

# Governing Alongside the Specter of Risk Society: Legislating US Terrorism Risk Insurance, 2001-2007

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**Abstract:** The continued extension of the Terrorism Risk Insurance Act (TRIA) providing federal financial support to the insurance industry in the event of further terrorist attacks in the US does not reflect the advent of a risk society of uninsurable danger. While the specter of risk society has tracked and influenced the legislative process, it has done so discontinuously and often contentiously. Instead, the legislative trajectory reveals the current insurance arrangements as being shaped by a heterogeneous collection of analyses, calculations and concerns as legislators have sought to govern the insurability of terrorist acts. The paper addresses how, why and with what implications governmental endeavors can become implicated with risk society concepts.

## INTRODUCTION

Let me begin by stating *some very simple facts*.... We do not know where it is going to occur. We do not know when it is going to occur. We do not know how often it is going to occur. And we do not know how much it is going to cost when it does occur. *It is an uninsurable event for all practical and theoretical purposes* (US House, July 27, 2005: 54, emphasis added).

The above comment about a possible terrorist attack in the US and its insurability was made by an insurance industry representative at a Congressional hearing in support of an extension of the Terrorism Risk Insurance Act (TRIA) beyond its originally scheduled 3 year duration. First discussed immediately after 9/11, TRIA provides federal financial support to the insurance industry in the event of further terrorist attacks in the US. TRIA was enacted into law in 2002 with explicit recognition of its anticipated temporary status. The legislation was extended in 2005 until 2007 and then again in December 2007 for a further 7 year period, seemingly supporting the insurance industry's position of the practical and theoretical uninsurability of the event and Beck's (1992, 1999) risk society thesis of the emergence of uninsurable catastrophic dangers. Yet as the legislative trajectory of TRIA shows, over the period 2001-2007 legislators in seeking to govern what became known as terrorism risk explored these 'very simple facts' and the issue of 'practical and theoretical' uninsurability. More significantly for this paper, in doing so, legislators encountered the connectivity of governmental processes and risk society arguments. Risk society arguments of the practical and theoretical uninsurability of terrorism risk provided an early important impetus for legislation and the initial framework for deliberations. Importantly, this framework and residues of the established insurance relationships have stubbornly although unevenly persisted, impacting subsequent government endeavors and policies.

It is this positioning of risk society arguments alongside governmental processes that the paper addresses. The issue of the insurability of terrorism risk has been approached either from an abstract risk society perspective or from the perspective of the insurance industry and insureds (Ericson and Doyle, 2004). Largely absent from consideration have been the governmental and legislative processes involved in the determination of the ensuing insurance arrangements. Legislators first debated terrorism risk insurance immediately after 9/11, unfamiliar with its relative properties as an issue of governmental concern and of appropriate governmental practice, and with risk society arguments of uninsurability at the forefront of the debate. From the earliest legislative deliberations, however, the trajectory of TRIA rather than being characterized by a risk society paralysis of uninsurability displayed a dynamic governmental concern to learn about an unfamiliar problem and to consider appropriate legislative responses. Issues as to whether there existed necessary and legitimate reasons for federal involvement were persistently raised, reflecting a concern with how precisely to govern the insurability of terrorism risk.

The paper provides a detailed analysis of the US legislative debates surrounding TRIA during the period 2001-2007. The choice of this empirical material was premised upon one central consideration. The longitudinal analysis of the legislative debates, involving many of the same participants, offers the chance to examine some of the moving rationales, problems, opportunities and contingencies that shaped the governmental trajectory of TRIA. The paper argues that any consideration of risk society should be considered less from the perspective of the underlying validity of its absolute rationale of the advent of uninsurable catastrophic risks. Rather, of greater significance is how, why and with what implications the potency of risk society arguments can affect governmental endeavors and how in a process of reciprocal interaction risk society arguments themselves can also become modified during governmental processes. Governmental endeavors and risk society are, therefore, in unstable and continuously moving interaction: the assessment of which a legislator involved in drafting the initial legislation described as "a thankless task" (US Senate, June 13, 2002: S5478).

