Reaching the White Collar Terrorist: Operational Challenges

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1. Introduction

In seeking to suppress the financing of terrorism, central banks face some of the same challenges as their law enforcement counterparts: the act of transferring funds, by itself, is neither evil nor something that should be discouraged. As we know, dirty money can be applied to legitimate purposes, a process that has come to be know as "money laundering." Similarly, clean money can be applied towards nefarious conduct, as in terrorist financing. In either case, the financial trail appears at first glance to be indistinguishable from legitimate commercial transactions. Rarely does a financial record, by itself, look suspicious.

To effectively ferret out money laundering or terrorist financing, central bankers must do what fraud investigators seek to do: look beneath the surface to uncover the nature of particular transactions to determine whether they are legitimate or properly-motivated. In this sense, the role of the central banker in countering terrorist financing is much like the criminal investigator, involving the same skills and operational issues. Like their police counterparts, central bankers are bound by their countries' legal tradition: they must operate under the rule of law. No one suggests otherwise.

To complicate matters, the applicable law varies from nation to nation. In terms of what central bankers can collect, review and disclose to law enforcement, what may be legal in Italy may be prohibited in Japan. This presents a challenge to establishing a worldwide solution to what is a global problem: no matter how much consensus exists on the existence and nature of the problem of terrorist financing, the specific means of combatting it will necessarily vary from country to country.

This article is premised on the notion that central banks can benefit from an understanding the law enforcement challenges faced by countries, like the United States, that have tried to target their law enforcement resources as the unique problem the white-collar terrorist. I do not intend to suggest that the American experience is universal, nor that should be used as an all-purpose template. My

goals are far more modest: offering some legal and historical insight from a law enforcement perspective. In my case, it is from the vantage of a financial prosecutor.

2. Why the United States?

Although experts were studying terrorist financing for years, it has only become a concerted global effort after 9/11. Countries like the United States, which now claim to be leading the war on terrorist financing, did not always take the problem as seriously as they should. This is a historical fact.

In the 1980s, for example, while American officials were imploring other countries to cease providing physical haven to terrorist groups like the Abu Nidal Organization and Hizballah, a unique brand of international terrorist was operating in our midst. White-collar professionals - doctors, lawyers, bankers, academics, journalists – came to the United States to raise funds for violent organizations with which they were associated. During this era, some of the most lethal terrorist organizations operating in the world, like the Palestinian Liberation Organization (PLO) and the Irish Republican Army (IRA), raised a significant portion of their operating budgets in North America. Indeed, it may not be a stretch to say that United States, Canada and Western Europe were serving as *financial* staging grounds for worldwide political violence .

How did this happen? In the United States, it was due in part to the our legal tradition. American law generally does not criminalize thoughts, speech or status. Instead, the law typically requires some act, combined with some malevolent intent. There is no American crime of being a terrorist, thinking terrorist thoughts or advocating terrorism. Persons here are not prosecuted for their speech or because of their associations.[2] Some people note that the United States Code defines the term "federal crime of terrorism." However, this provision merely provides a reference list offenses which are considered to be terrorism.[3] They offenses include such acts as hijacking, assassination, hostage taking, using weapons of mass destruction and the destruction of government buildings. To convict someone of these crimes, the U.S. prosecutor must prove that the defendant committed some particular prohibited act with the requisite malevolent intent. This was not an easy task where the terrorist was a financier, rather than front-line terrorist.

With this tradition, using American law enforcement to prevent acts of terrorism was a rather clumsy process. Even though our legal tradition recognizes the inchoate offenses of attempt and conspiracy, our police officers must wait until would-be terrorists show their hands and take an affirmative step in furtherance of their illegal plan, if in order to take an law enforcement action that will stand up in court. This is a dilemma which presents a thorny operational problem. It is risky to allow even a fledgling terrorist plot to proceed. Even if law enforcement could be inserted into the earliest stages of conspiratorial planning, the decision when to step

in and disrupt the terrorist plot is rarely unanimous. Questions inevitably arise. Relevant officials vary on fundamental issues. Do we currently have enough evidence? Should we wait for the plot to go further to assure that a jury will be more likely believe that they actually intended to commit the terrorist act, while raising the risk that the plot will succeed? In every undercover operation undertaken by American law enforcement – organized crime, drug conspiracies, or public corruption stings – there is controversy within the police ranks about when to "take it down" and make arrests. With terrorism, these challenges are exacerbated, since the stakes are so much higher. The risk of letting the terrorist planning we know about go further can literally be a matter of life and death.

