glenville, New York, became the first institution cited for violating reporting requirements.⁴⁵²

Another approach for either state would be to increase the accountability of the filing banks—that is, over-reporting might incur some sort of penalty; alternatively, efficient reporting might be rewarded. But this policy would send a mixed message to financial institutions already thrust into the front lines of intelligence gathering. Moreover, the resources such institutions would devote to compliance would be considerable, affecting their ability to compete internationally with rival organizations. Such sanctions may also alienate private industry—at a time when the state needs its cooperation to head off real threats.

An additional strategy may be for intelligence or law enforcement organizations to share information and then target specific regions, banks, individuals, and charities. For the most part, this reflects the current approach in the United States. But banks complain that intelligence services provide insufficient information. And there is evidence that this is the least effective of the current alternatives—that is, detection systems that “rely heavily on existing investigative methods,” in contrast to reporting requirements, may be more effective than reporting requirements in obtaining convictions. It is unclear whether this is because of the ease of targeting individuals already suspected of criminal activity⁴⁵³ or whether there is a more direct relationship between conducting investigations and then using finances to develop the case. Nevertheless, this approach may offer a more promising route to interrupting terrorist finance.

An important, additional consideration underlies any approach adopted: as demonstrated by the Saudi connection, some terrorist organizations receive considerable state support in a way that ordinary criminals attempting to launder funds do not. This suggests that other tools, such as diplomatic pressure and foreign policy alteration, may be far more effective in preventing terrorists from gaining access to funds than trawling through the records of thousands of organizations, only a small percentage of which may be knowingly providing support to terrorist organizations. Here, however, U.S. efforts fall short.

Saudi Arabia, whose role in funneling money to jihad movements worldwide was discussed in Part II of this Article, remains largely

452. T.J. Grasmick & Robert M. McNamara Jr., *Bank Secrecy Act Can Affect Expansion, Charter Value and Stock Price*, COMMUNITY BANKER, Dec. 2002, at 50.

453. Cuéllar, *supra* note 429, at 420–22.

unaffected by anti-terrorist financial provisions instituted post-September 11. For instance, although Saudi Arabia announced in March 2002 that it would target al-Haramain, one of the largest charities, to prevent it from sending funds to al Qaeda, soon thereafter the charity actually expanded into Bosnia and Somalia and opened a \$530,000 Islamic centre in Sarajevo.⁴⁵⁴ It was not until al Qaeda increased its attacks in Riyadh that Saudi Arabia began acting to curb the flow of money. On May 12, 2003, suicide bombers killed 34 people in the city. The following year, between May 29 and May 31, al Qaeda took foreign oil workers hostage in an attack that left 22 people dead. Less than a fortnight later a cell kidnapped and executed a U.S. citizen. And in December 2004 terrorists attacked the U.S. consulate.⁴⁵⁵ The Saudi response, however, fell significantly short of the actions necessary to curb the flow of finances to al Qaeda.⁴⁵⁶

The United States was slow to cry foul. When a RAND Corporation study leaked in August 2002, for instance, accused the Saudis of complicity “at every level of the terror chain,”⁴⁵⁷ the Bush Administration quickly distanced itself from the report. Two months later, the Council on Foreign Relations put together a special task force that was critical of President Bush for not maintaining political pressure: “The administration appears to have made a policy decision not to use the full power of U.S. influence and legal authorities to pressure or compel other governments to combat terrorist financing more effectively.”⁴⁵⁸ In November 2002 a *Washington Post* article reported that the Administration had a plan to lean on Saudi Arabia, but senior Administration officials denied the claim.⁴⁵⁹ While the September 11 Commission Staff Report on Terrorist Finance underscored the Saudi role in backing violent movements worldwide, the sections of the final report specifically addressing the House of Saud remained classified. Congress similarly initiated inquiries

454. Alden, *supra* note 357, at 19.

455. Infoplease, *Terrorist Attacks (Within the United States or Against Americans Abroad)*, <http://www.infoplease.com/ipa/A0001454.html> (last visited Nov. 17, 2005).

456. See, e.g., Roula Khalaf & Richard Wolffe, *Bush Urges Arab Allies to Condemn Terrorism*, *FIN. TIMES* (London), Apr. 18, 2002, at 33; Michael Mann & Richard Wolffe, *U.S. Accuses Africa Banks of Failing to Assist Search*, *FIN. TIMES* (London), Oct. 3, 2001, at 4; Cilina Nassar, *Saudi Arabia Works to Block Terror Funds: FATF Says Efforts are “Complicated,” but U.S. Treasury Says More Can be Done*, *DAILY STAR* (Lebanon), June 17, 2004.

457. Thomas E. Ricks, *Briefing Depicted Saudis as Enemies: Ultimatum Urged to Pentagon Board*, *WASH. POST*, Aug. 6, 2002, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A47913-2002Aug5?language=printer>.

458. TERRORIST FINANCING, *supra* note 253, at 2, available at http://www.cfr.org/content/publications/attachments/Terrorist_Financing_TF.pdf

459. See Edward Alden & Mark Huband, *Washington to Warn Saudis on Terror Financing*, *FIN. TIMES* (London), Nov. 27, 2002, at 12.

into Saudi Arabia,⁴⁶⁰ but such efforts were sporadic, and U.S. dependence on Saudi elites appears to have blunted their impact.

2. Pushing Money Out of the Regulated Sector

While the purpose of money laundering investigations is to prosecute perpetrators and obtain the funds,⁴⁶¹ terrorist financing investigations also need to accomplish other important goals, such as interrupting the flow of money to violent groups or preventing successful operations, whether or not they obtain a prosecution.⁴⁶² Stopping money from flowing through the regulated sector either by freezing it or by introducing sweeping regulations here harms one of the important national security aims of the state: law enforcement does not just lose a conviction, but it may be unable to trace the funds as extensively as may be required to interrupt operations or to find those linked to terrorist networks.

Examples of the benefits of retaining terrorist actors in the regulated sector readily present themselves. Because they operated within the Western banking system, September 11 hijackers Nawaf al Hazmi and Khalid al Mihdhar left a trail: they opened bank accounts in New Jersey and used debit cards to pay for their hotel room. Al Hazmi bought tickets on Flight 77 for himself and Salem al Hazmi, giving the authorities clues as to other perpetrators. Nawaf al Hazmi and another man who flew Flight 77, Hani Hanjour, used the same address to open bank accounts at the same New Jersey bank. Another hijacker from that flight, Majed Moqed, used the same address to open an account at another New Jersey bank. This information linked all five together, assisting federal law enforcement officers in quickly determining those responsible.

Because of the changes instituted post-September 11, however, the means by which groups linked to al Qaeda raise money and transfer funds has changed. The increased regulation of the Western banking system means that value is being moved through alternative means. Greater emphasis has been placed within terrorist networks on using trusted *hawaladars*, as well as couriers.⁴⁶³ To finance the Bali and Jakarta attacks,

460. See Waller, *FBI Polarized by "Wahhabi Lobby," supra* note 403, at 27; see also Waller, *"Wahhabi Lobby" Takes the Offensive, supra* note 403.

461. See, e.g., U.S. DEP'T OF THE TREAS., ANNUAL MONEY LAUNDERING STRATEGY (2001) (emphasizing the importance of asset forfeiture as the most direct way of preventing criminals from benefiting from money and describing its centrality to anti-money laundering efforts).

462. 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, at 2 (note that this is the second major report since September 11). See also GLOBAL FINANCIAL CRIME: TERRORISM, MONEY LAUNDERING AND OFF SHORE CENTRES (Donato Masciandaro ed., 2004).

463. See *Underground Finance Mechanisms: Hearing Before the Subcomm. on Banking, Housing and Urban Affairs, Subcomm. on Int'l Trade and Fin. of the S. Comm. On Banking,*

for instance, jihadists physically moved \$100,000 and then \$30,000 from the southern Philippines to Indonesia.⁴⁶⁴ And terrorists transfer increasing percentages of their funds into gold.⁴⁶⁵ While these techniques may have hampered the movement of resources, they have also made it harder to trace funds and find those responsible for terrorist violence.⁴⁶⁶ Simultaneously, al Qaeda has become more diffuse and harder to distinguish from the broader worldwide jihadist movement. An “array of loosely affiliated groups, each raising funds on its own initiative,” has replaced the group’s more centralized structure.⁴⁶⁷ And, while al Qaeda’s overall budget may have diminished, the organization requires less money now than it did prior to September 11: at that time, between \$10 million and \$20 million per year went to supporting the Taliban—an entity no longer in power in Afghanistan.⁴⁶⁸ Information from detainees also suggests a shift in how al Qaeda spends its money: what before went to recruitment and training now funds violent operations and supports active members.⁴⁶⁹

The net result is that it is becoming harder not just to stop financial flows but to find high-ranking individuals who are responsible for violence. Perhaps as a result, as of the time of writing no major convictions of individuals intimately involved in al Qaeda appear to have resulted from successfully following the flow of funds to the organization. This contrasts sharply with the situation prior to September 11, where financial flows proved central to many of the Southern District of New York trials of suspected jihadists.

Individuals caught in the judicial process tend to be those lower down in the chain, whose small contributions have little impact on an organization’s overall ability to mount operations. In money laundering cases, individuals convicted of financial offenses tend also to be charged with other substantive offenses, making the financial charge a way to augment punishment. But this element is missing in the terrorist finance realm.⁴⁷⁰ In the United Kingdom this directly relates to the state’s decision to divorce asset forfeiture from an underlying offense. But perhaps nowhere is the ill-fitted nature of the application of the money launder-

Housing and Urban Affairs. 107th Cong. 1 (2001). See also *Moving Target*, *ECONOMIST* (U.S. EDITION), Sept. 14, 2002.

464. Fidler, *supra* note 421 (citing UN report in 2004).

465. See *Still Flush*, *ECONOMIST*, Sept. 7, 2002. See also *Moving Target*, *ECONOMIST*, Sept. 14, 2002.

466. See, e.g., *U.S. Says al Qaeda Hurting for Funds*, *REUTERS*, May 18, 2005.

467. STAFF REPORT, *supra* note 1, at 29.

468. *Id.* at 9.

469. *Id.* at 19. Some \$200 per month currently is being provided to the families of those held in Guantanamo Bay. Fidler, *supra* note 421.