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## RISK SOCIETY AND INSURABILITY

TRIA might appear to confirm Beck's risk society thesis that without the federal financial support provided by TRIA, insurers could not and would not want to insure against terrorist threats. Beck attributed uninsurability to the delocalized, incalculable and non-compensable elements of catastrophic dangers. Delocalized refers to the potentially uncontained effects of misfortune whereby unfavorable consequences 'spill over' into other physical and temporal zones and out of insurance parameters. Incalculable refers to a resistance to quantitative assessment rendering risk metrics and actuarial calculations as hypothetical. Non-compensable refers to destruction of such magnitude and severity that monetary restitution is no longer sufficient. Each of these three issues was addressed in the legislative deliberations and was discovered not to constitute an insurmountable barrier to insurability, yet nevertheless each proved to be of significance for the practice of government.

As regards non-compensable, from the earliest deliberations legislators recognized that "virtually nothing could happen in the American economy without insurance" (Congressional Record, 2001:H8573), immediately establishing the monetary safeguard provided by insurance as a pivotal component of an apparatus of security and propelling insurance as an issue of legitimate government concern. The incalculable element of terrorism risk was a continuous source of discussion, with Beck's notion of hypothetical calculative matrices being raised by the insurance industry: "a lot of what we are doing here on terrorism really is guesswork" ((US House, July 27, 2005: 70). Nevertheless, as will be subsequently shown, calculative risk metrics were created and used for insurance risk assessment and pricing purposes, again with implications for the government of terrorism risk. Similarly, the delocalized element of insurability was surmounted as the insurance industry established differential pricing and coverage specifications, in attempts to establish boundaries around the insurable components of terrorism risk.

Beck (2002: 44, emphasis in original) qualified the idea of risk society and in particular the non-insurability of terrorism risk within private insurance markets in one important way, arguing that the private insurance market would not be completely absent from future insurance arrangements: adding "this opens up new questions and potential conflicts, namely how to negotiate and distribute the *costs* of terrorist threats and catastrophes between businesses, insurance companies and states". As Beck proposed, the negotiation and distribution between various parties of the costs associated with possible future attacks has indeed been central to the TRIA legislative process. Over the period 2001-2007 legislators learned that terrorism risk was not a uniform concept but one that could be unbundled into constitutive government components with differing legislative, financial and political implications. Importantly, it was this governmental unbundling of terrorism risk that resulted in the analysis of the possible different distributions of the costs resulting from terrorist attacks. In other words cost distribution and insurance arrangements resulted less from any essential risk society doctrine but from the calculations and programs of government practice.

Just as legislators unbundled terrorism risk, over a similar period the insurance industry did the same. On 9/11 insurers incurred substantial unanticipated financial losses as a result of terrorism risk coverage. The immediate contention of the insurance industry and insureds of the necessity of TRIA for insurability purposes indeed used a rationale consistent with that of Beck's risk society. So intuitively coherent was the rationale that its perceived veracity persisted despite evidence to the contrary. However, the industry quickly learned sufficient about terrorism risk insurance and its profit potential that it subsequently coordinated extensive efforts to help determine points of access and cost allocation patterns for what emerged as a lucrative line of business. Furthermore, once established, the financial opportunities of the insurance arrangements created by TRIA, both to the insurance industry and to insureds, have played a critical role in its continuation, despite increasing skepticism from a governmental perspective of the necessity and legitimacy of federal intervention in the private insurance market.

## IN THE SHADOW OF 9/11

After 9/11, terrorism insurance was placed on the US legislative agenda by the insurance industry, insureds and legislators for different but connected reasons. Fifteen days after 9/11, a Congressional hearing was held to discuss terrorism insurance. Insurers would ultimately face claims of around \$40 billion for coverage that had been routinely provided at no cost and as a common addendum to policies. Insurers worried about paying and insureds about receiving compensation. President Bush had announced that 9/11 marked 'a new kind of war'. Events associated with acts of war are routinely excluded from insurance coverage. While a representative of the insurance industry noted "the line between war and terrorism at least in my mind got hopelessly blurred" (US House, September 26, 2001: 47), the industry acknowledged "the losses will be paid.... the big question is: And then what?" (US House, September 26, 2001: 42). The insurance industry answered its own question: "it will become impossible to provide our customers with terrorism coverages" (US House, September 26, 2001: 39).

