



Should Trial Lawyers Make Terror Policy?

By Ted Frank

Six years after September 11, there is a healthy and extensive debate about the appropriate relationship between and scope of the powers of the three branches of government in addressing terrorism.¹ Perhaps surprisingly, however, there has been little discussion of the role of unelected trial lawyers, and how the civil justice system and the judicial branch's friendliness to regulation through litigation gives attorneys a financial incentive to use state and federal courts to undo sensitive decisions of the elected branches of government. Worse still is that the trial bar has lobbied for such an expanded role, and Congress has aided and abetted its goals.

One can imagine a parody—a team of wing-tipped attorneys parachuting into the wilds of Waziristan, armed with subpoenas forcing Osama bin Laden to produce all relevant documents and secure his attendance at a twenty-day videotaped deposition (damn the Geneva Conventions against torture). The legal and photocopying bills alone would crush al Qaeda.² The reality is much more prosaic—and less amusing.

Jack Landman Goldsmith's new book, *The Terror Presidency*, notes the burden of fear of hindsight bias on administration policies:

In my two years in the government, I witnessed top officials and bureaucrats in the White House and throughout the administration openly worrying that investigators acting with the benefit of hindsight in a different political environment would impose criminal penalties on heat-of-battle judgment calls. These men and women did not believe they were breaking the law, and indeed they took extraordinary steps to ensure that they didn't. But they worried nonetheless because they would be judged in an atmosphere different from when they acted, because the criminal investigative process is mysterious and scary, because lawyers' fees can cause devastating financial losses, and because an investigation can produce

reputation-ruining dishonor and possibly end one's career, even if you emerge "innocent."

This burden on the nation's anti-terrorism policy is further exacerbated by the misuse of the civil justice system, which, because of missteps by Congress and the judiciary, is structured to create incentives for private individuals and state governments to interfere with national policy goals for self-serving gain.

Misuse of Civil Anti-Terrorism Laws to Target Banks

In the 1970s, many state courts began to decide that the intentional acts of criminals should not bar plaintiffs from collecting money from others with deeper pockets. If you are carjacked, sue the parking lot owner. Most legislatures have yet to reverse this radical legal change.

Thus, trial lawyers, thanks to New York Supreme Court Justice Nicholas Figueroa's generous rulings and jury instructions, persuaded a jury in October 2006 that the terrorists who planted a truck bomb in the World Trade Center garage in 1993 were

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only 32 percent responsible, while the Port Authority of New York and New Jersey was 68 percent responsible—and therefore, under New York law, wholly on the hook for \$1.8 billion in damages.

After 9/11, lawsuits would have bankrupted several corporate victims of the attacks were it not for a \$7 billion, taxpayer-funded payout to potential plaintiffs. Even so, several dozen claimants opted for litigation. Naturally, their lawyers have sued everyone from the airlines to Boeing to Motorola to New York City. Attorneys are asking for billions of dollars in damages, and the first of these cases will go to trial on September 24. Banks have not been immune from terrorist-related lawsuits, either. They are being hauled into court because of who has accounts at their institutions.

Federal laws permit parties injured by an act of terrorism to recover treble damages and attorneys' fees in civil suits against terrorists. Fair enough. But an act of terrorism may also include "knowingly providing material support or resources to a foreign terrorist organization."³ The vagueness and breadth of this language is the source of the mischief. Following the 9/11 attacks, the United States started cracking down on front organizations for Islamic terror groups that posed as charities, and some of these faux charities had accounts at international banks. Bingo. Lawsuits are pending now that claim, in effect, that the banks should have known then what the U.S. government did not decide until years later.

For example, the United States designated Interpal and Comité de Bienfaisance pour la Solidarité avec la Palestine (CBSP), among others, as international terrorist organizations on August 22, 2003. These two outfits channeled funds to the Orwellian-named Union of the Good militant group, which in turn supported Hamas. Three days before the designation, on August 19, 2003, a Hamas suicide bomber, Raed Abdul Hamid Misk, blew himself up on the Egged No. 2 bus in Jerusalem, killing and wounding dozens.

The American victims and their families have sued over this and other attacks, but they have sued neither Misk—who, now beyond earthly jurisdiction, will have to answer to a higher authority—nor Hamas, nor Union of the Good, nor even Interpal or CBSP. Rather, the families are suing National Westminster Bank (NatWest), where Interpal happened to have some

bank accounts, and Crédit Lyonnais, which once held CBSP money.