470. See Cuéllar, *supra* note 429, at 413–20.

ing regime to terrorist finance more evident than in the realm of SARs traditional money laundering tools.

3. Metrics Used to Gauge Success

Both formal and informal accounting measures in the anti-terrorist finance realm rely on traditional money-laundering metrics to gauge success. In the United States, for instance, annual money laundering reports examine the number of states with blocking orders in force, the number of entities with seized assets, and the value of money frozen as indications of success. The Northern Ireland money laundering reports use similar categories. But these numbers say little about whether the money laundering regime targets the right people—and how important those that become caught in the system are to the flow of terrorist funds. Similarly, announcements from the Executive amount to scorekeeping, in which the total dollar amount seized becomes the indicator of state success.

While such exercises may prove helpful for public relations purposes, the standards they set for those attempting to interrupt the financial flows are out of synch with what may be the most effective indicators of success. Because metrics play a role in determining agencies' emphases, the use of the wrong standards influence the effectiveness of state counterterrorist efforts.

Better indicators would include the successful conviction rate of those responsible for supplying money or the level within the terrorist network of those caught because of financial strictures. Here, the isolation of the regime from the underlying offense makes accounting more difficult: previously, financial offenses might augment sentences, making the level of involvement of those found guilty of complicity easier to determine. Yet these numbers in this area are revealing: statistics related to straight money laundering efforts suggest that the few successful convictions in this realm tend to be focused on underlings: In 2002, 80 percent of those sentenced did not receive a leadership enhancement. And almost 80 percent of those sentenced laundered less than \$1 million.⁴⁷¹ Transferring this regime into anti-terrorist finance and expecting it to net substantially dissimilar results defies logic. States might also adopt a way of tracking the number and extent to which following money trails helped security forces to interrupt planned operations or to catch perpetrators in past operations. Right now, however, the public standards of effectiveness do not track these successes.

471. U.S. DEP'T OF THE TREAS., ANNUAL MONEY LAUNDERING STRATEGY (2002), *supra* note 411, at 7.

One issue compounding the current accounting system is that the United States does not know the total value of money flowing to al Qaeda. Pushing the money out of the Western regulated sector is not going to help matters here; putting resources, first, into finding out how much money is there and, second, into finding out how it is moved would give the state a much better indicator of what level of funding it is intercepting. This means putting more money into alternative areas, such as signals intelligence and human intelligence, to strengthen the financial picture.

B. Rights-Based Considerations

In addition to the practical effect of many of these measures, rights-based concerns can hardly be ignored—particularly in the context of the U.S. and U.K. aim of promoting democratic norms. Anti-terrorist initiatives in both states implicate free speech, freedom of association, privacy, property, and due process.

In the interests of length, this Part focuses on U.S. initiatives. It does not provide exhaustive constitutional analysis; instead, it gives some examples of how current measures affect the above rights—a function made more important by the limited scholarly attention to anti-terrorist finance.

None of these rights, of course, are absolute: administrative and regulatory bodies, for instance, have powers that allow them to interfere with property rights. Underlying the discussion, however, is the suggestion that property seizures in the counterterrorist realm represent something different in kind. The elimination of intent, use of secret evidence and *ex parte* proceedings, and the stigma attached to the label “terrorist”—to say nothing of the practical impact of discounting rights as part of a counterterrorist strategy—suggest that special care should be taken in freezing and forfeiting assets as part of an anti-terrorist regime.

1. Rights Impacted

The United States’ anti-finance provisions post-September 11 had an immediate and profound affect on individual rights. The First Amendment to the Constitution includes in free speech the solicitation of funds, long considered a necessary constituent for the effective flow of information and ability of citizens to advocate different positions.⁴⁷² Yet significant risks currently accompany any contribution to an Islamic charity or any dealing with Islamic or Arab businesses. The Casey Foundation conducted a survey of 30 mosques and found that all of them had

472. *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980).

suffered a loss of funds. In “Assessing the Need: Addressing the Problem,” Louise Cainkar reported that Islamic religious leaders cited “widespread community fears of the federal government . . . feelings of being watched and followed, [and] reductions in charitable giving.”⁴⁷³ These findings are borne out by statistics: the Treasury Department, through April 2005, lists 743 people and 947 organizations with frozen assets. Of these, 98 percent (725) of the people and 96 percent (907) of the organizations appear to be Muslim and/or Arab.⁴⁷⁴ Because of the reduced standard of proof required to freeze assets—namely, mere association—a number of prominent banks have adopted internal policies that require employees to refuse interaction with Islamic and Arab enterprises.⁴⁷⁵ And Islamic publications have seen the sudden withdrawal of advertisers.⁴⁷⁶ Co-religionists, in turn, are unable to fulfill their religious duty to support Islamic charity work, impacting freedom of religion.⁴⁷⁷ This brings the state into conflict with well-established religious beliefs.

Privacy, long read into the penumbra of the rights afforded by the Constitution, has also taken a hit. Under the USA PATRIOT Act, any federal agency can now obtain sensitive and private data without any subpoena or judicial intervention, as long as it is investigating one of some 200 possible offenses. The irony is that many of the provisions adopted after September 11 had previously been rejected precisely because of privacy concerns. The Bush Administration marketed them to the financial community as central to the counterterrorist effort. David Aufhauser, General Counsel at Treasury, for instance, announced that with 24-hour surveillance the state could “home in on and bomb terrorists on the basis of a clue as tiny as a tyre-track in a desert.” He told an audience of international bankers “that they should use the same sort of technology on their customers.”⁴⁷⁸ In January 2002 Assistant Attorney General Michael Chertoff notified the Senate Banking Committee that,

473. LOUISE CAINKAR, *ASSESSING THE NEED: ADDRESSING THE PROBLEM, THE FAITH COMMUNITIES AND URBAN FAMILIES PROJECT 27* (Nov. 2003) (sponsored by the Annie E. Casey Foundation). See also Nancy Dunne, *U.S. Muslims See Their American Dreams Die: Since September 11 the Community Has Felt Threatened*, *FIN. TIMES* (London), Mar. 28, 2002, at 10 (discussing the disappointment of the Muslim community in the Bush Administration stemming from government raids).

474. U.S. DEP’T OF THE TREAS., OFFICE OF FOREIGN ASSETS CONTROL, *supra* note 350. The total number includes aliases and different spellings of names cited elsewhere on the list. See also *The Iceberg Beneath the Charity*, *supra* note 358.

475. Author interviews with large firm investment bankers, New York City, New York (June 27, 2005).

476. Author interview with editor of the Arab-American News (Autumn 2004).

477. Author participation in Global Security and Cooperation program of the Social Science Research Council on the impact of post-September 11 measures on the Islamic community in the United States.

478. *The Needle in the Haystack*, *THE ECONOMIST*, Dec. 14, 2002, at 81.

in relation to § 314's new information-gathering powers, "[t]he principal provisions of the Right to Financial Privacy Act no longer apply to letter requests by a government authority authorized to conduct investigations or intelligence analysis for purposes related to international terrorism."⁴⁷⁹

These provisions put banks between a rock and a hard place: customers, in the absence of a subpoena, might mount legal challenge to the bank's decision to hand information to the government. It raised serious issues related to the institutions' ability to ensure the security of customers' financial data.⁴⁸⁰ On the other hand, though, strict penalties applied for failure to do so. And it was bad for business to be associated with terrorist groups.

Many of the new powers had to be tailored to specific sectors, creating a dense and complex web of federal powers. Treasury released hundreds of pages of regulations. To assist in complying with the statute, a cottage industry sprang up that further implicates the right to privacy.

Bridger Tracker Online 5.5 provides a good example. This software takes the identification requirements in § 326 of the USA PATRIOT Act and allows banks to compare their lists and account or transaction information against more than 20 different federal watch lists, only one of which is the OFAC SDN list. By January 2005, more than 80 percent of U.S. banks used the program. The company boasts that the software helps institutions to better "know your customers."⁴⁸¹ Nevertheless, its accuracy could only be presented in relative terms: "With its sophisticated and proprietary fuzzy logic, Bridger Insight yields false positive rates three times lower than competitive products."⁴⁸² The upshot of these changes was that Treasury became privy to everyday financial transactions, and private companies became an extension of the state's counterterrorism efforts.⁴⁸³ In the meantime, privacy rights took a hit.

These developments are at odds with the importance of privacy not just to the liberal, democratic state but to international banking and finance.⁴⁸⁴ In the past, the idea of third party records as voluntary held when individuals willingly relinquished them. But now, the reporting

479. Rob Garver, *Will USA Patriot Act Prove A Recipe for Trouble? Government Access to Banking Information vs. Right to Privacy*, AMERICAN BANKER, Apr. 23, 2002, at 10 [hereinafter *Recipe for Trouble?*]. See also Rob Garver, *Launder Rules Will Apply Across Financial Services*, AMERICAN BANKER, Apr. 23, 2002, at 1 [hereinafter *Launder Rules*].

480. *Recipe for Trouble?*, *supra* note 479; *Launder Rules*, *supra* note 479.

481. Bridger Insight, <https://secure.bridgerinsight.choicepoint.com/free-trial-request.asp> (last visited Dec. 2, 2005).

482. Press Release, Bridger Insight, Bridger Systems Announces Release of Bridger Tracker™ Online 5.5.0.0 (SEPT. 4, 2003), <http://www.bridgerinsight.choicepoint.com/press-release-online-55.htm>.

483. Trustco Bank, N.A., in Glenville, New York became the first bank cited for violations of the USA PATRIOT Act. See Grasmick & McNamara, *supra* note 452, at 50.

484. See, e.g., *The Needle in the Haystack*, *supra* note 478.

requirements for financial institutions means that they *must* maintain certain records and so the judicial assumption of voluntariness falls somewhat short.⁴⁸⁵

Perhaps the most significant legal right impacted is one often left off the litany of rights frequently associated with counterterrorist concerns: property. Although title may not be lost under Executive Order 13,224, the government can impose indefinite forfeiture. Under the USA PATRIOT Act, the state can block assets “during the pendency of an investigation.” No limits are set on the length of such an inquiry. The courts have held that indefinite forfeiture does not constitute a taking, as it does not permanently vest property in the United States.⁴⁸⁶

2. Distinguishing Anti-terrorist Finance

The lowering of standards highlighted above is not unique to the United States. The United Kingdom’s Terrorism Act 2000 employs a civil law standard, which deviates from the criminal law requirement. Using this standard, the state can divest individuals suspected, but not convicted, of terrorist activity of their property.