This problem is made even more acute where the individual participants are not all involved in the *violent* aspects of the plot. If the plot involves white-collar professionals who themselves do not handle weaponry, they will generally not be in the same room as their bomb-throwing colleagues. Their role will be more subtle, like the raising and transfer of funds, and will often be accomplished from afar rather than through face-to-face meetings. These white collar types nevertheless play a pivotal role in the plot logistics.

Fortunately, the world now recognizes that white-collar terrorists should not escape scrutiny, and that effective counterterrorism efforts must necessarily focus on every participant in the plot, from the bomb-throwers to the financial facilitators. This is the main reason central banks are now involved in counterterrorism.

The world's central banks now find themselves focusing on the same problem that has plagued those of us within American law enforcement: how to discover and deal with the white-collar terrorist, in accordance with the unique legal tradition of their countries. Faced with this common problem, central banks share our operational challenges. They are being asked to monitor the flow of funds which are not clearly marked as derived from dirty sources or destined for nefarious applications. Like us, the world's central banks often do have full access to information that will easily disclose the identity of the bomb-throwers. Instead, their information will be limited to more peripheral players at either end of a financial transactions, for which financial institutions happen to maintain records. To meet this new challenge, it helps to understand some basic concepts and definitions.

3. What is Terrorist Financing?

Within American law enforcement, the term terrorist financing has traditionally referred to the act of knowingly providing something of value to persons and groups engaged in terrorist activity. This crime has been officially recognized within the U.S. since 1994, with the enactment of the first American "material support" crime.[4] Before then, such conduct could only be redressed through money laundering prosecutions.[5]

As a target of police action, terrorist financing is similar to money laundering, and plays a role in counterterrorism is akin to money laundering in the war on drugs. "Money laundering" is the process whereby money that is the product of some specified unlawful activity is cleaned, its source disguised, and is placed inside the banking or other mainstream financial system. "Terrorist financing," while it sometimes involves dirty money, differs in that its focus is on the application – rather than the illegal source – of funds. In terrorist financing, it does not matter whether the transmitted funds come from a legal or illegal source. Indeed, terrorist financing frequently involves funds that, prior to being remitted, are entirely clean and unconnected to any illegal activity. A common example occurs when legitimate dollars are donated to charities that, sometimes to the chagrin of donors, are in reality fronts for terrorist organizations.

Meanwhile, tracking terrorists' financial transactions is more difficult than following the money trails of mainstream criminal groups because of the relatively small amounts of funds required for terrorist actions and the range of legitimate sources and uses of funds. While many organized crime groups are adept at concealing their wealth and cash flows for long periods of time, their involvement in the physical trade of illicit drugs, arms, and other commodities, often exposes their revenues and expenditures connected to illegal dealings. In contrast, terrorist attacks are comparatively inexpensive. The financing of particular attacks is often overshadowed by the larger financial resources allocated for the group's political and social activities, making it more difficult to uncover the illicit nexus.

Within the United States, the enactment of the first American material support crime in 1994 was followed by additional legislative changes, starting with the 1996 enactment of the powerful "material support to designated terrorist organizations" crime, 18 U.S.C. § 2339B, and continuing to the recent changes enacted with the USA PATRIOT Act. Today, there are several different crimes, and many new investigative tools, available to U.S. law enforcement personnel involved in identifying and punishing the white collar terrorist. Central banks might benefit from an understanding of how these tools work, if only to consider what might be done within the context of their own countries' laws. Before examining their specifics, it is important to step back and look at American approach to counterterrorism as a law enforcement matter generally, since this involves something that is important to central banks: a legal tradition that is designed to protect individual liberties while facilitating commerce.

4. The American Law Enforcement Approach to Terrorism

Although the United States has been fighting terrorism since President Thomas Jefferson dealt with the Barbary Pirates in the 18th century, our treatment of terrorism as a law enforcement issue is a relatively modern development. This is partly due to the fact, until the last quarter century, the U.S. was not the target of choice of international terrorists. In fact, from 1960s to the 1990s, most acts of

terrorism against U.S. interests occurred abroad or in the air. Empirically, Americans who remained with their feet on U.S. soil could feel relatively safe from terrorist threats.