The 2006 complaint against Crédit Lyonnais spends most of its seventy-nine pages listing heinous acts of Hamas and their consequences. So what does this have to do with Crédit Lyonnais? A small section of the

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complaint claims that Crédit Lyonnais was supposed to be monitoring Al Jazeera in case an official of one of its customers, such as CBSP, said something incriminating. Perversely, the fact that Crédit Lyonnais reported suspicious banking activity to regulators is supposed to be evidence that the banks "knew" that the two charities were supporting terrorism.

The plaintiffs make much of the fact that Israel designated CBSP and Interpal

unlawful organizations in the late 1990s, but the United States did not until 2003—and France and Britain have yet to do so, despite extensive investigation. The banking system will grind to a halt if a bank must scrutinize every customer to the degree plaintiffs argue should have been done for CBSP and Interpal—a degree of scrutiny greater than their own home countries have established.

France and Britain may well be wrong to assess these Hamas-affiliated organizations as "humanitarian." Money is fungible, and Hamas can readily shift its own funds from feeding constituents to making bombs, but criminal prosecutors, not contingency fee-hunting trial lawyers, should chase terrorist financing. The latter are more interested in wealth than guilt, and they have motivation to attempt to attach blame to the deepest and most readily available pocket instead of the actual culpable parties. Nor do they bear the consequences when they undercut U.S. diplomatic efforts by treading on the wrong toes.

Both NatWest and Crédit Lyonnais filed motions before Judge Charles Sifton of the Eastern District of New York to dismiss the cases against them, but without success. The lawsuits are going forward and are in the pretrial discovery stage.

If courts are not going to apply the antiterrorism laws sensibly, Congress should amend them to make clear that civil liability is limited to those who commit criminal acts of international terrorism and to those who aid and abet with specific intent to commit terror. Otherwise, terrorists can damage the global economy simply by inducing fratricidal litigation.

The Blackwater Suits

For better or worse, twenty-first-century American defense strategy strongly relies upon the use of private contractors to supplement American soldiers.⁴ There are nearly 100,000 contractors in Iraq, 20,000 of which are serving in a quasi-military role.⁵ Using private contractors permits the armed forces to expand and contract quickly in response to specific military operations without added human resources expense.

Twenty-three Blackwater contractors have died in Iraq alone.⁶ Some of these deaths, including those of the four contractors notoriously murdered in a Fallujah ambush in March 2004, have resulted in litigation. The families of the Fallujah four sued Blackwater in North Carolina state court in Wake County.

Plaintiffs' attorney Daniel Callahan is clear that his goal is more than simple recovery for his clients: "As we expose Blackwater in this case, it will also expose the inefficient and corrupt system that exists over there [in Iraq]." ⁷ He has successfully lobbied the Democratic Congress to hold hearings that promote his litigation, in part by calling Blackwater an "extremely Republican" company.⁸

Attempts to remove the case to federal court were rebuffed.⁹ Though Blackwater employees sign a waiver agreeing not to sue their employer, and surely assume the risk by accepting employment (and premium salaries) in a war zone, the state court has refused to enforce the waiver and permitted the suit to proceed. Finally, a federal court enforced the arbitration provisions of the original contract and compelled arbitration.¹⁰ Other courts have dismissed cases against Halliburton,¹¹ but a similar case against Blackwater is pending in federal court in Florida, where the Eleventh Circuit will decide if district judge John Antoon was correct that allegations of "negligence by contractors in the provision of services" is actionable.¹²

In 1950, the Supreme Court ruled that American soldiers could not sue the military over injuries from military service,¹³ but private contractors are not being given the same immunity consistently and some courts are not even permitting them to create contractual arrangements that do so. Perhaps, contrary to the wishes of the Defense Department and the Congress that approves its budget, we as a society do not want private contractors

involved in battlefield actions. Any sensible view of federalism, however, would have that decision made by the federal government rather than by trial lawyers and state courts punishing private parties with civil liability for military decisions, even bad ones. In any other liability regime, military contractors will be serving two masters: the military chain of command and a civil liability system that second guesses their work. The expected expenses of liability will raise prices to taxpayers. Congress should close this loophole in the Defense Base Act.¹⁴

Congress Muddies the Preemption Waters

In *CSX Transportation v. Williams*,¹⁵ railroads successfully blocked an ordinance by the District of Columbia that, on grounds of preventing terrorism, purported to ban all

shipments by rail or truck of certain hazardous materials within 2.2 miles of the U.S. Capitol. Such a law would have destroyed the ability of railroads to function effectively in interstate commerce as other jurisdictions engaged in their own "not-in-my-backyard" laws. The Department of Transportation intervened and successfully argued that the D.C. ordinance was preempted by federal regulations¹⁶ and the Federal Railroad Safety Act.¹⁷ Such preemption would also bar state-court civil litigation against

rail carriers complying with federal regulation were they to be attacked by terrorists and were trial lawyers to seek to blame them because of their deep pockets.