Nor are limits on individual entitlements, such as property rights, unique to the counterterrorist realm. Various spheres in the contemporary administrative state restrict transactions and waive protections otherwise afforded under due process. Under export controls, regulatory bodies deny licenses. Administrators routinely make decisions that may have a multimillion-dollar impact. Review of their decisions may only require “some evidence.” And zoning boards limit what property owners can do with their land.

485. THE PRIVACY PROTECTION STUDY COMM’N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY: THE REPORT OF THE PRIVACY PROTECTION STUDY COMM’N ch. 9, at 3 (1977), available at <http://www.epic.org/privacy/ppsc1977report/> [hereinafter PRIVACY COMM’N REPORT]. On voluntary disclosure and compulsory process:

U.S. v. Miller [425 U.S. 435 (1976)] reaffirmed that customer bank account records are *not* the private papers of the customer. An individual has neither ownership nor possession of such records, reasoned the Court; therefore, the records are simply the “business records of the bank.” This line of argument and the precedents which have developed it extend back through the Eighteenth Century. The crucial element in this traditional view is that the individual, lacking a “proprietary” interest in a bank’s records of his account, has no legal right he can assert to challenge access to those records by government or anyone else.

PRIVACY COMM’N REPORT, *supra*, ch.9, at 4 (emphasis added). For eighteenth century tradition, see WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 382 (1854); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 372 (1969).

486. *Global Relief Found., Inc. v. O’Neill*, 207 F. Supp. 2d 779, 802 (N.D. Ill. 2002), *aff’d* 315 F.3d 748 (7th Cir. 2002) (“Many courts have recognized that a temporary blocking of assets does not constitute a taking because it is a temporary action and not a vesting of property in the United States.”).

The whole subject of the legitimacy of government deprivation of private property rights is complex and well beyond the scope of this study. Much of the discussion centers on regulations that deliberately address economic concerns. Thus some stated government interest in building on the economic health of the state is admitted as justification.

That dialogue, however, has little to do with forfeiture that is not concerned with routine, economic issues. And, as implied by the preceding discussion, whatever rights that may be involved in regulatory cases (e.g., those in the Fifth Amendment), the type of forfeitures under consideration in antiterrorist finance affect an entirely different area of constitutional rights—including the First Amendment, the right to privacy, and the like.

My argument here is not necessarily a doctrinal claim about actual violations of these rights but rather a concern that if antiterrorist finance is designed to promote democratic values, attention must be drawn to legislation that may disserve these values. Well-established doctrines of the legitimate right of government to deprive individuals of their property are not inconsistent with this approach.

In addition to the breadth of rights affected by anti-terrorist finance measures—all of which play an important function in the overall health of a democracy, three additional considerations set anti-terrorist finance apart: the elimination of intent, the use of secret evidence, and the stigma associated with designation.

a. Elimination of Intent

Even as anti-terrorist finance provisions impact property rights, intent has all but dropped from the equation. Executive Order 13,224, for instance, does not include any requirement that the individual involved *knowingly* assist terrorist activity. But how can the state infer intent from mere associational links? Unlike drug laws, where possession may be the trigger for asset forfeiture, more nebulous accusations appear sufficient for the Executive to deny an individual access to his assets. In the case of Benevolence International Foundation, for instance, the FBI claimed that the founder, Enaam Arnaout, had links to bin Laden in the 1980s. Considering the United States' \$3.5 billion package for mujahideen in Afghanistan at the same time, this hardly appears adequate evidence on which to expropriate all of Arnaout's resources. Indeed, the state never was able to bring criminal charges on these grounds; instead, it simply suspended his access to his property until the state could bring suit on different charges.

The standard is a low one: many people may be involved in raising money for Islamic causes; they may share a common religion; they may

even disagree with U.S. foreign policy. But this does not mean they are terrorists. Banks carry out business with numerous customers, whose behavior they cannot hope to regulate outside their direct relationship. Al Taqwa provides a good example. A financial network based in Switzerland and the Bahamas, the Bush Administration alleged al Taqwa had ties to terrorism. The Administration claimed that Hamas maintained accounts there, that in October 2000 Al Taqwa extended a clandestine line of credit to “a close associate” of Osama bin Laden, and that the chairman of the bank provided financial assistance to bin Laden and al Qaeda in late September 2001.⁴⁸⁷ On November 7, 2001, Treasury froze the assets of organizations and individuals associated with al Taqwa.⁴⁸⁸ When the Swiss Banking Commission audited the firm of Youssef Nada, who owned al Taqwa, though, it found no evidence of money laundering or of other organizations using the bank as a front company.⁴⁸⁹

Efforts to target such businesses carry real economic costs: Arab Bank, the third largest Arab lender, first established a New York Office in 1982. In February 2005 the bank cited the “litigation environment in the U.S.” as the reason why it would begin shutting down its U.S. operations. The bank claims that it was unaware that payments from a Saudi charity in the West Bank and Gaza Strip were going to the families of suicide bombers. Shukry Bishra, the chief banking officer, stated, “We have zero role in determining who receives the payments and why that beneficiary received the payments.” He suggested that the U.S. government used the courts “to target Arab individuals, banks, and governments.”⁴⁹⁰

The prevailing political attitude in Washington, however, does not buy this argument. President Bush stated in November 2001: “We fight the terrorists and we fight all of those who give them aid. America has a

487. *The PATRIOT Act: Investigating Patterns of Terrorist Financing: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. On Fin. Serv.*, 107th Cong. 10 (2002) (statement of Juan C. Zarate, Dep. Ass’t Secretary for Terrorism & Violent Crime), available at <http://financialservices.house.gov/media/pdf/021202jz.pdf> [hereinafter Zarate]. See also Michael Isikoff & Mark Hosenball, *Terror Watch: Preaching Violence*, NEWSWEEK, Sept. 29, 2004.

488. Zarate, *supra* note 487. Federal agents raided offices in Minnesota, Ohio, Massachusetts, and Washington. *Id.* at 6. Bush announced that the networks provided al Qaeda with fundraising, financial, communications, weapons-procurement, and shipping assistance. Matthew Levitt, *Policy Watch #585: Navigating the U.S. Government’s Terrorist Lists*, THE WASHINGTON INSTITUTE FOR NEAR EAST POLICY: POLICE WATCH/PEACE WATCH, Nov. 30, 2001, available at <http://www.washingtoninstitute.org/templateC05.php?CID=1463>.

489. See Donald G. McNeill, Jr., *Italian Arab is Perplexed by Swiss Raid*, N.Y. TIMES, Nov. 8, 2001, at B8.

490. *Arab Bank Says It Didn’t Know of Payments to Bombers’ Families*, BLOOMBERG, Feb. 10, 2005, available at http://www.bloomberg.com/apps/news?pid=10000085&sid=a_0CRqtqmut0&refer=europe.

message for the nations of the world: . . . If you feed a terrorist or fund a terrorist, you're a terrorist, and you will be held accountable by the United States and our friends."⁴⁹¹ Nearly two years later he reiterated his earlier remarks:

I want you to know, the doctrine that says, 'Either you're with us, or you're with the terrorists,' it still stands, and we enforce it every single day. If you harbor a terrorist, if you feed a terrorist, if you finance a terrorist, you're just as guilty as the killers who struck America on September the 11th, and we'll hold you accountable as well.⁴⁹²

While this language may make good political rhetoric, as a legal doctrine it leaves something to be desired. There is an enormous difference between making contributions that eventually flow to terrorist activity and actually, intentionally, funding such activity. The reliance on intent, rather than a substantive violation, represents a relatively recent departure. Here, the so-called "spoon" and drug forfeiture laws are of consequence.⁴⁹³ By the Bush Administration's own admission, the shift to eliminating intent gives the state unprecedented power to go after private assets.⁴⁹⁴ The courts, however, have been loath to interfere in this realm, seeing it as firmly within the Executive's domain.

It is important at this point to distinguish between punishing individuals aiding designated state sponsors (or giving direct aid to individuals engaged in terrorism) and the forfeiture or blocking of assets of an individual merely associated with someone suspected of terrorism. In the former instance, an individual does not need to share a *mens rea* to be found in violation of the law. The transfer of assets to the named state or individual constitutes a crime. In the latter instance, however, no actual help to further terrorist offenses needs to occur. Mere associational links are sufficient to lose access to one's assets. This would be the equivalent to saying that once a terrorist state has been so designated, knowing anyone of that nationality is sufficient to lose one's home. Put in this context, the new approach appears preposterous. If the actual

491. President George W. Bush, Remarks to Troops and Families at Fort Campbell (Nov. 21, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011121-3.html>.

492. President George W. Bush, Remarks at the Dinner of Senatorial Candidate Norm Coleman and Congressional Candidate John Kline in Minneapolis (July 15, 2002), in 38 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1177, 1181.

493. See Cuéllar, *supra* note 429, at 402; Annotation, *Validity under Federal Const. of So-called 'Head Shop' Ordinances or Statutes Prohibiting Manufacture and Sale of Drug Use and Related Paraphernalia*, 69 A.L.R. Fed. 15 (1984).

494. Mark Kantor, *The War on Terrorism and the End of Banking Neutrality*, 118 BANKING L.J. 891, 892 (2002) (citing press briefing by White House Press Secretary Ari Fleischer on September 24, 2001).

funding of terrorists or terrorist organizations is not included as a necessary condition to freeze assets, mere association, without intent, seems an insufficient basis on which to seize or freeze an individual's assets.

b. Secret Evidence and Due Process Concerns

Another distinguishing factor between antiterrorist finance provisions and regulatory or administrative procedures centers on the practical effect of the use of secret evidence and other characteristics of the anti-terrorist finance regime that give rise to due process concerns.

