GIBSON DUNN

The Humanitarian and Policy Challenges of U.S. Sanctions on the Taliban

Avoidable consequences for Afghan civilians

By Adam M. Smith

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As the Taliban swept across Afghanistan over the last weeks, a focus of attention has naturally been on efforts to get U.S. nationals, allies, and at-risk Afghans out of the country and to safety. However, soon there will need to be a new effort with a similar focus to get people, goods, and services *into* Afghanistan. The country is almost entirely dependent upon foreign aid – 80 percent of its GDP comes from donors.

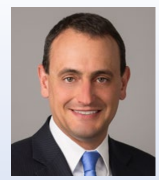
While mobilizing donor support given COVID-19 and broader economic uncertainty is challenging, the biggest factor that will make aid delivery and economic development even more vexing is that the Taliban, who now appear to be in control of Afghanistan, has long-been sanctioned by the United Nations and, more importantly, by the United States.

While UN sanctions are significant – and require all states to impose serious restrictions on transactions, travel, and blocking of assets, among other measures – not all UN member states have fully implemented these measures and there is a longstanding history of limited global compliance with UN sanctions more generally.

As a result, U.S. sanctions against the Taliban have had more bite in practice. The group was one of the first targets of U.S. counter-terrorism sanctions launched in the immediate wake of the 9/11 attacks. Since then, an additional fourteen Taliban-related groups, in Afghanistan, Pakistan, and spreading across Asia and Africa have similarly become sanctioned under one or more U.S. counter-terrorism sanctions programs. Given the role of the United States, and in particular the U.S. dollar, in global finance, these sanctions have had far-reaching consequences for the Taliban – choking off their access to formal finance.

The Taliban's move from rebel group at the periphery to what appears to be central government leadership in Kabul is likely to automatically extend these consequences across Afghanistan as a whole. Existing U.S. sanctions freeze any assets associated with the Taliban that come under U.S. jurisdiction, while also criminalizing almost any transaction with a U.S. nexus involving the Taliban. Such a U.S. nexus can occur through the involvement of a "U.S. person" in a financial transaction or a U.S. entity including a financial institution. Non-U.S. entities and individuals can easily come under U.S. jurisdiction given the ubiquity of the use of U.S. dollars and institutions in international commerce.

Unfortunately, the United States has never defined exactly what (or who) makes up "the Taliban," nor has it made clear whether the fact that a sanctioned group controls a country means that the country itself is sanctioned. However, in the early days of the Taliban's control of Afghanistan, it appears that the



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United States may be interpreting the sanctions rules to now include all of Afghanistan under Taliban control. Even if the administration has not formally reached this conclusion, its actions have led many to come to that conclusion.

Those perceptions alone are important, because a huge effect of such sanctions is in deterring third parties from engaging in any financial transactions with a sanctioned individual or group. For that reason, *not* deciding to be clear as to how the U.S. sanctions apply is in effect deciding.

Shortly after the fall of Kabul, the Biden administration announced that the substantial portion of Afghanistan's official foreign reserves – $9.4 billion worth – held in the United States would not be available to the Taliban government. Additionally, as the Taliban began their march through Afghanistan, the Biden administration cancelled a planned shipment of physical dollars due to be delivered to the country and directed the International Monetary Fund to renege on its long-planned release of funds to Afghanistan.

The exact reasons that the Biden team acted to reduce Afghanistan's access to funds were not made clear. It is possible that it was not done because of sanctions but rather because of uncertainty as to who has rightful access to the funds. This appeared to be the situation following the Myanmar coup in February 2021, after which the Biden administration did not sanction the new military regime but nonetheless ordered the country's U.S.-held foreign reserves similarly restricted. Likewise, after the Iraq invasion of Kuwait in 1991, the United States moved to restrict Kuwaiti assets in the United States in order to protect them from Iraqi access.

However, in both of those cases there were two potential government claimants to funds. In the Afghanistan case, the situation is murky. Many of these financial actions by the United States occurred before the Taliban announced the formation of a government. What's more, there are some signs of a potential competitor government – which could become a "government in exile" – in the form of the Vice President Amrullah Saleh of the outgoing Ghani administration, who said that he is the "legitimate care taker president," citing the country's constitution. What's more, with the United States' current posture of formally withholding recognition of a Taliban-led government, we are in less charted territory.

That said, a very likely interpretation of the Biden team's actions is that the White House views, or will view, Afghanistan under a Taliban-led government as "sanctioned." This is supported by the language of the reports regarding the blocked assets of the Afghan government as "frozen," which is what the U.S. Treasury Department's sanctions arm, the Office of Foreign Assets Control (OFAC), orders must immediately happen to assets of sanctioned parties.