The evolution of the U.S. terrorism criminal statutes was driven by the establishment of principles of international law, generally through multilateral treaties negotiated under the auspices of the United Nations. These treaties include what are known as "extradite or prosecute" instruments, whereby signatory states are required to create certain terrorism-related crimes and the means of enforcing them.[6] They also include non-terrorism treaties which officially recognized customary international law concepts regarding the nations' rights to assert criminal jurisdiction over persons located and conduct occurring outside of their boundaries.

The U.S. Constitution recognizes the inviolable right to free expression and free association, and the right to be free from deprivations of liberty or property without "due process of law." As interpreted by American courts, persons in the U.S. cannot be prosecuted for their thoughts alone, nor can the U.S. criminalize conduct protected by the First Amendment. As a result, our criminal jurisprudence stresses definable acts, rather than thoughts or speech unattached to particular conduct.

Terrorism crimes are developed in the same manner as other law enforcement areas: policymakers determine what negative results should be prevented, and then craft criminal laws that take into account how such results are generally achieved. On occasion, acts that are criminalized are not ones that should necessarily be discouraged, if committed by persons not otherwise involved in the offensive result sought to be prevented. Ideally, laws are crafted to criminalize such conduct only when committed in particular circumstances.

5. The Narcotics Analogy

The best illustration of this concept comes from the war on drugs. To combat the growing scourge of illicit drugs on urban streets, American police aggressively enforce the crimes of importing, distributing, and possessing certain controlled substances. From there, criminologists determine how drug dealers typically operate, and help draft new laws to criminalize that particular conduct.

Drug dealers, for example, cannot enjoy the proceeds of their crime unless they could find a way to spend it without drawing attention to themselves. To do this, they rely on financial institutions to store and transfer their illegal proceeds, and find ways to make their proceeds appear legitimately derived. Recognition of this phenomoenon led to the creation of the crime of money laundering: engaging in financial transactions for purpose of making dirty money appear clean.

Part of the U.S. money laundering program involved establishing required reports that must be generated and provided to the Treasury Department upon the

occurrence of an act that conforms with the what we know about drug dealers' operations. For example, because illegal drugs are generally purchased with cash, drug dealers will typical make large cash deposits into their bank accounts. In the 1980s, U.S. banks were required to generate a report, known as a Currency Transaction Report (CTR), any time a customer deposits more than $10,000 in cash.[7]

Is this fair to the person in a legitimate cash business who happens to deposit cash in excess of $10,000? Note that the law merely requires the submission of a report. It does not mark the commission of a crime. The reporting requirement recognizes that there may be legitimate reasons to make large currency deposits. Persons who fall into that category should have no reason to fear the issuance of a report, assuming that they are paying taxes on their cash earnings.

The same may not true for drug dealers, of whom the required reports would draw unwanted scrutiny. To accomplish their necessary financial goals after the imposition of this new requirement, drug dealers divided their currency deposits into smaller increments, each of which would be under the $10,000 triggering amount for a CTR. To redress this phenomenon, Congress created the crime of "structuring currency transactions" to avoid the reporting requirement. Where bank records show that someone made several $9,900 deposits at several different banks in the same day, prosecutors can ask the jury to infer that the person had a large corpus of cash and intentionally structured it to avoid the CTR requirement, thereby committing a crime.

The structuring offense (31 U.S.C. § 5324) is an example of a carefully crafted statute that prohibits conduct that is not inherently offensive (making several large cash deposits in a single day) in those circumstances that separate the innocent from the guilty. It effectively closed a loophole available to drug dealers who aspired to use the U.S. financial system to wash their illegal proceeds, forcing them to rely on other means. If persons other than drug dealers were ensnared in the process, these people are limited to those who had reason to fear (sometime unknown to the prosecutors, even after conviction) the generation of a CTR. Sometimes, the motive for the structuring and the illegal nature of the structured funds remains unknown, even after the conviction.

This specific example of policymaking, the challenge to which reached the Supreme Court,[8] is less challenging than those in the counterterrorism area, where – unlike the act of depositing cash in excess of $10,000 – the peripheral conduct is sometimes constitutionally-protected.

6. The Counterterrorism Crime Challenge

I use a simple device to illustrate this law enforcement challenge, a construct I refer to as "overinclusive" targeting. This concept and its converse, "underinclusive" targeting, is not my creation. It is used in U.S. constitutional jurisprudence, to describe the standards for determining the constitutionality of laws that make distinctions between classes of people. Under the Equal Protection Clause of our Fourteenth Amendment, the constitutionality of such government-drawn distinctions depends on the nature of the classification (racial, gender, alienage, income level, etc.), the state's interest, and how closely the classification is drawn to achieve such interest.