The USA PATRIOT Act § 106 explicitly amended the IEEPA to allow the Executive to submit classified evidence *in camera* and *ex parte*.⁴⁹⁵ The movement to the civil realm is important here: the courts have held that because terrorist financial freezing does not fall under criminal law, the defendant's claim to a Sixth Amendment right to confront accusers does not apply.⁴⁹⁶

As a constitutional matter, strong arguments can be raised on both sides of the divide: on the one hand, it is well-established that temporary and permanent aliens have a Fifth Amendment right to due process.⁴⁹⁷ And the Supreme Court has routinely held the ability to confront witnesses and answer evidence as central to due process.⁴⁹⁸ But a constitutional argument could be made to the contrary that, according to the Foreign Intelligence and Surveillance Act (FISA) and IEEPA-related cases, discretionary use of secret evidence is permitted: where the latter allows for it, the former demands it. Indeed, in the national security realm, the courts historically have been reluctant to interfere in such due process claims. *Benevolence International Foundation, Inc. v. John Ashcroft*, although decided on different grounds, cited precedent for allowing secret evidence.⁴⁹⁹ In *Global Relief Foundation, Inc. v. Paul O'Neill*, the court denied the plaintiff's motion not to allow *in camera* and *ex parte* proceedings. It suggested that just because the judiciary

495. 50 U.S.C. § 1825(g).

496. Joan M. O'Sullivan-Butler, *Combating Money Laundering and International Terrorism: Does the USA PATRIOT Act Require the Judicial System to Abandon Fundamental Due Process in the Name of Homeland Security?*, 16 ST. THOMAS L. REV. 395 (2004).

497. *Chew v. Colding*, 344 U.S. 590, 596 (1953); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

498. *Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.").

499. Defs.' Mem. in Supp. of Their Mot. to Submit Evidence *in Camera* and *ex Parte*, *Benevolence Int'l Found., Inc. v. John Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02 C 763); see also *U.S. v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987) (holding that secret proceedings do not violate due process).

considers secret evidence does not mean that it relies exclusively on it. The use of such information may be necessary where “acute national security concerns” are of issue. Many contend that terrorism presents something different from ordinary crime; thus some sort of mechanism is needed to allow law enforcement to work with intelligence information.

The general rule appears to be that a court cannot dispose of the merits of a case on the basis of secret evidence.⁵⁰⁰ Yet this is under attack. In anti-terrorist finance cases that it has brought since September 11, the government has not only asserted the right to secret evidence, but it claims that it is entitled, on the strength of the evidence, to obtain summary judgment.⁵⁰¹

Setting aside for the moment the purely legal question of whether secret evidence and *ex parte* proceedings can be used in anti-terrorist finance efforts, the fact they are used suggests that we might want to maintain a higher standard than that employed in regulatory or administrative procedures. The risks of not doing so are significant. The so-called “Supergrass” trials in Northern Ireland prove illustrative. In the early 1980s Britain attempted to crack down on terrorist suspects by allowing individuals to turn witness for the state. Much of the secret evidence, though, later used to convict scores of individuals, turned out to rest on personal vindictiveness. The phenomenon is not unknown in the United States: the government detained Hany Kiardeeen, a Palestinian living in New Jersey, after an informant accused him of meeting with one of the individuals convicted in the 1993 World Trade Center bombings. When Kiardeeen realized that the main source of the information was his wife, with whom he was locked in a bitter child custody battle, he informed the judge, who began to question the evidence and process in more depth. The state released Kiardeeen.

The problem of vindictiveness is not insurmountable: one possible solution, put forward in the BIF memo, might be for the prosecution to issue a statement of undisputed facts, which can then be used to build the case. This would give the defense the opportunity to counter the

500. See *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987); *Global Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779, 802 (N.D. Ill. 2002).

501. In *Benevolence International*, the plaintiff's lawyers argued against this, saying “The government cannot . . . be permitted to seize an American corporation's assets indefinitely, never bring criminal or civil charges, and obtain dismissal of the corporation's suit for return of its property by using ‘evidence’ that the corporation cannot see or respond to.” Pl.'s Mem. in Opp'n to Defs.' Mot. to Submit Evidence *in Camera* and *ex Parte* at 15, *Benevolence Int'l Found., Inc. v. John Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02 C 763). In addition, the lawyers argued that this violated due process rights guaranteed under *Matthews v. Eldridge*. *Id.*

charges.⁵⁰² Nevertheless, the law as currently written incorporates no such protection.

Other concerns haunt the process, underscoring the importance of maintaining a stronger due process standard. For example, the impact on property rights goes well beyond ordinary regulatory regimes, even as courts deny protections ordinarily connected with such invasive mechanisms in criminal law. The judiciary has interpreted interest in property in its broadest sense, deferring to OFAC regulations: “an interest of any nature whatsoever, direct or indirect,” which could include “any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.”⁵⁰³ The only check on this system is that a mid-level government official makes the decision. An informal audit revealed that officials omitted even this minimal administrative record on at least three occasions.⁵⁰⁴

Searches conducted in the course of anti-terrorist finance efforts may be extensive, and the impact of freezing assets may prove substantial. In December 2001 Larry Thompson, the Deputy Attorney General, authorized a FISA search of the offices of the Global Relief Foundation (GRF) and its director’s home.⁵⁰⁵ From the former, the FBI collected records, video equipment, financial literature, promotional books, tapes, email, and computers, as well as servers, modems, a cell phone, hand-held radios, a credit card imprinter, and diskettes. From the director’s home, agents took computers, diskettes, video photographs, documents, records, audio tapes, cassette tapes, date books, a cell phone, a camera, a palm pilot, credit cards, foreign currency, and \$13,030. The federal government simultaneously froze all GRF assets, forcing the organization to close, and INS deported a key GRF fund raiser. Although in January 2002 GRF sued the state and requested a return of the materials seized, the suit failed.⁵⁰⁶ The court held that an agency’s interpretation of its own regulations must be given controlling weight when challenged unless it

502. *Id.*, at 17.

503. 31 C.F.R. §§ 535.311–312, 595.310.

504. In the case of the Illinois charities, the suspension of assets lasted ten or eleven months—hardly the pressing emergency to which the measure was meant to apply. STAFF REPORT, *supra* note 1, at 51.

505. 50 U.S.C. §§ 1821–29. GRF, which began operating in 1992 as a domestic, non-profit enterprise headquartered in Illinois, funneled millions of dollars to alleviate human suffering in 25 states. In 1995 it funded programs in Chechnya, Bosnia, Pakistan, Kashmir, and Lebanon. In 1996 it expanded to Afghanistan and Azerbaijan; in 1997 to Bangladesh, in 1998 to Iraq and Somalia; in 1999 to Albania, Belgium, China, Eritrea, Kosovo, and Turkey; and in 2000 to Ethiopia, Jordan, and Sierra Leone. It also funded programs in Gaza and the West Bank. *Global Relief Found., Inc. v. O’Neill*, 207 F. Supp. 2d 779, 785 (N.D. Ill. 2002).

506. *Global Relief Found., Inc.*, 207 F. Supp. 2d at 787.

was plainly erroneous or inconsistent with the regulation, especially in matters involving foreign policy and national security.⁵⁰⁷

The Staff Report for the September 11 Commission highlighted “the highly deferential standard of review afforded to the President in the exercise of his Commander in Chief powers under IEEPA.”⁵⁰⁸ The report reflected: “Although effective in shutting down its targets, this aggressive approach raises potential civil liberties concerns, as the charities’ supporters insist that they were unfairly targeted, denied due process, and closed without any evidence they actually funded al Qaeda or any terrorist groups.”⁵⁰⁹ This deference allows the state to waive the notice requirements otherwise inherent in due process. The courts explained:

Because of the Executive’s need for speed in these matters, and the need to prevent the flight of assets and destruction of records, the President and his designees cannot provide pre-deprivation notice under these circumstances . . . Pre-deprivation notice would, in fact, be antithetical to the objectives of these sanctions programs and, as a result, it is OFAC policy when initiating a blocking pursuant to IEEPA not to provide pre-blocking notice.⁵¹⁰

Further distinguishing anti-terrorist finance from other administrative and regulatory capabilities is a certain conflict of interest in the way the current system operates. Defendants who have had their assets frozen must apply to OFAC for a license to release funds. The license dictates who can represent the defendants, how much money the defendants can spend, and which issues they can raise. This basically puts Executive branch officials in control of who can sue them, the terms upon which they are sued, and how vigorously the lawsuit is pursued.⁵¹¹ And others cannot step up to pay for legal fees: the Executive Order makes any such support illegal, raising issues related to the rule of law. The courts have yet to rule on the merits of the claim that this violates a Fifth Amendment right to due process and a First Amendment right to sue for redress. (The one case to address this issue, *Benevolence International Foundation*, ended up being plea bargained.)⁵¹²

507. *Id.* at 792. As of the time of writing, the Department of Justice still has not brought any criminal charges against GRF.

508. STAFF REPORT, *supra* note 1, at 11 n.4.

509. *Id.* at 11.

510. *Global Relief Found., Inc.*, 207 F. Supp. 2d at 803–04.

511. Corrected Mem. in Supp. of Pl.’s Mot. for Prelim. Inj., at 38, *Benevolence Int’l Found., Inc. v. John Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02 C 763).

512. 18 U.S.C. § 1957 does not prevent the state from freezing criminal funds that could be used for legal defense. See D. Randall Johnson, *The Criminally Derived Property Statue:*

The use of secret evidence and *ex parte* proceedings, the significant impact on rights, the absence of notice, and the conflict of interest that characterize the current regime raise important due process concerns that set anti-terrorist finance efforts apart from other state administrative and regulatory regimes.

c. Stigma

Finally, even if no criminal charges follow, the stigma of investigation is hard for an entity to counter. A few examples suffice: Bob Simon, from CBS' 60 Minutes, claimed during one show that several Muslim groups in Herndon, Virginia, had terrorist ties. Reported on the basis of an anonymous source (that turned out to be Rita Katz), the story suggested that the groups invested in Mar-Jac Poultry, a chicken-plucking farm in Gainesville, Georgia, where possibly millions of chickens had gone "missing." Customs agents raided the farm but found nothing. Mar-Jac filed suit against the network and the city of Atlanta. Because of the investigation, the poultry farm is facing bankruptcy, and banks, "wary of being accused of financing terrorism, may cut its credit lines."⁵¹³

Global Relief Foundation, as already noted, became the subject of freezing orders under the IEEPA. Although the state never brought criminal charges, the stigma attached to GRF undermined its operations. The courts ruled that the mere statement that such groups are under investigation, without more defamatory statements, is insufficient to merit legal claims.⁵¹⁴

3. Political and Humanitarian Costs

Just as the United States and United Kingdom appear aware of the problem caused by the sudden increase in SARs, both states seem, at a minimum, to realize the implications of the inroads into the rights of particular states or ethnic groups without more evidence of a direct connection to terrorist activity. International partners, vital in responding to global terrorist movements, may be alienated. And domestic and international populations that the states need to help respond to terrorist claims may find both ethnic targeting and the states' refusal to respond to humanitarian issues unacceptable. Such behavior underscores terrorist assertions, which, since September 11, have painted Western states as

Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957, 34 WM. & MARY L. REV. 1291 (1993).