As a matter of sanctions law and regulation there is logic to this conclusion. Upon being sanctioned by the United States, an entity becomes restricted *and* pursuant to U.S. law all property in which that entity has any interest whatsoever – even if that property interest is indirect, conditional, or partial – is equally encumbered. As a consequence, given the Taliban's resumed political role in Kabul, it would seem to have an unquestioned interest in the property of the Afghan state – that interest (and the funds associated with that interest) are consequently equally blocked by operation of law. Indeed, it is important to note that could be the situation even if a government-in-exile emerged and regardless of whether the Taliban government is recognized by the United States by virtue of the simple fact that they will retain an "interest" in the assets at issue.

Limiting Taliban access to funds has immediate macroeconomic effects – leading to a near certain balance of payments crisis – and potentially cataclysmic microeconomic effects as food and medical supplies dry up given the absence of funds and donations. This dire situation has been exacerbated by the near-term shutting down of many embassies in Kabul and international aid operations in the country.

To forestall a catastrophe, the United States must marshal the full resources of the inter-agency – the National Security Council must urgently convene OFAC, the State Department, and the intelligence community – and quickly turn its focus to addressing the sanctions issue. It must devise strategies and tools to ensure that Afghan civilians don't further become imperiled by the Taliban takeover due to unintended consequences of U.S. policy.

The Potential Harm but not a Potential Solution – The Yemeni Precedent

The potential harm of leaving the sanctions issue unaddressed was seen earlier this year in the context of the outgoing Trump administration's designation of the Houthi group in Yemen. In that case, the rebel Houthi group fighting in Yemen had assumed administrative control of large portions of the most hard-hit areas of the country years prior. But ignoring pleas from international NGOs and the United Nations, in his last days in office Secretary of State Pompeo added the Houthis to the government's list of Foreign Terrorist Organizations.

The consternation of the aid community was immediate – despite the existence of exemptions under U.S. sanctions to allow the delivery of certain assistance, the United Nations' aid chief warned the sanctions would push Yemen into a famine. The concern was that because the Houthis were functionally acting as the government in various parts of Yemen, the restrictions imposed on the Houthis would necessarily impact those Yemenis residing in areas under the group's control. The result of this concern was the quick reversal of the Trump decision by the new Biden team. While opting to de-list the Houthis from the sanctions list, the Biden administration did not formally reverse any finding that the Houthis were terrorists but rather acted "due entirely to the humanitarian consequences of this… designation… which the United Nations and humanitarian organizations have since made clear would accelerate the world's worst humanitarian crisis," a State Department official said.

"Sanctions won't be lifted" – then what?

In the Afghan context, lifting sanctions against the group that harbored al Qaeda is almost certainly – and rightly – a non-starter. Secretary of State Blinken made it clear that the sanctions would not be lifted if the group does not "uphold the basic rights of its people, including women and girls" or "harbors terrorist groups," and that any U.S. engagement with the Taliban would be based entirely on the group's behavior going forward. On Sunday, President Biden similarly stated the imposition of sanctions "depends on the conduct" of the Taliban. Given early reports of the Taliban's revenge killings and the reemergence of the violent misogyny that marked their rule in the 1990s this approach does look promising.

On the other side of the ledger, the United States' principal competitors in Beijing and Moscow see a potential opening with the U.S. departure. While there is little thought that China or Russia are interested in aiding Afghanistan's development – instead seeing the country as both a playground for great power influence and, on the part of Beijing, a mercantilist maneuver critical to clinching its Belt-and-Road initiative in South Asia – it is possible that China and Russia can actually leverage U.S. sanctions and the restrictions major financial institutions will face in dealing with Afghanistan to empower the Taliban and their own interests. The Taliban meanwhile may welcome China and Russia filling the void of western finance and aid while also taking advantage of the departure of U.S. restrictions on poppy production to return to state controlled narcotics sales, furthering enriching themselves while continuing to impoverish the Afghan people.

As a consequence, the risks of continued U.S. sanctions of this kind are that such measures may have limited leverage over Taliban behavior – given likely Beijing and Moscow largesse combined with renewed state-orchestrated drug production – and that such measures may restrict the interest of and ability by major Western institutions to engage with Afghanistan in a manner that could help Afghans and further long-term U.S. security interests.

Already, numerous financial institutions – including core providers of remittances and development aid – from the West have begun treating the country as sanctioned, restricting fund flows and transfers. Payments of overflight and landing fees, taxes, and almost any engagement with Afghan authorities ranging from commercial licensing, to the payment of utility bills and salaries for local staff, to foreign exchange — all of which are critical to allowing aid and commerce to flow — will be similarly encumbered.

Without a reassessment of U.S. sanctions and an urgent provision of interpretative guidance, exemptions, and forward-leaning engagement by U.S. authorities, U.S. sanctions on the Taliban risk becoming an unintentional liability for U.S. policy.