Trial lawyers lobbied the Democratic Congress to step in. An early version of the homeland security bill, HR 1401, expressly forbade preemption "unless compliance with State law would make compliance with Federal requirements impossible." Homeland Security Secretary Michael Chertoff protested to Congress in a May 30, 2007, letter, and the administration threatened a presidential veto. The resulting compromise satisfied the administration, but remained recklessly irresponsible:

§ 20106. Preemption

(a) NATIONAL UNIFORMITY OF REGULATION.—

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

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(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) CLARIFICATION REGARDING STATE LAW CAUSES OF ACTION.—

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) JURISDICTION.—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.¹⁸

This word soup, which gives with one hand what it takes away with the other, provides little certainty to

interstate actors, punting questions about the relationship between the federal government and states to the whims of courts applying an amorphous balancing test. The civil liability provisions, effectively an earmark for trial lawyers, will permit individual states to create civil liability rules that benefit their own residents at the expense of interstate commerce for the other forty-nine states. The resulting collective action problem will surely be resolved by liability well beyond the optimal amount. This is upside-down federalism¹⁹—almost a return to the Articles of Confederation—and an appalling abdication by Congress of its responsibilities simply to benefit a special-interest group.

Illusory Immunity

In November 2006, six imams, who had just attended a private conference on imams and the media and politics, were waiting for US Airways/America West Flight 300

and decided to act rather provocatively. They shouted “Allahu Akbar!” loudly while praying in the waiting area, refused to take their assigned seats (instead squatting in the front row of first class and the exit rows—consistent with trying to control the entry and exit areas of the plane), demanded use of a seatbelt extension designed for the morbidly

obese despite being only moderately overweight (and then placed the heavy-buckled potential weapons under their seats instead of on their seatbelts), and started speaking to one another in Arabic (which a fellow passenger translated as angry denunciations of America). They succeeded in the attempt to draw attention to themselves: the captain asked them to leave the plane, they refused, and were then arrested. The plane then underwent a three-hour search for bombs.

“They should have been denied boarding and been investigated,” former air marshal Robert MacLean said. “It looks like they are trying to create public sympathy or maybe setting someone up for a lawsuit.”²⁰ And, indeed, lawsuits followed against the airport, America West, and the anonymous passengers who identified them.

For once, the *ex ante* versus *ex post* problem was recognized: if passengers can be sued for reporting suspicious activity, they will be deterred from doing so. The costs of false negatives from failing to report far exceed the costs of the occasional false positive. The skewed priorities of a system in which the Transportation Security

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Administration was requiring mothers to dump infant formula before boarding planes, but passengers did not dare report problems, was obvious. Congress purported to intervene.

The original version in a homeland security bill before Congress read:

(a) In General—Any person who, in good faith, makes, or causes to be made, a voluntary disclosure of any suspicious transaction, activity, or occurrence indicating that an individual may be engaging, or preparing to engage, in an action described in section 3 to any employee or agent of the Department of Homeland Security, the Department of Transportation, or the Department of Justice, any Federal, State, or local law enforcement officer, any transportation security officer, or any employee or agent of a transportation system shall be immune from civil liability to any person for such disclosure under any Federal, State, or local law.

(b) False Disclosures—Subsection (a) shall not apply to any statement or disclosure that the person making the statement or disclosure knows to be false at the time it is made.²¹

Democrats and trial lawyers objected, and the provision was quietly and entirely removed in committee (without any representative taking credit for the deletion). The right-wing blogosphere and talk radio, led largely by Michelle Malkin, erupted in outrage. Democrats acted to reinsert the language, but subtly changed it:

(a) Immunity for Reports of Suspected Terrorist Activity or Suspicious Behavior.—

(1) In General.—Any person who, in good faith and based on objectively reasonable suspicion, makes, or causes to be made, a voluntary report of covered activity to an authorized official shall be immune from civil liability under Federal, State, and local law for such report.