513. *Moving Targets*, THE ECONOMIST, Sept. 14, 2002, at 80. See also John Sugg, *Terrorist Chicken Laundering*, ALTERNET, June 12, 2003, available at http://www.bintjbeil.com/articles/2003/en/0612_sugg.html.

514. See, e.g., *Global Relief Found., Inc. v. New York Times Co.*, 390 F.3d 973 (7th Cir. 2004).

solely interested in targeting individuals on the basis of race and religion with little regard for their rights.

a. International Fallout

More than 80 percent of the money the United States blocked post-September 11 came under state control within the first three months of the attacks.⁵¹⁵ The state's immediate and sudden creation of lists of individuals and entities for the purposes of asset blocking, however, appeared to occur without sufficient evidence. Early cases quickly demonstrated the weakness of the U.S. charges against those the state accused of complicity in terrorist aims. And lower standards of proof did nothing to increase international confidence in U.S. standards of justice. As Part II noted, the U.S. initiatives essentially replaced a criminal law standard with an intelligence one: mere links to terrorists or terrorist organizations became sufficient as a basis on which to seize assets. Together with the targeting of a specific ethnic and religious community—a similar targeting of which would cause considerable domestic unrest in states with a larger percentage population drawn from the Arab, Muslim community—the lack of due process involved created concern. Simultaneously, the Bush Administration refused to provide additional information on which the claims had been made. The Staff Report for the September 11 Commission found:

These early missteps have made other countries unwilling to freeze assets or otherwise act merely on the basis of a U.S. action. Multilateral freezing mechanisms now require waiting periods before money can be frozen, a change that has eliminated the element of surprise and virtually ensured that little money is actually frozen.⁵¹⁶

A United Nations monitoring panel established in January 2004 to determine whether and to what extent financial measures had been effective against al Qaeda concluded that the network had successfully evaded sanctions, while the financial sanctions regime itself had lost credibility.⁵¹⁷

Several examples of apparent errors on the part of the United States present themselves. Take, for instance, the London-based Palestinian Relief and Development Fund, known as Interpal. First registered in the United Kingdom in August 1994, the organization “provides aid to, assists, guides and comforts poor and needy Palestinians in the West Bank

515. LEE, *supra* note 252, at 1.

516. STAFF REPORT, *supra* note 1, at 48.

517. Fidler, *supra* note 421.

and Gaza strip, Jordan and Lebanon. It aims to relieve the hardship and suffering of these distressed persons by co-operating or working with other charitable organizations in the region.” Its income between January 2000 and December 31, 2001, was more than £4 million. On August 21, 2003, President Bush accused the group of sending funds to Hamas. The Charity Commission for England and Wales, which registers charities, responded within three days by temporarily freezing Interpal’s bank accounts. Its subsequent investigation, however, failed to find any evidence to back this claim. By September 2003, the United Kingdom released the organization’s assets and closed its inquiry, announcing, “The U.S. authorities were unable to provide evidence to support allegations made against Interpal within the agreed time scale.”⁵¹⁸ The Commission openly stated that it was “alert to the possibilities of charities being used to further or support terrorist activities.” It was willing to look at the U.S. allegations and work with law enforcement for investigation, but it noted, “The Commission’s own work reveals that connections or links between registered charities in England and Wales and terrorist organizations are very rare.”⁵¹⁹

In another case, Aqeel al-Aqeel, the former director of al-Haramain, filed a lawsuit against four U.S. officials for including him in the specially designated global terrorist list. In the face of U.S. refusal to release any evidence implicating al-Aqeel, the Dutch government unfroze his assets.⁵²⁰

Perhaps the best example, though, is al-Barakaat. “The blessing” in Arabic, al-Barakaat served as the principal banking system in Somalia. Founded by Ahmed Nur Ali Jumale in 1985, by September 11 it had more than 180 offices in 40 different states, with its headquarters in the United Arab Emirates. The U.S. government alleged that from 1992 Osama bin Laden served as both a customer and a silent partner of the organization, which supposedly had close links to al-Itihaad al-Islamiya (AIAI), a group of Islamists that the Defense Intelligence Agency considered a major threat in Somalia. In July 1999 the FBI in Minneapolis opened a full field investigation and found other al-Barakaat branches in

518. Cilina Nasser, *Closure of U.S. Terror-designated Charity Shatters Many Lives*, DAILY STAR (Lebanon), Aug. 27, 2004.

519. PALESTINIANS RELIEF AND DEVELOPMENT FUND, paras. 10, 11 (The Charity Commission, Sept. 24, 2003), available at <http://www.epolitix.com/NR/rdonlyres/262ED501-45CE-4FDE-9866-A7FD4530F60F/0/THECHARITYCOMMISSION24SEPTEMBER2003.doc> (results of the Charity Commission’s inquiry into the affairs of the Palestinians Relief and Development fund, known as INTERPAL).

520. P.K. Abdul Ghafour, *Aqeel Sues U.S. Officials*, ARABNEWS.COM, May 14, 2005, <http://www.arabnews.com/search> (search “Aqeel Sues US Officials”; then follow hyperlink to article). See also *Saudi to Sue Senior U.S. Officials*, ALJAZEERA.NET, May 15, 2005, <http://english.aljazeera.net/NR/exeres/4C89A739-F7C7-4F4A-8E60-4BA92F6811E6.htm>.

San Diego, Washington, D.C., Charlotte, Cincinnati, New York, and Seattle. The following year it opened a criminal investigation.

Following September 11 al-Barakaat became one of the first organizations to have its assets frozen. On November 7, 2001, federal agents broke into eight Barakaat offices around the United States and seized their records. President Bush held a press event, alleging that Jumale was a friend and a supporter of bin Laden and estimating that some \$25 million went through his organization to terrorist operations. Jumale and others the state associated with the network and placed on the list could not so much as buy a stick of gum in the following months without violating Executive Order 13,224. After five months of trying to get its assets unfrozen (and OFAC not returning its calls), the organization brought suit in April 2002.

In the interim, the FBI began to realize that the information it had collected from the United Arab Emirates (UAE) and various intelligence bodies was contradictory. Out of tens of thousands of documents from al-Barakaat, nothing appeared out of order. It turned out that bin Laden had not been in Afghanistan with Jumale. The FBI spent time in UAE, which cooperated fully with the investigation. Despite scores of interviews with individuals involved in the case (including Jumale) and unfettered access to the organization's records, the "FBI could not substantiate any links between al-Barakaat and terrorism."⁵²¹

The United States did not just go after the U.S. assets of those associated with al-Barakaat. It placed three Swedish citizens and one Canadian on the UN list. In January 2002, the Swedes petitioned OFAC and the UN to remove their names. Canada also moved to take its citizen off the list. Sweden unsuccessfully tried to convince the Security Council to use criminal evidentiary standards for constructing the list. The United States vigorously opposed this, on the grounds that most of the names would be removed. The Swedish effort spurred France to try to convince the Security Council to establish even basic rules, such as criteria for sanctions and a procedure for review. Eventually the United States removed five people from the list and said it would consider other appeals.⁵²² The UN, in turn, created an evidentiary requirement for the list

521. STAFF REPORT, *supra* note 1, at 84.

522. For the current UN list, see U.N. Security Council, 1267 Comm., *The New Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and al-Qaida Organization as Established and Maintained by the 1267 Committee*, available at <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

as well as an appeals procedure. The Swedes brought suit in the European Court of Justice, claiming a violation of due process.⁵²³

The case became a lightning rod for human rights and due process violations associated with U.S. actions post-September 11. Well known Swedes collected money for the men's defense, and a prominent attorney took the case. One of the men, Abdirisak Aden, had run for office in the 2000 Swedish elections; none of them had criminal records. Ultimately, this designation, and many of those made immediately after September 11, undermined U.S. efforts to stem the flow of funds to terrorist organizations. The Staff Report of the September 11 Commission later found:

The post-9/11 period at OFAC was "chaos." The goal set at the policy levels of the White House and Treasury was to conduct a public and aggressive series of designations to show the world community and our allies that the United States was serious about pursuing the financial targets. It entailed a major designation every four weeks, accompanied by derivative designations throughout the month. As a result, Treasury officials acknowledged that some of the evidentiary foundations for the early designations were quite weak . . . The rush to designate came primarily from the NSC and gave pause to many in the government. Some believed that the government's haste in this area, and its preference for IEEPA sanctions, might result in a high level of false designations that would ultimately jeopardize the United States' ability to persuade other countries to designate groups as terrorist organizations. Ultimately . . . this proved to be the case with the al-Barakaat designations.⁵²⁴

By 2004 the United Nations recognized that its list had "begun to lose credibility and operational value" and needed updating. Only 21 states submitted names for list—the bulk of which originated from the United States—including approximately 174 people and 111 groups associated to al Qaeda. By 2004, not a single person on the list had been stopped by the travel ban.⁵²⁵

The credibility gap meant not only that states tended to be uncooperative, but that those responsible for intentionally funding terrorist operations continued to act with impunity: more than two years after the attacks, for example, Youssef Nada and Ahmed Idris Nasrddin, both of whom were central to al Qaeda's international financing, remained in

523. Press Release, 1267 Committee Approves Deletion of Three Individuals and Three Entities From its List, U.N. Doc. SC/7490 (Aug. 27, 2002), available at <http://www.un.org/News/Press/docs/2002/sc7490.doc.htm>.