In formulating criminal laws, governments are essentially creating a classification. Upon its enactment, a crime creates two classes of people: (a) those who are prosecutable under the statute and (b) those who are not. Persons in the first category, when charged with the crime, sometimes claim that the crime makes an unconstitutional distinction between what they are accused of doing and the conduct of other people which is not criminalized. Sometimes, they advance another constitutional argument: the enactment of the crime unconstitutionally infringes on their right to express themselves freely or associate with whomever they choose. These arguments are depicted by the following charts:

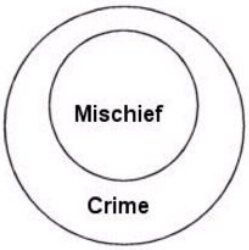

Figure 1.1

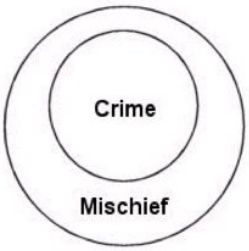

Figure 1.2

In the case of **overinclusive targeting** (Figure 1.1), the person charged claims that his conduct, while perhaps within the larger circle, is outside of the "mischief circle." His argument:

> *The crime I am charged with committing arbitrarily ensnares me in something that should not be prohibited, because my conduct is outside the realm of "mischief" and is no more offensive that the type of conduct other people who are not charged with this crime.*

Note that this is the type of argument that would be made by the non-drug dealer charged with structuring. It is, essentially, "I may be a lot of things – tax cheat, bad husband who wants to hide assets from my wife – but I am certainly not a drug dealer, which is what the structuring offense is designed to capture."

In the case of **underinclusive targeting** (Figure 1.2), the person is charged with conduct that fits within the interior "crime" circle. Her argument:

> *While I may have done something that I should not have done, look at all of the other people who did the same sort of thing but whose conduct lies outside of the inner circle of "crime." If you are serious about stopping the misconduct in which you are accusing me of engaging, the crime I am charged with should include them as well, and is unfair as applied only to me.*

Neither of these two arguments, cloaked as they are in notions of fairness, is likely to gain much traction with American courts. Motions to dismiss are generally not granted on unfairness arguments by criminal defendants. These arguments are essentially public policy arguments, by self-interested persons who find themselves ensnared in particular crimes. The better arguments would consist of a claim that the prosecution infringes on constitutionally-protected activity or fundamental rights.

In the first example, the person claiming to be aggrieved by the overinclusive targeting might argue:

> *I am charged with the crime of doing something that is protected by the First Amendment. While I do not contest the government's right to punish those people who actually detonated the bomb, you should not lump me into their scheme simply because I believed in their cause and was present in the room when they were planning the attack. By doing so, you are seeking to punish me for my legitimate exercise of First Amendment rights, while chilling the exercise of such rights by other people who will notice what you are doing to me and be deterred from expressing themselves.*

The second person, complaining about the underinclusive targeting, might argue:

> *Your prosecution of me for committing an act of terrorism overlooks other acts of terrorism committed by people motivated by things other than the right to Palestinian freedom and self-determination. You are selectively prosecuting me because of my race, while consciously overlooking the terrorism committed by radical Jews and Irish nationalists.*

To date, in the context of U.S. counterterrorism enforcement (described below), these arguments have failed, but they come closer to the type of arguments looked upon more favorably by U.S. courts. They also suggest the rarely-achievable ideal, depicted here:

Figure 1.3

This ideal, which I refer to us "optimal targeting," criminalizes virtually all of the mischief sought to be prevented, leaving few opening for criminal defendants to attack the enforcement program, either on constitutional or fairness grounds. In reality, criminal statutes and their enforcement are overinclusive or underinclusive, which does not present a problem if they do not infringe on constitutional protected activity.

The concepts of overinclusive and underinclusive targeting are particularly helpful when taken a step further and applied to the operational challenges raised by the white collar terrorist.

7. Philosophical Underpinnings of U.S. Terrorist Financing Enforcement Program

The United States Constitution, as interpreted by the Supreme Court, recognizes certain financial transactions as protected by the First Amendment, in particular the guaranteed freedoms of speech and association. The act of providing funds is a form of speech and association. Accordingly, any legal restrictions on such conduct must be tailored to conform with the First Amendment. This is not to say that financial transactions cannot be regulated or restricted. The constitutionality of monetary limits on political contributions and of embargoes which prohibit U.S. citizens from engaging in certain foreign transactions, for example, is well-established.[10]

Meanwhile, there is no question that some of the most lethal international terrorist organizations engage in legitimate philanthropic and humanitarian activity for people suffering within the regions in which they operate. For groups like Hamas and Hizballah, this activity is considered the benevolent counterpart to their violent activities, and is designed to win the hearts and minds of people in such regions while simultaneously killing innocent people through indiscriminate violence elsewhere.