(2) False reports.—Paragraph (1) shall not apply to any report that the person knew to be false or was made with reckless disregard for the truth at the time that person made that report.²²

The distinction is critical. Under the old language, a passenger who made a report was protected. Under the new language, such a passenger is protected only if the report is based on “objectively reasonable suspicion”—

a test guaranteed to encourage second-guessing. The protection is illusory: not only can plaintiffs’ attorneys get around the immunity by alleging that the report was not based on objectively reasonable suspicion, but no jury would have found liability under existing law nor would defendants be able to prove that their report was based on objectively reasonable suspicion. Yet the tactic worked: the illusion of immunity was created to quell public outrage against Democrats, but the ability of trial lawyers to profit from false positives was retained.

In August, bad publicity led to the voluntary dismissal of the passengers from the *America West* case,²³ but a message was sent: report suspicious activity only if you have a good attorney. The lawsuit against the airport and airline continues, and airlines act against Muslims behaving suspiciously at their own peril—while simultaneously risking bankruptcy through liability should their inaction be blamed for failing to prevent a terrorist attack.

Conclusion

One can debate the appropriate role for each of the three branches in the post-9/11 world in coordinating domestic and foreign policy in responding to terrorism. But one matter should be beyond debate. Individual litigants in individual cases should not be able to use the combination of civil liability rules and the power of the civil courts to interfere with larger national policy. Congress can disagree with the executive branch, but should do so through legislation, rather than abdicating its responsibilities to trial-lawyer proxies. Civil liability is a poor tool for deterring suicide bombers, and civil anti-terrorism laws are bound to have their greatest effect when used against innocent parties.

AEI research assistant Sara Wexler and web editor Laura Drinkwine worked with Mr. Frank to edit and produce this Liability Outlook.

Notes

1. Compare Jack Goldsmith, *The Terror Presidency* (2007) with John Yoo, *The Powers Of War And Peace: The Constitution And Foreign Affairs After 9/11* (2005) with Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (2006). See also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

2. Interestingly, it is reported that Hezbollah intends to engage in a litigation campaign against the main target of its terrorism, Israel. Yoav Stern, *Hezbollah to File Lawsuits Against Israel for Damage Caused in War*, Haaretz, Aug. 29, 2007.

3. 18 U.S.C. § 2339A (2004).

4. See AEI Panel Discussion: Contractors on the Battlefield (May 17, 2006).

5. Mark Hemingway, *Warriors for Hire*, Weekly Standard, Dec. 18, 2006.

6. Jonathan Karp, *Contractors in War Zone Face Legal Front*, Wall Street Journal, March 8, 2007.

7. Jeremy Scahill, *Blood is Thicker Than Blackwater*, The Nation, May 8, 2006.

8. Peter Lattman, *SoCal Trial Lawyer Behind Hearings on Iraq Abuse*, WSJ Law Blog, Feb. 9, 2007, <http://blogs.wsj.com/law/2007/02/09/socal-trial-lawyer-behind-congressional-hearings-on-iraq-abuse/>.

9. *In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006), cert. denied *Blackwater Security Consulting, LLC v. Richard P. Nordan*, No. 06-857 (2007).

10. *Blackwater Security Consulting LLC v. Nordan*, No. 06-CV-00049-F (E.D.N.C. Apr. 20, 2007).

11. *Smith-Idol v. Halliburton*, No. 4:06-cv-01168, 2006 WL 2927685 (S.D. Tex. 2006).

12. Karp, *supra.*; *McMahon v. Presidential Airways, Inc.*, 410 F.Supp.2d 1189 (M.D. Fla. 2006).

13. *Feres v. United States*, 340 U.S. 135 (1950).

14. 42 U.S.C. §§ 1651 *et seq.*

15. 406 F. 3d 667 (D.C. Cir. 2005).

16. 68 Fed. Reg. 14,510 (Mar. 25, 2003).

17. 49 U.S.C. §§ 20101 *et seq.*

18. Implementing Recommendations of the 9/11 Commission Act of 2007, H.R. 1, 110th Cong. § 1528 (2007).

19. Michael S. Greve, *Real Federalism: Why It Matters, How It Could Happen* 81 (1999).

20. Audrey Hudson, *How the Imams Terrorized an Airliner; Clerics Protest Bump from Flight 30*, Washington Times, Nov. 28, 2006.

21. H.R. 2291, 110th Cong. § 1 (2007).

22. Implementing Recommendations of the 9/11 Commission Act of 2007, H.R. 1, 110th Cong. § 1206 (2007).

23. Audrey Hudson, *Imams Drop Passenger from Lawsuit*, Washington Times, Aug. 22, 2007.