524. STAFF REPORT, *supra* note 1, at 79.

525. Fidler, *supra* note 421.

business in several European states.⁵²⁶ Al-Taqwa, supposedly shut down, continued to operate.⁵²⁷ And a number of individuals placed on the lists began to bring suit.⁵²⁸

This problem of the alienation of allied (and non-allied) states is particularly important. On the one hand, the lack of evidence provided means that Islamic states, in complying with U.S. requests, look as though they are simply “caving in to Western demands at the expense of Muslim tradition,” risking “a backlash against the governments.”⁵²⁹ Indeed, Islamic banks are beginning to go on the offensive.⁵³⁰ As governments prove reluctant to trust the United States, the U.S. government is forced to adopt more coercive methods to achieve their objectives. This means a growth in extraterritorial powers—the approach adopted by the anti-terrorist finance provisions in the USA PATRIOT Act. Such coercion, however, consumes political advantage that might be better applied to more effective ways to interrupt terrorist operations. And it creates a gulf between states. A *Financial Times* article explained on September 25, 2001: “President George W. Bush’s order freezing terrorist assets is directed as much against international banks and governments as Osama bin Laden’s network.”⁵³¹ This is a dangerous perception to cultivate when one needs international allies to counter a global terrorist threat.

b. Assisting Terrorist Claims and Aims

Not only do such measures alienate important allies in the battle against terrorism, but the manner in which they have been implemented, particularly on this side of the Atlantic, appears to validate some of Osama bin Laden’s claims. Specifically, the campaign against Muslim charities does little to undermine the assertion that the United States is targeting Muslims. As the Staff Report to the September 11 Commission

526. See Edward Alden, Mark Huband & Mark Turner, *Al Qaeda “Financiers” Active in Europe: A UN Report Reveals a Lack of Action Over Youssef Nada and Ahmed Idris Nasreddin*, FIN. TIMES (London), Nov. 14, 2003, at 11; Michael Isikoff & Mark Hosenball, *Terror Watch: Dubious Link between Atta and Saddam*, NEWSWEEK, Dec. 17, 2003 (web exclusive).

527. Alden et al., *supra* note 526.

528. For example, Yasin al Qadi (aka Yasin Kadi), the former director of Blessed Relief (Muwafaq Foundation) sued in the European Court of Justice to have his name removed from the list. Constant Brand, *EU Court Hears Terror Blacklist Case*, GUARDIAN (London), Oct. 14, 2003, available at <http://www.guardian.co.uk/worldlatest/story/0,1280,-3263794,00.html>.

529. Looney, *supra* note 2.

530. See Nigel Dudley, *Islamic Banking—Structure is a Necessary Target—A New Institution Aims to Set Industry-wide Standard for Islamic Banking*, THE BANKER, May 1, 2003; James Drummond, *Islamic Banks Stung by Claims They Fund Violent Extremists*, FIN. TIMES (London), Oct. 8, 2001, at 6.

531. Richard Wolffe, “Wake-up Call” Warns Banks to Co-operate Freezing Assets, FIN. TIMES (London), Sept. 25, 2001, at 3.

notes, “the campaign has aroused controversy on various political, religious and humanitarian grounds and is viewed in some quarters as broadly anti-Islamic.”⁵³²

A few examples suffice: Al Sanabil Association for Relief and Development, established in 1993 in response to UNRWA budget cuts, sponsored 1,200 Palestinian families, spending approximately \$800,000 in 2003 on orphans and \$55,000 on needy patients. The organization also distributed food and home appliances to displaced persons. Treasury froze the group’s assets in August 2003, claiming that its funds went through Hamas. Those previously benefiting from the organization witnessed the devastating affect, as the UNRWA proved unable to provide even basic needs for the more than 1.3 million Palestinian refugees in Lebanon, Syria, Jordan, West Bank, and the Gaza Strip. Considerable publicity in the region drew attention to the United States’ actions—and the lack of evidence to support its allegations.⁵³³

Benevolence International Foundation (BIF), a nonprofit charitable organization founded in 1992 and run by U.S. citizens, raised millions for humanitarian aid in twelve locations: Pakistan, Bosnia, Azerbaijan, Tajikistan, Yemen, Bangladesh, Turkey, Dagestan, Georgia, China, and Ingushetia.⁵³⁴ When OFAC froze the organization’s assets in 2001, BIF offered to have the FBI itself take the money overseas to a Charity Women’s Hospital in Daghestan and a children’s tuberculosis hospital in Tajikistan that would otherwise be forced to close. OFAC refused the request. Most employees had to be let go, and the charity was unable to raise new funds to support its humanitarian relief. Ultimately, the frozen funds were all spent on BIF’s legal fees, with a devastating affect on the regions it previously served. Such actions, as well as the overt inclusion of a clause in the Executive Order banning assistance for real humanitarian need created by the freezing of assets—in conjunction with the clear use of the measures against the Arab and Muslim populations in the United States and overseas—does little to undermine al Qaeda’s claims.

U.S. policy post-September 11 also brings the United States into conflict with Islamic states that depend upon the flow of alternative remittances for the health and welfare of their populations. Aside from foreign policy considerations, the United States has an interest in

532. STAFF REPORT, *supra* note 1, summary. *See also* LEE, *supra* note 252.

533. Nasser, *supra* note 518.

534. Complaint, Benevolence Int’l Found., Inc. v. John Ashcroft, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02 C 763); Pl.’s Mem. in Opp’n to Def.’s Mot. to Submit Evidence *in Camera* and *ex Parte*, Benevolence Int’l Found., Inc. v. John Ashcroft, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02 C 763); *see also* Enaam M. Arnaout, *Muslim Official Indicted or Aiding Terrorists*; *Benevolence International Foundation*, 199 THE CHRISTIAN CENTURY, Oct. 23, 2002, at 15.

ensuring that many of these regions remain economically viable and tied to U.S. influence as a way to prevent the creation of a vacuum into which extremist movements can move. Somalia provides a good example: aid agencies there became concerned that shutting down al-Barakaat, the largest remittance company in Somalia, would push the state into the hands of extremists. Approximately \$500 million per year—a number far in excess of the foreign aid given to the region—flowed through this entity. The company ran highly efficient transfers. The United Nations itself used the system. And the humanitarian costs of shutting it down would be considerable: with an economy already driven into the ground from war, weather, and border closures, at least 50 percent of the Somali population, according to Save the Children, depended upon funds from abroad for their basic existence. Blocking these funds does not marginalize fundamentalists; it makes them more powerful. The United States ignored these claims, however, taking the rather absurd position that Western Union operated along the borders and Moneygram had one office in Mogadishu—and so money would continue to flow to the region.⁵³⁵ These more expensive and extremely limited alternatives, however, proved dreadfully inadequate to address the significant levels of need within Somalia.

It is not just Islamic states with the potential to host fundamentalist movements that feel the affect of an increased regulatory system. For example, although Latin America is not specifically listed on the annex to Executive Order 13,224, it would be wrong to assume that the area is not affected. In 2000 the Bureau for International Narcotics and Law Enforcement Affairs spent roughly \$11 million on drugs, terrorism, and money laundering in the Bahamas, Central America, and South America.⁵³⁶ The United States could use its post-September 11 authority to target financial institutions in the region: the Executive Order grants the Secretary of State discretion without any standards of culpability. While acknowledging this reality, President Bush downplayed the region's concerns: "Although the blocking powers enumerated in the Order are broad, my Administration is committed to exercising them responsibly, with due regard for the culpability of the persons and entities potentially covered by the order."⁵³⁷

535. Edward Alden, Robert Shrimley & Mark Turner, *Closing Down Bank "Will Hit Somalis,"* FIN. TIMES (London), Nov. 9, 2001, at 8.

536. Hale E. Shappard, *U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America*, 17 AM. U. INT'L L. REV. 625, 628 (2002).

537. See *Text of Bush's Message to Congress on Freezing Assets Available to Terrorists*, WASH. POST ONLINE, Sept. 23, 2001, http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushletter_092301.html.

This claim, however, is a hollow one. The point is that the powers are available, and in order to ensure compliance with the new regulatory regime, remittance businesses will incur new expenses. The affect is felt well beyond the counterterrorist realm. Latin American immigrants in the United States, for instance, send an average of \$250 each to their home states 8–10 times each year. But transfer fees raise the costs to up to 20 percent of the value they send. Increased regulatory requirements make remittances—which exceed U.S. foreign aid to the region—even more expensive.⁵³⁸ Moreover, Latin American institutions may well reject even legitimate business they would have accepted in the past. States may opt to introduce even stricter rules than those in the United States to retain other economic benefits of association with Washington. And economic consequences may follow: just as Mexico is recovering from the 1994 peso crisis, these policies may trigger an economic downward spiral, destabilizing the Mexican economy.⁵³⁹ Concerns abound elsewhere: in 2003 the expatriate community in the United States sent some \$1 billion to Cuba. In May 2004 the Administration announced new limits on this transfer. The measures capped remittances at \$1,200 per year and allowed only one visit every three years, instead of annually, as previously. Cubans in the United States reacted strongly to what they soon saw as a humanitarian crisis.⁵⁴⁰

c. The Problem of “Black Lists”

In considering the political and humanitarian costs of the current regime, special attention ought to be given to the problem of “black lists.” Here, the issues described in Part III.A (the overburdening of the regulatory regime) and those in Part III.B (the rights implicated in the current regime) are related. That is, with the overburdening of the regulatory regime, one alternative is to depend on the creation of black lists, which, outside the judicial realm, raise significant issues related to rights. As one prominent lawyer noted, the construction of these lists lacks a certain scientific accuracy.⁵⁴¹ Indeed, the cases cited earlier in this Article demonstrate that often the wrong people—or at least individuals for whom no evidence of culpability is forthcoming from the state—become caught in the process. As individuals increasingly challenge

538. Zagaris, *supra* note 311, at 13.

539. Shappard, *supra* note 536.

540. Marc Frank & Richard Lapper, *U.S. Squeeze Angers Cubans: Bush Clampdown is Seen as Blow to Family Ties*, *FIN. TIMES* (London), May 10, 2004, at 4.

541. David Cole remarked, “[G]roups are designated behind closed doors, in secret process, without any notice, without any hearing and even without any substantive criteria for what counts as a Specially Designated Global Terrorist. It’s just a term the Bush Administration made up.” Laura Rozen, *Strange Bedfellows*, *THE NATION*, Nov. 10, 2003, at 6.

their terrorist designations in court, belief in the justness of anti-terrorist seizures erodes, affecting both domestic and international support for the regime itself. The United States' refusal to allow any sort of independent arbitration to accompany the creation of lists substantially weakened the UN attempt to build a dossier of dangerous individuals. Simultaneously, the lack of such a structure opens the door to abuse from other states.