Against this backdrop of a risk society of uninsurable danger, legislators considered the 'then what' question in a variety of ways, seeking to establish some foundations for the practice of government. Legislators worried about their lack of knowledge of terrorism risk insurance with the Chairman opening the panel discussion by asking "how effective is the system in Great Britain? Are there similar ones in other countries? Those kinds of things – I am going to kind of make it a free-for-all" (US House, September 26, 2001: 43). As legislators considered "proposals in which Government and industry can partner to provide critical insurance coverage" (US House, September 26, 2001: 4), a legislator worried about the consequences of federal intervention cautioning "if you throw a saddle on that horse you can't gripe about where it takes you" (US House, September 26, 2001: 72). Legislators also worried about the prudence of recent federal allocations. A \$40 billion Congressional appropriation for post 9/11 discretionary Presidential spending had already been debated and had not been legislated unconditionally: "the first package that was presented to us was, frankly, a blank check... that approach was rejected" (US House, September 14, 2001: H5621).

Where the same horse might lead was also of concern to the insurance industry: in particular the effect of federal involvement on either future or existing private insurance relationships. Various forms of possible federal involvement were considered including a pooling arrangement whereby insurers contributed monies into a federally administered fund. An insurer countered “if there are companies that want to write terrorist coverage they should be allowed to do that and not have to go into a pool” (US House, September 26, 2001: 47). Legislators also considered whether the insurance of natural catastrophes was also an appropriate problem to be linked to terrorism risk. The same insurer urged “I think it is a whole different issue and there the private sector should be up front” (US House, September 26, 2001: 59).

Some initial contours of governing under the specter of risk society and the reciprocity of relationships between risk society and government is suggested in these early exchanges. The future uninsurability of terrorism risk was proposed by the insurance industry providing an immediate risk society framework for discussions and the possibility of federal financial intervention. Legislators acknowledged their unfamiliarity with terrorism risk insurance, worried about future insurance arrangements and where federal involvement might lead. So too did insurers. Significantly, while the issue of terrorism risk insurance was considered from the perspective of a risk society of unavailability, it was also being conceptualized as a dynamic issue with significant yet unknown practical future governmental implications.

#### FOUR WEEKS LATER

In October 2001, a further Congressional hearing was held, entitled ‘Protecting Policyholders from Terrorism: Private Sector Solutions’. This signaled an immediate legislative interest in the possibilities for the government of terrorism risk insurance within market based technologies. Legislators learned however, that since the first hearing an adjacent field of analyses and priorities, some risk society influenced others only tangentially so, had also been explored by insurers and insureds. Significantly, these explorations already intersected with the conditions and constraints of what at this stage were feasible government endeavors.

Legislators were informed of a proposal for federal financial support of the insurance industry for terrorism risk prepared by the Treasury on behalf of the Administration. In response to a question as to the relative status of this proposal, the Chairman of the Council of Economic Advisors (CEA) stressed: “this is from the President” (US House, October 24, 2001: 34) with the Secretary of the Treasury adding “we need it quick” (US House, October 24, 2001: 14). Immediately after 9/11 this endorsement carried substantial weight as pressure existed to present a united political response to the attacks. The Chairman of the Committee in his introductory remarks argued “we all have to pull together” (US House, October 24, 2001: 3). Mediating governmental endeavors was a further factor. Prepared statements supporting legislation were provided to the hearing by influential organizations representing the insurance, real estate and construction industries which as either insurers or insureds considered themselves directly impacted by 9/11<sup>1</sup>. Insurers ar-

gued that federal financial support “is critically important . . . to the future viability of literally hundreds of thousands of small and large US businesses” (US House, October 24, 2001: 169), with insureds insisting “congress must not fail to act” (US House, October 24, 2001: 179).

Confronted by such pressures, for legislators how to govern terrorism risk insurance might have seemed a moot point. However, it is important to identify the role that risk society elements played in what seemed a likely, if not inevitable, federal financial intervention. The Secretary of the Treasury explained the unavailability of insurance on the basis that “the uncertainty surrounding terrorism risk has disrupted the ability of insurance companies to estimate, price and insure risk” (US House, October 24, 2001: 6) with the legislation providing “a transition period to allow the private sector to establish market mechanisms to deal with this insidious new risk” (US House, October 24, 2001: 80). The transitional status of any federal support was a theme repeatedly underscored with both the Treasury and the CEA expressing optimism about the insurability of terrorism risk: “the insurance companies will figure out a way to neutralize the risk” (US House, October 24, 2001: 24), remembering “naysayers saying we will never figure out how to really do disaster insurance . . . and experience has proven that wrong” (US House, October 24, 2001: 26). It is possible to argue that such expectations remained empirically ungrounded. Nevertheless, terrorism risk was considered currently uninsurable on the basis of its unfamiliarity to insurers but not inherently uninsurable in the private market as proposed by risk society. Furthermore, in emphasizing that any federal support should not impede incentives for the private market to assume responsibility for terrorism risk, the current problem of uninsurability was conceptualized as resolvable with appropriate industry and government inventiveness.