Given the hybrid nature of many terrorist organizations, it would be an almost insurmountable law enforcement challenge to be required to trace the dollars coming from U.S. sources, through the shadowy Third World financial sector, to their ultimate use in purchasing bombs and bullets. Perhaps more importantly, even if such law enforcement efforts succeeded, it would be even more difficult to establish that the U.S.-based providers specifically knew that the funds were going to the malevolent, rather than humanitarian, purposes of the group.

These two factors led to the philosophical basis for the current U.S. terrorist financing statutory scheme: the notion that all money is fungible, and the benevolent intent of the donors cannot wash what is inherently a dangerous act – funding overseas groups that kill innocent persons. The funds provided by the humanitarian-minded donor are just as useful to the terrorist organization as the funds provided by persons who intend such funds to be used for violence.

This recognition has led to an approach to terrorist financing enforcement that is increasingly being adopted by other countries and in multilateral fora. It involves list-making. Starting in 1995, the U.S. adopted procedures resulting in the publication of lists of designated groups and persons that, according to facts contained in administrative records compiled for this specific purpose, are conclusively determined to be terrorists. Upon the inclusion of any group or person on these lists, it becomes a crime for anyone subject to United States jurisdiction to engage in financial transactions with the group/persons, even if the transaction itself is not designed to promote terrorism.

For American law enforcement, the list-making approach to terrorist financing effectively altered the challenge. Instead of tracing monies from our shores to their ultimate use in terrorist acts, the enforcement challenge now is to establish that persons here engaged in financial transactions with persons they knew were acting on behalf of designated terrorist groups and individuals. Because the crimes of terrorist financing do not require a completed crime, if we can establish sufficient proof of intent, persons within the U.S. can be prosecuted for transactions where the funds never make it overseas to their intended destination. Defendants merely need to agree to provide funds to a terrorist organization, and send a payment in furtherance of this goal. This powerful law enforcement tool is the main terrorist financing crime of 18 U.S.C. § 2339B, known as the crime of providing "material support to designated terrorists." Enacted in April 1996, this crime did not become fully operational until the Secretary of State issued the first list of "Designated Foreign Terrorist Organizations" (FTOs) on October 7, 1997.

8. Section 2339B and the Designation of Terrorist Groups

Section 2339B prohibits anyone "within the United States or subject to the jurisdiction of the United States" from providing "material support or resources" to a

designated foreign terrorist organization (FTO). The offense portion of the statute reads:

> **§ 2339B. Providing material support or resources to designated foreign terrorist organizations**
> **(a) Prohibited activities.–**
> **(1) Unlawful conduct.**--Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

The Secretary of State designates FTO's, in consultation with the Attorney General and the Secretary of the Treasury. These designations are based on definitions contained within the Immigration and Nationality Act. FTO designations are valid for two years and are renewable. The first FTO list, announced by Secretary of State Madeleine Albright in October 1997, consisted of twenty-nine organizations. Certain groups have been added and removed, and the current FTO list contains 37 groups.[11]

The Secretary of State's FTO designations are the culmination of an exhaustive interagency review process in which information about a group's activity, taken both from classified and open sources, is scrutinized. The State Department, working closely with the Justice and Treasury Departments and the intelligence community, prepares a detailed administrative record which documents the terrorist activity of the proposed designee. Seven days before publishing an FTO designation in the Federal Register, the Department of State provides classified notification to Congress. Upon their announcement, designations are subject to judicial review, triggered by a challenge from the group itself. This has occurred a few times since the publication of the original FTO list. In addition, one lawsuit was filed independently by the prospective donors of two FTOs, arguing that the designation infringes on their First Amendment freedoms of speech and association, and seeking a declaratory judgment that the statutory scheme was unconstitutional. The constitutionality of the FTO designation process has been thoroughly upheld.[12]

The other two terrorist lists that are relevant to U.S. terrorist financing enforcement involve the International Emergency Economic Powers Act (IEEPA), which permits the prosecution of persons who engage in financial transactions with persons and organizations the President has determined to be a threat to United States national security.[13] The U.S. Treasury Department administers these programs under its economic sanctions authority. The two lists are entitled Specially Designated Global Terrorists (SDGTs) and State Sponsors of Terrorism (SST). A third list, which contains groups and individuals whose conduct threatens the Middle

East Peace Process, is referred to as Specially Designated Terrorists (SDTs), although its usefulness is limited to transactions that occurred between January 1995 and September 1997 since all SDTs are SDGT, and many are FTOs.