In other words, while the United States focuses on the "war on terror," it is entirely conceivable that other states, particularly those in parts of the world where al Qaeda may have a particularly strong hold, may attempt to use any existing regime to target political opponents. Here U.S. policy may be contradictory: while a significant aim of the "war" may be to establish democratic regimes (with the assumption that their presence will strengthen U.S. national security), black lists themselves may become a tool with which other regimes silence voices demanding democratic change. And there will be little or no recourse without any independent arbitration of the placement of individuals on these lists.

The policy may even more directly increase the threat to national security. As states such as Egypt, Syria, Sudan, and Pakistan detain, torture, and confiscate the assets of "militants," local communities may become enraged, strengthening the hand of Islamists. Dangerous long-term consequences may result. In other words, as the rule of law erodes, so too may non-militant political space.

The United States defends its position by claiming that it cannot reveal the sources on which its list is based; this would compromise its intelligence-gathering abilities, as well as operatives in the field. In some cases, this most certainly is true; in others, this assertion may be just a way to conceal the lack of any real information beyond speculation. But even legitimate intelligence concerns should not deter the United States from seeking to establish mechanisms that could verify its underlying data. If anything, such an independent process would bolster the U.S. claim that particular individuals contributed to terrorist movements and allow the United States to freeze the assets of those it considers a real threat, assuming that freezing the assets is, indeed, the appropriate step to take—as opposed to following the money to determine who is responsible for violence, interrupting operations, and bringing the perpetrators to justice.

Because terrorism is as much a propaganda battle as anything else, the nature of the process for constructing black lists matters. Who the United States includes in its lists becomes as important as who it excludes.⁵⁴² Relatedly, there are a range of entities and individuals missing

542. Pat Robertson Partner Charles Taylor Funded Al-Qaeda, *Report Says*, *supra* note 1. Robertson had been in business with Taylor since 1999.

from the U.S. lists that counterterrorist experts would expect to see. Their absence tends to underscore the unique geopolitical ties of certain states and entities—notably Saudi Arabia and those connected to the ruling Saudi elite. By not including them on the lists, however, the United States further undermines its claims to be acting in a just manner. The inclusion, instead, of individuals either unconnected to terrorism or connected only in a minor capacity breeds a cynicism that undermines U.S. counterterrorist efforts.

Perhaps one of the most important innovations in the development of British anti-terrorist measures, in fact, lies in the importance the state finally granted to the role of public communications. The Select Committee on Northern Ireland Affairs recognized that “publicity campaigns can be more effective than law enforcement in certain situations” and urged “the Government to give serious consideration to the role which such campaigns might play in the future strategy for dealing with specific facets of organized crime such as fuel laundering and tobacco smuggling.”⁵⁴³

This involved more than just attempting to accumulate the right information—admittedly, one of the weaknesses of the bureaucracy. Prior to the creation of the Organized Crime Task Force, the United Kingdom lacked even a definition of organized crime, making it difficult for the Police Service of Northern Ireland to collect data on operational successes in this sphere. Once the state adopted the appropriate metrics, its public outreach mechanisms could take the information generated and move the battle to the next level: “We recommend that the Government ensure that the judiciary in Northern Ireland are fully apprised of the strong links which have now been established between paramilitary organisations, serious and organized crime and the range of offences which provide these groups and individuals with their income.”⁵⁴⁴

The public proved an equally important target.⁵⁴⁵ Parliamentarians lamented the situation in Northern Ireland, where it was acceptable to “pull one over” on the government. Indeed, much of the emphasis in the recent reports of the organized crime task force centers on the idea that paramilitary activities are not victimless crimes. This theme is repeated on the task force’s web site, launched in 2002. In many ways, this is an extremely effective strategy: instead of falling into the early 1980s trap of calling paramilitaries criminals, the state is emphasizing the criminality of certain types of behavior in which paramilitaries engage.

543. COMMITTEE ON NORTHERN IRELAND AFFAIRS, FOURTH REPORT, *supra* note 4, ¶ (k), List of Conclusions and Recommendations.

544. *Id.* ¶ (u).

545. *Id.* ¶ 101.

Admittedly, this effort is limited to illicit sources of funding; but it is an effective way to address criminal methods from which many terrorist organizations raise funds.

Opportunities for pursuing a similar route in the United States may also exist. Zakat, for instance, requires individuals not just to contribute anonymously but, as read by moderate Islamic scholars, also enjoins them to ensure the gift reaches its intended recipient. Islam, moreover, only demands anonymity between the recipient and the donor, making this requirement entirely acceptable. In theory, at least, this means that states should be able to trace funds—and that theological reasons may exist for individuals to object to charities funneling money to terrorists. If the U.S. government helps to publicize this interpretation (without tainting it as U.S. propaganda), its anti-terrorist efforts may be more successful. But this strategy requires the state to recognize the importance of public relations in its overall counterterrorist effort—a consideration largely absent from the current regime.

One intriguing approach not yet explored in this Article is the creation of “white lists,” which would confer rewards on regions, states, or entities that prove particularly helpful in tracing terrorist assets.⁵⁴⁶ It appears as though the U.S. government has already tried something similar: in October 2002 the United States agreed that the Financial Action Task Force would suspend its “name and shame” program to allow the International Monetary Fund to offer technical assistance to states that introduce more stringent anti-terrorist finance measures.⁵⁴⁷ This idea deserves further discussion.

C. Future Concerns: The Electronic Sphere

The United Kingdom and United States—and terrorist organizations that threaten both states—are just now beginning to explore the significance of the Internet and e-commerce in the terrorist realm.⁵⁴⁸ This area raises important issues related to anonymity, the lack of geographic bounds, and clandestine communications.

The CIA World Factbook estimated in 2002 that more than 10,000 ISPs and more than 580 million users occupy the electronic realm.⁵⁴⁹ Terrorist groups can use the Internet to solicit donations, share data, and recruit supporters. One site, for instance, www.azzam.com (named after

546. See Jonathan Winer, *How to Clean up Dirty Money*, FIN. TIMES (London), Mar. 23, 2002, at 1.

547. Alden, *supra* note 357.

548. See, e.g., 2003 NATIONAL MONEY LAUNDERING STRATEGY, *supra* note 5, at appendix H, 53–80.

549. *Id.* at 17.

Abdullah Azzam, bin Laden's mentor), posted a page entitled, "What Can I Do to Help Jihad and the Mujahideen?" The text asserted:

Jihad is a profitable investment that pays handsome dividends. For someone who is not able to fight at this moment in time due to a valid excuse they can start by the collection and donation of funds . . . Azzam Publications is able to accept all kinds of Zakat and Sadaqah donations and pass them on where they are most needed.⁵⁵⁰

Global Jihad Fund had a site requesting money "to facilitate the growth of various Jihad Movements around the World by supplying them with sufficient funds to purchase weapons and train their individuals."⁵⁵¹ It included links to web sites funding the Taliban, Hamas, and Hezbollah.⁵⁵²

What tools can and will states use to address concerns raised by this medium? And what will be their affect? As Part II of this Article demonstrated, Northern Ireland terrorist organizations are increasingly turning to the Internet as a way to solicit and move money. What is the role of traditional crimes conducted online, such as stolen identification and credit card theft, intellectual property piracy, and online security fraud? In Northern Ireland, increasing terrorist use of the Internet has meant an ever smaller gap between counterterrorism and ordinary criminal law. Instead of the latter being applied to the former, however, counterterrorist provisions, considerably broader and lacking traditional safeguards, have flowed over into the criminal realm. What does this mean for the state of criminal law more generally? Will we see the movement of such crimes into the civil realm, given their separation from conviction of an underlying offense? These questions have yet to be addressed.

In relation particularly to al Qaeda-type organizations, how will terrorist organizations exploit charitable organizations online to solicit funding for violence? And how will they use the Internet to move funds—e.g., cash, brokerage, and securities firms? A host of issues are of consequence here, ranging from the protection of individual rights to the applicable levels of culpability. For instance, how will the alienation of the Muslim and Arab community since September 11 effect the state's efforts to obtain language capabilities necessary for it to monitor developments in the electronic realm?

If the United Kingdom and the United States persist in simply applying the traditional money laundering regime to these new media, many

550. *Id.* at 59.

551. *Id.*

552. *Id.*

of the issues highlighted in this Article—such as inefficiencies in the financial sector more broadly and the ineffectiveness of driving actors out of the regulated sectors—may well apply. Simultaneously, increased state monitoring and regulation may lead to further use of encryption, making the tracing of such funds even more difficult. If the United States is successful at weakening encryption standards, however, the effect may be felt more broadly, both in the U.S. industry's ability to keep pace with international competition and in a possible increase in computer-based crime unrelated to terrorism.

These, of course, are broad, sweeping generalizations whose investigation is beyond the bounds of this particular Article. But they are illustrative of a host of questions that attend the expansion of the money laundering regime to the electronic sphere. Instead of simply transferring the anti-money laundering regime to counterterrorist efforts, careful analysis that begins and ends with these media and, specifically, terrorism needs to occur. As of yet, however, sufficient attention to these questions, and the host of queries that mark the use of the electronic sector for terrorist finance, has been lacking.

IV. CONCLUSION

On December 1, 2001, Hamas orchestrated two suicide bombings in Israel that left 25 people dead. The following day, Prime Minister Sharon asked President Bush to act against Holy Land Foundation for Relief and Development (HLFRD), a California corporation headquartered in Texas which, according to its annual report, distributed approximately \$6 million per year to refugees in Jordan, Lebanon, and Israel.⁵⁵³ (It also raised money for non-Islamic causes, such as the victims of the Oklahoma City bombing and, in 2001, the attacks on the World Trade Center.) By December 4, 2001, the United States had frozen the organization's assets and raided its offices in Texas, California, New Jersey, and Illinois. President Bush said the money went to Hamas to "support schools and indoctrinate children to grow up into suicide bombers."⁵⁵⁴ (Ironically, one supposedly Hamas-controlled institution financed by HLFRD, the al Razi hospital in the West Bank, also received support from the U.S. Agency for International Development and the UAE Red Crescent.)⁵⁵⁵

553. Mike Allen & Steven Mufson, *U.S. Seizes Assets of Three Islamic Groups*, WASH. POST, Dec. 5, 2001, at A1; LEE, *supra* note 252, at 5.

