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Fighting Terror with Civil Litigation: The Wrong Approach

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Historically, the United States has respected the international customary legal principle of sovereign immunity – refusing to allow foreign governments or heads of state to be sued in U.S. courts for their public acts. Recent changes to the 1976 Foreign Sovereign Immunities Act, however, enable U.S. citizens to bring civil suits against countries on the State Department's 'terrorism list'. While these changes have enjoyed strong Congressional support, they are ultimately damaging to U.S. political and diplomatic interests and, potentially, to its justice system. Outstanding judgments against sovereign entities complicate U.S. foreign policy while leaving the United States open to similar litigation in other countries' legal systems. At the same time, the terrorist state litigation has the potential to politicize U.S. courts unduly by dragging them into foreign policy battles. Nor is civil litigation in U.S. courts a useful weapon in the war against terror, which can be fought much more effectively through military, political, and diplomatic means. The U.S. administration should work with Congress to revise or redraft this legislation.

Sovereign Immunity

For most of its history, the United States has abided by the international legal principle of "sovereign immunity," whereby foreign states may not be sued in other countries' courts for their public acts. As early as 1812, the U.S. Supreme Court recognized this principle by finding a French naval vessel immune from the jurisdiction of U.S. courts. The 1976 Foreign Sovereign Immunities Act (FSIA) formalized the evolving customary law on the subject, while recognizing an exception for disputes in which a foreign state is acting as a commercial agent. The FSIA was also significant because it removed from the State Department, and placed with the courts, the burden of deciding whether a foreign state should or should not have immunity from suit. Prior to the enactment of FSIA, the State Department had principal responsibility for making immunity decisions in individual cases.

In 1996, however, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), Section 221 of which explicitly allows civil lawsuits against states that support terrorism. The result has been a struggle between U.S. administrations that have sought to defend traditional sovereign immunity and a Congress eager to punish rogue states and to allow its victimized constituents a means of redress. This conflict has manifested itself primarily through disputes over whether and how

huge judgments that plaintiffs have won in the courts should be satisfied.

An illustrative example of this is the lawsuit filed by Stephen Flatow under the AEDPA against the government of Iran for the death of his daughter at the hands of a suicide bomber in Israel. In 1998, a federal district court awarded Flatow more than $250 million. Flatow's victory in the courts was just the beginning of his struggle, however. The administration did not support his requests for help in seizing Iranian assets. With the State Department's blessing, a federal court ruled that Flatow could not attach Iranian assets seized by the United States in connection with the hostage crisis. A principal point of contention between Flatow and the administration was the Foreign Military Sales Fund, which contains monies that Iran claims it is owed for undelivered military equipment paid for before the 1979 revolution. The administration was similarly reluctant to attach frozen Cuban assets to secure a judgment against Cuba for its role in the 1996 shooting down of two civilian aircraft. Administration opposition thus prevented Congressionally-supported lawsuits from achieving their full goals.

In the meantime, other plaintiffs have brought suit and won other massive judgments, which to date total more than a billion dollars. As the judgments mounted, so did Congressional ire at the Clinton administration's refusal to unblock frozen assets. Finally, the administration brokered a compromise whereby it finally agreed to allow payment in suits against Iran, while sticking to its insistence that the frozen Iranian Military Sales accounts not be touched. In broad terms, the payments to successful plaintiffs will come from a combination of U.S. Treasury funds and rental proceeds generated by Iranian properties in the United States. The claims by plaintiffs against Iran are therefore effectively subrogated to the government of the United States, and, by extension, to its taxpayers.

The Case Against AEDPA: Why it Runs Counter to U.S. Interests

The Antiterrorism and Effective Death Penalty Act runs counter to U.S. interests for several reasons. Most importantly, it complicates U.S. diplomacy by allowing unpredictable U.S. civil litgation to play a role in important bilateral relationships. Furthermore, it leaves the United States and its assets open to similar litigation abroad and thrusts U.S. courts into the heavily politicized role of rendering judgments against hostile foreign governments.

AEDPA Hamstrings U.S. Policymakers

As the lessons of September 11th indicate, there will be times and events that demand the isolation and punishment of states known to support terrorism. A decision to pursue this course, however, must be the result of considered foreign policy rather than the *de facto* product of unpredictable courtroom litigation. The intrusion of U.S. civil litigation into foreign policy complicates intergovernmental diplomatic efforts.

For supporters of the lawsuits, the huge judgments against terrorist states are equivalent to a program of economic sanctions against these states, further discouraging their involvement in terrorism. Should the U.S. leadership decide that a sanctions regime is a necessary component in isolating a state for its support of terrorism, there are far more effective ways of implementing that regime than through the lengthy and unwieldy process of U.S. litigation. Moreover, a consensus is emerging that sanctions regimes need to be more targeted, 'smart', and multinational to be effective. Large U.S. court judgments against states like Iran do not further this effort.