The SDGT list is premised on Exec. Order No. 13224,which authorized the U.S. Treasury Department to block assets and freeze bank accounts of these designated groups/individuals.[14] There are currently over 350 SDGTs, and that number grows from week to week.[15] Any willful violation of these blocking orders is a criminal IEEPA violation.[16] The SDGT list now includes all of the organizations on the State Department's list of Foreign Terrorist Organization (FTO), plus many more. Thus, there is a potential IEEPA violation in every § 2339B investigation. Unlike the FTO list, the IEEPA list of designated entities is not limited to foreign groups. The Texas-based Holy Land Foundation for Relief and Development (HLFRD), for example, was designated under IEEPA on December 7, 2001. It is also not limited to organizations, as the IEEPA list includes Usama bin Laden himself, as well as HAMAS leader Mousa Abu Marzook. As a result, financial transactions with HLFRD, bin Laden, or Marzook, without the requisite Treasury licensing, is a crime, even though none of the three are FTOs.

9. Wider Benefits of the List-Making Approach to Terrorist Financing

Just as the terrorist lists changed the American law enforcement landscape, they assist central bankers in their counterterrorism role. For central banker, the main lists are issued by the United Nations pursuant to Security Council Resolution 1373.[17] As with American police, the central banker's job is made easier by these lists. How? The impact can be depicted visually, using Hamas as an example:

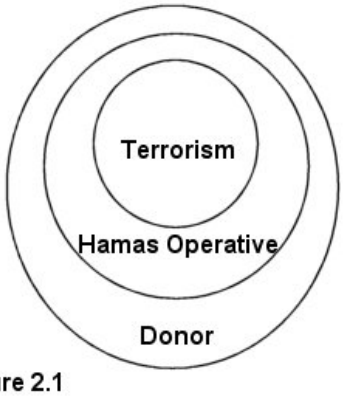

Figure 2.1

Consider this first in the context of law enforcement, with the American statutory regime described above.

An American prosecutor obtains indictments against three different persons: (1) the Hamas leader within the smallest circle; (2) the Hamas operative in the

middle circle; and (3) the person who knowingly provided funds to the Hamas operative, in the outer circle.

The third of these defendants, indicted under § 2339B, makes the following argument to the court:

> *I am charged with doing something that is not inherently dangerous – providing funds to the charity of my choice. In making this donation to Hamas, I intended my funds to be used for philanthropic goals, never violence. The United States government, if anything, should encourage charitable gift-giving. My decision to give to Hamas is protected by my First Amendment rights to express myself however I want, and to associate with whomever I choose. Moreover, people looking at what you are doing to me will naturally be deterred from giving funds to Hamas, and their First Amendment-protected activities will be chilled.*

The prosecutor responds:

> *Section 2339B represents Congress' clear intent to dry up the United States source of funds for international terrorists. Under this statute, the United States announces the groups we view as designated foreign terrorist organizations. That action marks groups that use violence to achieve their political goals, and the fact that they may also engage in philanthropy does not change the terrorist nature of that organization. As a person within the United States, the defendant is prohibited by § 2339B from providing any funds to certain groups, including Hamas, no matter how the defendant intends Hamas to use his donated funds. This is a reasonably-tailored prohibition, supported by clear legislative history and an administrative record, which comports with First Amendment jurisprudence, just as the laws that prohibit United States citizens from purchasing items produced with embargoed countries have been upheld. In addition, the statutory scheme has been upheld when challenged on these same grounds, by persons who are alleged to have engaged in the same type of conduct as the defendant.*

Note that the prosecutor's argument responds to the arguments of the defendant situated in the outer-most ring, the one furthest removed from the violent activity depicted in the inner circle. With regard to the constitutionality of § 2339B as applied to particular facts, the conduct of the other two defendants is an even easier argument. That is, these two defendants would have a more difficult time arguing that their alleged conduct is protected expression or association. Faced with these arguments, U.S. courts have sided with the prosecutor.[18]