554. White House News Releases, President George W. Bush, Remarks by the President on the Financial Fight Against Terror (Dec. 4, 2001), available at <http://www.whitehouse.gov/news/releases/2001/12/20011204-8.html>.

555. UAE Red Crescent Donates "Huge Chunk" of Aid to Palestinians in Jenin, BBC NEWS, Oct. 29, 2002; Press Release, USAID, USAID Delivers Humanitarian Relief to People

On March 7, 2002, HLF RD sued the DOJ, the Department of State, and the Department of the Treasury. The organization claimed a violation of its First Amendment right to religious freedom, Fourth Amendment right to freedom from unreasonable searches and seizures, and Fifth Amendment right to due process. Court documents revealed that the decision to freeze the organization's assets came from a November 5, 2001, 49-page memo written by Dale L. Watson, assistant director of the counterterrorist division of the FBI, claiming that HLF RD was the "primary fund-raising entity for Hamas." The complaint noted that the group conducted extensive charitable and humanitarian work with the International Committee of the Red Cross/Red Crescent, NATO, the UNHCR, Turkey, the UN World Food Program, UN Relief and Works Agency for Palestinian Refugees in the Near East, and the UN International Children's Emergency Fund.

The state never brought criminal charges against HLF RD. Nor, as was earlier noted, did it manage to prosecute BFI, or a host of other charities whose assets it froze, for terrorist contributions.⁵⁵⁶ The United States' failure to substantiate such claims, the introduction of measures that allowed for freezing assets on the basis of mere association, and the state's disproportionate focus on Muslim charities created an environment hostile to legitimate Islamic businesses and charities. Admittedly, the alienation of Arabs and Muslims is also the product of other official policies, such as indefinite detention, and informal practices, such as planning commissions' reluctance to approve the building of mosques in the aftermath of September 11. But the cumulative impact is borne in the economic affect on families, as well as a larger strain on social services. At a broader level, minority groups may develop a lack of confidence in the political process, preventing social cohesion and political participation.

of Jenin, Apr. 16, 2002; available at <http://www.usaid.gov/wbglpress>, cited in LEE, *supra* note 252.

556. In the case of Benevolence International Foundation, DOJ never brought criminal charges alleging that the organization assisted al Qaeda. Instead, the government brought suit only after the entities with their assets frozen had submitted court documents that claimed BIF had not provided aid to organizations known to be engaged in violence. When the organization later attempted to amend the statement, DOJ counter-sued, saying that BIF donated X-rays and hand and toe warmers to Chechen fighters and that it had misled its donors in this regard. BIF and Enaam Arnaout entered a plea bargain in response. Grand Jury Charges, United States of America v. Enaam M. Arnaout, No. 02 CR 892 (N.D. Ill. 2002); Criminal Comp., U.S. v. Benevolence International Foundation, Inc., and Enaam M. Arnaout, Case No. 02 CR 414 (N.D. Ill. 2002). See also U.S. v. Enaam M. Arnaout, No. 02 CR 892 (N.D. Ill. 2002) (laying out the violations); Plea Agreement, U.S. v. Enaam M. Arnaout, No. 02 CR 892 (N.D. Ill. 2002). But see Press Release, United States Dep't of the Treasury, Treasury Designates Benevolence International Foundation and Related Entities as Financiers of Terrorism, <http://www.ustreas.gov/press/releases/po3632.htm> (saying that links to bin Laden and al Qaeda extend beyond activity carried out in the 1980s).

And remittances that need to go to develop civil society in economically-deprived regions where Islamists recruit may disappear.

These issues, and others that haunt U.S. efforts to respond to al Qaeda, are not unique to that state: recent events have increasingly forced Britain to grapple with how to address the flow of funds to terrorist organizations outside the Northern Ireland context. This point was vividly brought home on July 7, 2005: four suicide bombers detonated explosives in central London. Starting from King's Cross, the men traveled north, south, east, and west, making their point that no one within the United Kingdom was safe. At least 52 people died and more than 700 sustained injuries. A group calling itself the Secret Organization of al Qaeda in Europe claimed responsibility. Within a fortnight officials apprehended the believed leader of the cell, Haroon Rashid Aswat, in Pakistan as he attempted to cross the border into Afghanistan with £17,000 in cash.

None of the suicide bombers, all British subjects, had appeared on the British security services' financial or intelligence radars. The United Kingdom's regulatory measures, moreover, would not have been able to intercept Aswat's domestic expenditures or his subsequent physical transfer of assets. And he had been trained in the United States—where he similarly escaped the regulatory regime established post-September 11. Both states might have more successfully mounted freezing orders: Aswat was already known to intelligence agencies on both sides of the Atlantic, and he was carrying a British passport under his own name when Pakistani authorities caught him on the border. But for the successful intercept of any funds physically carried either at that time or previously, the complicity of a range of governments would be required—here the evidentiary standards needed to convince other states to follow suit is of great importance. While increased regulation and asset forfeiture may represent important law enforcement tools writ large, the impact on individual rights—particularly property—and the effectiveness of such measures in the face of terrorist challenge deserves greater attention.

In Part II of this Article I suggested that the United Kingdom and the United States follow a similar trajectory in their treatment of anti-terrorist finance. In the former, from 1972 forward Northern Ireland paramilitaries expanded the source of their funds. Although prior to this time Northern Ireland retained the authority to suspend property rights, it used it only sporadically. Upon the advent of Direct Rule, Westminster retained the powers for Northern Ireland but initially rejected incorporating them into the rest of the United Kingdom. The battle against drugs and, specifically, money laundering, however, changed this. Gradual in-

roads into property rights and the growth of regulatory mechanisms later moved into anti-terrorist finance and, from there, back into money laundering statutes. The attacks on September 11 did not so much create as accelerate a process already in motion, moving the whole regime into the regular criminal realm while divorcing the procedures from underlying criminal offenses. This shift into the realm of civil law weakened the burden of proof, the presumption of innocence, evidentiary rules, and the standards employed to determine guilt.

The United States' familiarity with anti-terrorist finance is much more recent. Executive Orders issued in the mid-1990s, combined with the 1996 Anti-terrorism and Effective Death Penalty Act, created the precedent for a sudden interest in the issue post-September 11. The drug war also contributed to its structure. Post-September 11 the United States aggressively changed its administrative, legal, and, to some extent, political agenda to interrupt the flow of money to terrorist organizations. Like the changes instituted in the United Kingdom, Title III of the 2001 USA PATRIOT Act, and the issuance of Executive Order 13,224 under the IEEPA, significantly impacted individual rights. Like the United Kingdom, the United States began to avoid criminal law; it went one step further, however, by trying to dodge the judiciary all together. The Executive drew on an intelligence standard—mere links to known terrorists—as a sufficient basis for the suspension of property.

Domestic measures form only part of the picture. Both states have taken a leading role in trying to establish international norms, particularly by working through the United Nations, the Financial Action Task Force, and the European Union. Such initiatives are relatively recent, and they tend to reflect the national approaches of the two regions, highlighting the importance of examining the effectiveness of the states' efforts to stem terrorist finance.

In Part III I built on these findings by suggesting that U.K. and U.S. measures undermine the states' counterterrorist regimes and carry negative implications for the financial sector more broadly. The primary reason for the negative effect may be the unsuitability of the money laundering regime to the counterterrorist realm. Suspicious Activity Reports, sensitive to politics, have flooded the systems, making the analysis of terrorist financial flows more difficult. Simultaneously, the states have forced the flow of funds outside the traditional structures, making it more difficult to find those responsible for the last attack and head off future attacks before they occur. The metrics used to gauge success, moreover, are ill-fitted to anti-terrorist concerns.

Another concern raised in relation to the current regimes centers on rights, where free speech, freedom of association, privacy, property, and

due process have been negatively impacted. While none of these are absolute—indeed, infringements on property rights are a staple of administrative and regulatory bodies—what makes the inroads into rights of concern is the omission of intent, use of secret evidence and *ex parte* proceedings, and stigma attached to being labeled complicit in terrorist activities. Public perception, moreover, so critical in any state's counterterrorist program, takes into account the status of rights. Here, the United States in particular has directed its new asset forfeiture laws, with the reduced evidentiary standards and sidestepping of judicial review, to Arab, Muslim entities. This has led to the alienation of a community very much needed in the midst of a deadly threat. The state's actions have also led to a drying up of funds to areas of the world that depend upon remittances for basic needs. Humanitarian consequences of these actions aside, the result is that many of these regions may become ripe for recruitment to terrorist organizations targeting the West. Unlike the United Kingdom, the United States refuses to allow for concessions to alleviate humanitarian suffering of those subject to U.S. sanctions. This does little to help battle al Qaeda's claims against the United States, which underscore the West's treatment of Arabic Muslims worldwide.

The use of black lists creates a special problem. Lacking important safeguards, this mechanism is increasingly being challenged and losing credibility in both the domestic and international realm. At the same time, U.S. refusal to allow external review of these lists opens the possibility of abuse. Here, the United States' efforts to democratize states may be at odds with the tools being provided to dictatorial regimes to maintain their control of the political apparatus. An independent process would strengthen U.S. and, indeed, British claims as to the involvement of individuals in violent movements, while protecting against the undermining of other important national security concerns. Related to black list concerns is the importance of propaganda in the battle against terrorist claims. Who is not included in such directories matters as much as who does appear on the lists. The absence of individuals that appear to carry a high level of culpability tends to breed cynicism and undermine states' efforts to present their approach as a just one. The United Kingdom appears to be recognizing the importance of such public communication as part of its overall efforts; this presents a promising way forward.

The United Kingdom and the United States, and terrorist entities that operate in both regions, are just now beginning to explore what the Internet and e-commerce mean for their respective endeavors. Issues related to anonymity, the lack of geographic bounds, and clandestine communications will be particularly important in this area in the coming

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decade. The wholesale transfer of money laundering tools, however, should be treated with some skepticism: many of the same concerns that haunt both states' anti-terrorist finance efforts, plus a host of additional issues unique to the electronic realm, attend. At the very least, this area deserves extensive examination. At stake is the ability of the United Kingdom and United States to head off the terrorist threat.