Developing a New Sanctions Strategy

While sanctions on the Taliban have been in place for two decades, there is no statutory requirement to maintain sanctions measures unchanged. Indeed, OFAC has broad authorities to issue both "general licenses" (regulatory exemptions that are generally available to parties who qualify) and "specific licenses" (ad hoc approvals issued by OFAC on a case-by-case basis in response to a license application by parties wishing to engage in transactions that would otherwise be prohibited).

Given this flexibility, there are numerous ways the Executive (potentially buttressed by Congress) can craft strategies to retain pressure on the Taliban leadership to live up to its obligations without needlessly imperiling Afghans and empowering Beijing and Moscow.

Though the situation in which a designated terrorist group has taken over a country is unprecedented in the annals of U.S. sanctions, there are numerous cases in which entire governments or jurisdictions have been sanctioned. These circumstances have brought with them similar concerns for the security of innocent parties who live in those jurisdictions.

In the Afghanistan case, the sanctions imposed against Venezuela may be the most instructive. The entire government of Venezuela has been sanctioned since 2019 under Executive Order (E.O.) 13884. That measure formally defined the government exceedingly broadly, including in its ambit:

> "the state and Government of Venezuela, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Venezuela…, any person owned or controlled, directly or indirectly, by the foregoing, and any person who has acted or purported to act directly or indirectly for or on behalf of, any of the foregoing, including as a member of the Maduro regime."

However, EO 13884 did not define the entire *jurisdiction* of Venezuela as sanctioned (this is the difference between the Venezuela sanctions and those in place in comprehensively sanctioned jurisdictions like Iran, Cuba, North Korea, Syria, and the Crimea Region of Ukraine). In jurisdiction-based sanctions the government is sanctioned either directly or simply by virtue of the fact that *all* activity in that territory (or conducted by persons outside those territories if they are "ordinarily resident" in those territories) is prohibited. That is not the case in Venezuela, where it is "only" the government and specifically sanctioned parties who are restricted. This may be the approach the U.S. government formalizes in the Afghan case. But it may not be narrow enough to promote U.S. interests to continue assisting the Afghan populace.

Sanctioning governmental authorities is potentially very impactful (hence the concern in the Houthi case). As a result, in the Venezuela situation, OFAC moved quickly to mitigate collateral consequences by promulgating the most aggressive and extensive use of general licenses in the agency's century-long history. The broad sanctions on Venezuela are less than a decade old, and there are more than three dozen general licenses in place allowing parties to engage in activities ranging from the provision of health, education, environmental cleanup, and other services while also permitting certain payments to the Venezuelan government (taxes, payment for services like electricity, etc.) — all with the purpose of permitting continued activity in the country to aid the Venezuelan citizenry. (In comparison, the forty-year old Iran sanctions have only fewer than half as many general licenses).

While OFAC should be strongly encouraged to consider a similar suite of general licenses in Afghanistan (the general exemptions available under OFAC's counter-terrorism designations are very limited), OFAC's strategy of general licenses has not been as effective as it could have been. Even with the general licenses and a permissive attitude by OFAC to issuing specific licenses upon application, major NGOs, western corporations, and even foreign governments have steadily withdrawn from Venezuela as sanctions bit down. There is even more reticence for parties considering exports to places like Iran to take advantage of even broader general licenses allowing agricultural and medical shipments.

To avoid this outcome in Afghanistan – which could quickly return the country to being a failed state and increase the chances that it provides a haven for the very groups the U.S. invasion was predicated upon removing – the United States must consider an even more forward leaning approach to **affirmatively encourage** (rather than just allow) humanitarian and related activities in Afghanistan.

U.S. and non-U.S. parties eager to comply with U.S. regulations in countries like Venezuela or Iran have often found exemptions are insufficient. Rather, parties have long-asked OFAC for formal "safe harbors" or "comfort letters" assuring them that if they engage in certain activities OFAC and U.S. authorities will not pursue them for violations if situations go awry. OFAC has historically been very reluctant to offer such assurances. The agency has, however, taken small steps in that direction with respect to developing a "humanitarian mechanism" for Iran that offers parties some comfort if they provide the agency substantial information about their activities. This initiative is a start, but has seen very little uptake. Most parties are much more eager for one-off comfort letters – that can be brandished to banks, shippers, and other critical intermediaries – than any general mechanism.

OFAC must overcome its historic unwillingness to provide broader comfort than its general licenses and guidance documents have yielded in practice. The agency and the broader U.S. government must consider with dispatch offering safe harbors to parties who seek compliance with U.S. measures while also assisting the Afghan citizenry. This would be a boon to U.S. policy interests – allowing western finance, aid groups, and eventually commerce to compete against a forward-leaning Beijing and Moscow — while providing commercial benefits outside the drug trade and serving the critical needs of the Afghan people who have already suffered under decades of conflict.

Editor's note: This article is part of Just Security's ongoing coverage of the U.S. military withdrawal and Taliban takeover in Afghanistan.

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