For the central banks, the promulgation of terrorist-related lists similarly reorients their task. It is no longer necessary for central banks to glean the nature of innocent-looking financial transactions and attempt to fathom the intent of the

parties. The inclusion of a particular name on a list solves that problem. It represents a statement by the world's terrorism experts that there is sufficient basis to conclude that a particular entity or individual is in involved in terrorism. With the terrorism lists, financial institutions are relieved of the burden of determining whether a particular transaction is clean or dirty. If the transaction involves an entity that appears on a terrorism list, the transaction is *de facto* dirty. The bankers' new operational challenge becomes determining whether the particular financial transaction involves such listed persons/entities, a task that can be made easier by increasingly available bank compliance software.

This task, however, that will be complicated as designated terrorist react to the lists and disguise their identity or establish front companies to act on their behalf. This is inevitable, since terrorists are opportunistic criminals. While financial institutions, like their police counterparts, will enjoy the operational shortcuts that comes from terrorist lists, they must continue to be vigilant in developing their own expertise and ability to discern suspicious activity from transactions that are designed to appear innocent. An important aspect of developing this expertise is familiarity with intelligence and the craft of those who practice it as a profession, the final part of this article.

10. The Concept of "Actionable Intelligence"

Because terrorist financing is a national security matter that transcends national boundaries, it will involve foreign intelligence. Like their law enforcement counterparts who are new to this area, central banks should understand how the concept of intelligence, and the role intelligence concepts play in countering the financing of terrorism.[19]

The "intelligence cycle" is a well-known term among intelligence professionals. It refers to the collection, production, and dissemination of information. The term "cycle" denotes a never-ending process in which the needs of the recipient – in intelligence parlance, the "consumers" -- are constantly communicating with those responsible for developing the intelligence (the "collectors" and "producers"), who targeting their methods accordingly.

In theory, the goal of intelligence is always some action taken on its basis. Intelligence is produced for the benefit and use of operational decisionmakers. Within the U.S., every agency that has a role on executing Presidential decisions in the national security arena are consumers of intelligence; they cannot offer options without having the best sources of information and analysis. "Raw intelligence" is a colloquial terms meaning collected intelligence information that has not yet been converted into finished intelligence. Raw intelligence become "finished intelligence" through the analytical work of various experts within the intelligence cycle. The goal of the consumers is the receipt of "actionable intelligence:" information that is sufficiently reliable for decisionmakers to rely on it in taking actions.

The standards for determining the reliability for a particular action depends on the standards have evolved or been set by the particular consumer. For the law enforcement consumer, the ultimate form actionable intelligence is *evidence* -- facts that can be introduced in court -- although law enforcement actions are sometime taken on the basis of "lead" information that would not qualify as evidence. For other types of operational decisions – whether to authorize military action or whether to place a particular name on a list of terrorist organizations, for example -- the standards may vary

Where do the central banks fit within the intelligence cycle? The answer depends on the particular country. In some nations, the Financial Intelligence Unit (FIU) suggested by the Financial Action Task Force (FATF) recommendations is located within the central bank. In some, the FIU is a collector of information. In others, it is a consumer of information collected by other government or private components.

The United States' FIU is known as the Financial Crimes Enforcement Network (FinCEN), a component of the Treasury Department. Where does FinCEN fit within the U.S. intelligence community? The difficulty in answering this question reflects the changing nature of counterterrorism and intelligence within the U.S., which is again illustrated by how American law enforcement has evolved to deal with the terrorist threat.

After 9/11, police officers and prosecutors ceased being merely consumers of intelligence. The USA PATRIOT Act permitted information-sharing between intelligence and law enforcement that was previously proscribed. Information collected by grand jury subpoena or through judicially-approved electronic intercepts in criminal cases is now shared with non-law enforcement components of the U.S. intelligence community. At the same time, personnel assigned to criminal law enforcement are now privy to the full range of foreign counterterrorism intelligence. With this change, law enforcement has become both a consumer and collector of intelligence.

Is this not also true of the FIUs and of the central banks? Take the United States as an example. FinCEN is a *collector* of information. Like any intelligence agency, it develops intelligence products in accordance with the consumers' need for particular information and analysis. How does FinCEN collect? With regard to the raw intelligence, it comes from the private sector, in reports that financial institutions are required to file with FinCEN under the Bank Secrecy Act.