At the same time, the lawsuits have the effect of limiting essential flexibility in U.S. diplomacy. Managing relations with a difficult regime requires that the U.S. administration have a great deal of leeway, and the new war on terrorism requires fashioning and sustaining coalitions of diverse states, including some that may have supported terrorism in the past. In some places, such as Iraq, lawsuits will simply be ineffectual in furthering U.S. policy goals because of the intransigence of the regime in power. In other countries, where there is at least a minimum level of political openness, a huge overhang of potential claims would pose a strong disincentive to

improving bilateral relations, domestic political reform and integration by these states into international legal and financial regimes. The Flatow decision, for example, came down just as Mohammad Khatami was consolidating his political position in Iran, and administration officials at the time worried that the ruling might hinder rather than help his cause.

In this context, granting plaintiffs, their lawyers, and U.S. courts the ability to impose massive judgments on foreign states makes little sense. The administration has limited control over which cases will be pursued and controversy surrounds the question of how terrorists are defined. The timing of court rulings is unpredictable and their announcement may add unnecessary complexity to ongoing intergovernmental negotiations. These are not arguments for a gentle approach toward states that support terrorism; they are arguments for keeping important bilateral relationships in the hands of the administration and the Congress rather than in the courts.

U.S. Vulnerability to Reciprocal Suits

There is reason to fear that the AEDPA has started a process that will, in the not too distant future, threaten United States assets abroad. With its worldwide interests, the United States would be particularly vulnerable should foreign countries imitate U.S. legislative initiatives and permit suits against the U.S. government and its instrumentalities abroad. Testifying before Congress in 1999, then Deputy Treasury Secretary Stuart Eizenstat made this point:

> Because we have more diplomatic property and personnel abroad than any other country, we are more at risk than any other country if the protections for diplomatic and consular property are eroded. If we flout our obligations to protect the diplomatic and consular property of other countries, then we can expect other countries to target our diplomatic property when they disagree strongly with our policies or actions.

Reasoning like this had little impact in the environment that attended Congressional deliberation on the issue. Implicit in the Congressional attitude on the subject may have been the dangerous assumption that the dominant U.S. position in the world allows it to depart from international norms without paying the price in reciprocal steps by other states. Should this assumption prove false, it could have damaging consequences for the U.S. government and citizenry.

U.S. Courts as Foreign Policy Makers

Less apparent, but potentially just as serious, is the danger that the 'terrorist state suits' will overly politicize U.S. courts. This danger was recognized in the case of *Banco Nacional de Cuba v. Sabbatino,* when the Supreme Court was asked to recognize the illegality under international law of Cuban expropriations of U.S. property in the 1960s and to return the proceeds from the sale of expropriated property to their rightful owner. The Court wisely demurred, noting the importance of preserving judicial independence from international political questions. *Sabbatino*'s lesson for today's courts is that they should avoid entanglement in essentially political disputes. Courts that regularly adjudicate cases against terrorist states run the risk of becoming unduly politicized.

Today's judges have little choice but to try these politically charged cases. Defending his opinion in the recent case brought by former hostage Thomas Sutherland, Judge Royce Lamberth argued that, "…today's holding is not a foreign policy edict; rather it is an edict on the rule of law." In a narrow sense, he is correct. He and other U.S. judges who must try terrorist state lawsuits are correctly applying properly enacted U.S. law. But there is no doubt that these enactments—which violate traditional understandings of sovereign immunity—place the courts on the front lines of a foreign policy debate.

Not surprisingly, the foreign states accused in civil cases normally neither appear to defend themselves nor acknowledge the jurisdiction of U.S. courts over them (though Libya has defended itself in some cases). Also problematic from a procedural standpoint is the fact that the very basis of

jurisdiction in such cases is the designation of the state-defendants as supporters of terrorism by the U.S. government. Thus, the fairness of the proceedings themselves is open to question, and the temptation for judges to make unwise forays into foreign policy is keen.

Punishing Terrorist States and Compensating Victims

There are other – far more effective – means to address the problem of international terrorism (and the legitimate grievances of U.S. citizens) than lawsuits filed in the United States against governments believed to sponsor terrorism. At one end of the spectrum is the use of military force to punish terrorist networks and the states that support them. At the other end is the criminal justice paradigm, or the notion of individual criminal responsibility, which lies at the heart of current international prosecutions for war crimes in the Balkans and in Rwanda. The United States supported the criminal justice paradigm in bringing the bombers of Pan Am Flight 103 to justice. This more targeted approach against the individual government officials and private actors responsible for terrorism places blame where it belongs and is consistent with the developing norms of international criminal responsibility.

Ending terrorist state litigation need not mean ending compensation to American victims of terrorism. Congress, through separate legislation, could easily authorize federally-funded compensation to those who have been victims of international terrorism. Addressing these very legitimate claims, however, must not simultaneously constrain U.S. diplomacy, threaten U.S. interests abroad, and damage U.S. domestic institutions.

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