In its relationship with the private sector, FinCEN is an intelligence *consumer*. It tasks the collectors – American banks – to collect and report certain information. This tasking is accomplished through Treasury-promulgated regulations in which banks are told what they should report, and how. The resulting intelligence – in the

form of such documents as Suspicious Activity Reports (SARs), Cash Transaction Reports (CTRs), and Currency and Monetary Instrument Reports (CMIRS) – are collected, finished and disseminated by FinCEN to its consumers.[20]

This American example hopefully illustrates how central banks fit into the world of counterterrorism enforcement. Some central banks will be consumers of information collected by others. Others will collect, analyze and disseminate financial information within their control, in hopes of providing actionable intelligence for their country's decisionmakers. No matter how a particular central bank fits within their countries' legal and regulatory apparatus, the operational challenges will be similar to what is being faced by others throughout the world, including law enforcement professionals who, like their central bank colleagues, are continuing to think of creative ways to redress the problem of the white collar terrorist-support infrastructure. I submit that the reliance on terrorist lists makes central banks both collectors and consumers of intelligence, for these lists - though they are intentionally public – are an example of disseminated intelligence. Armed with these lists, the consumer becomes the collector, and the intelligence cycle repeats.

11. Conclusion

The American law enforcement experience does not provide the answers to every operational challenge faced by central banker in countering the financing of terrorism. It is merely one perspective. I agree that it is vitally important for experts from a variety of countries and background get together to share experiences, through such vehicles as this conference sponsored by the International Monetary Fund (IMF), of which I was honored to be part.

Endnotes

1. This article is adapted from Jeff Breinholt*, Counterterrorism Enforcement: A Lawyer's Guide*, now available through the U.S. Department of Justice Office of Legal Education. The author can be reached at jeffrey.breinholt@usdoj.gov.

2. There are some limited exceptions to this rule. For example, it is a U.S. crime to threaten to take the life of the President (18 U.S.C. § 871), and persons can be prosecuted on the basis of their associations under the Racketeer Influenced and Corrupt Organization (RICO) Act (18 U.S.C. § 1961 *et seq.*)

3. See 18 U.S.C. § 2332b(g)(5).

4. 18 U.S.C. § 2339A.

5. American money laundering laws prohibit the transfer of funds from a place in the United States to a place outside of the United States with the intent to promote a "specified unlawful activity" (SUA). 18 U.S.C. § 1956(a)(2)(A). The crimes of terrorism are SUAs.

6. Air violence, for example was addressed in the December 16, 1970 "Convention for the Suppression of Unlawful Seizure of Aircraft" (the Hague Convention) and the September 23, 1971 "Convention for the Suppression of Unlawful Act against the Safety of Civil Aviation (the Montreal Convention).

7. This requirement grew out of the Bank Secrecy Act (BSA), Pub.L. 91-508, Titles I, II, Oct. 26, 1970, 84 Stat. 1114 to 1124, which added nine sections to Title 12 of the United States Code. 12 U.S.C.A. § 1951 *et seq.* In 1982, provisions were added to Title 31 which to require "certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311. These records include those of "a resident or citizen of the United States or a person in, and doing business in, the United States ... when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency" (18 U.S.C. § 5314), reports on exporting and importing monetary instruments totaling more than $10,000 (18 U.S.C. § 5316), and reports when a domestic financial institution is involved in a transaction of more than $10,000 in U.S. coins or currency (18 U.S.C. § 5313).

8. *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed (1994).

10. *See Buckely v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed (1976).

11.A list of these groups can be found at http://www.state.gov/s/ct/rls/fs/2003/12389.htm.

12. *See, Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000); *People's Mojahedin Org. of Iran v. Dep't of State,* 182 F.3d 17 (D.C. Cir. 1999) (rejecting challenges by two designated groups); *National Council of Resistance of Iran v. Dep't of State,* 2001 WL 629300 (D.C. Cir. June 8, 2001) (groups that have sufficient United States presence are entitled to procedural due process).

13.50 U.S.C. § 1701 *et seq*.

14. 66 Fed. Reg. 49,079 (September 23, 2001).

15. A list of these designees can be found at http://www.treas.gov/offices/eotffc/ofac/sanctions/t11ter.pdf.

16. 50 U.S.C. § 1705.

17.See http://www.un.org/Docs/sc/committees/1373/resolutions.html.

18. See endnote 12.

19. The most accessible source of information on the structure of the U.S. national security apparatus is a CIA publication entitled *A Consumer's Guide to Intelligence.*

20. See endnote 8.