The interplay between risk society arguments and the shifting dynamics of uninsurability, with important future implications for the government of terrorism risk, were exhibited in other exchanges during the hearing. Risk society arguments were set out by the insurance industry in the clearest terms. In written testimony, it was argued that: “it is crucial that everyone recognize that we are dealing with a peril this [sic] is not quantifiable and therefore not insurable within the finite resources of the insurance industry” (US House, October 24, 2001: 93). In contrast, however, the oral testimony of the same representative presented against a backdrop of recurring legislative insistence of the anticipated temporary status of any federal support argued: “it is crucial that everyone recognize that we are dealing with a peril *that is at this stage* not quantifiable and therefore not insurable” (US House, October 24, 2001: 43, emphasis added). Whether this discrepancy was due to legislative pressure or a genuine ignorance on the part of the industry as regards the insurability of terrorism risk cannot be determined. Significant, however, was how the issue of current insurability and the valid-

<sup>1</sup> Contributing organizations included the American Council for Capital Formation, Associated Contractors of America, American Resort Development Association, Build-

ing Owners and Managers Association International, International Council of Shopping Centers, Mortgage Bankers Association of America, National Apartment Association, National Association of Industrial and Office Properties, National Association of Real Estate Investment Trusts, National Association of Realtors, National Multi-Housing Council, Pension Real Estate Association, Real Estate Board of New York, Real Estate Round Table, American Council of Life Insurers and Independent Insurance Agents of America.

ity of risk society arguments was thrown into sharper relief by another witness before the hearing.

The Director of Aviation at the New Orleans International Airport presented testimony as regards the cost of insurance for the airport after 9/11. The Director informed the hearing that for the year ending 30 September 2001 “our policies covered essentially all risks, including war and terrorism, up to \$300 million. Our annual premium was \$321,000.... After September 20<sup>th</sup> we did have an offer of a policy. But the new policy excluded war and terrorism” (US House, October 24, 2001, 54): a short while later, we received an offer of \$50 million in terrorism coverage for a \$450,000 premium. Thankfully, we received a second offer for the same level of coverage, \$50 million for a premium of just over \$300,000...Now, just this week, we received an additional offer to consider, and that is an offer of an additional \$100 million in war and terrorism coverage which would increase our total protection to \$150 million, half of what we had before. The premium on that coverage is \$573,000 a year (US House, October 24, 2001: 55).

The significance of this testimony is apparent: the insurance industry had learned sufficient about terrorism risk insurance that while on September 20<sup>th</sup> insurance was unavailable, a short while later it was available at a price, and by the third week of October available at a lower price, all without federal support.

The present and future government of terrorism risk insurance at this stage was predicated on an assortment of differing beliefs, assertions and facts, already unevenly intertwined with risk society concepts. Legislators had received notification that the Administration believed a problem existed with the unavailability of terrorism risk insurance and that urgent legislative action was necessary. The proposal to provide temporary federal financial support as a solution was premised upon the assumption of the risk’s ultimate location in the private market. Legislators had heard assertions from the insurance industry and insureds of the problem of the non-quantifiability of terrorism risk and hence its uninsurability on a risk society basis. Legislators had also been presented with evidence, in opposition to risk society arguments, that the risk was currently insurable, without federal intervention although no longer without cost, an issue of concern to insureds. Legislators had also brought their own suspicions of a risk society argument with them. In an exchange with the Secretary of the Treasury, a legislator observed: “I am a little afraid that the insurance industry might be taking advantage of us” (US House, October 24, 2001: 15), while another reflecting upon past experiences with flood insurance, recalled “there was never any incentive to get out and privatize it. It is going to stay with the Government as long as I guess the leaves turn brown”. (US House, October 24, 2001:10).

### **Escalating the Pressure to Legislate**

In June 2002 the proposed legislation was re-examined by Congress. The backdrop to the hearing was an earlier stalled attempt in November 2001 to introduce bi-partisan draft legislation. At that November hearing reference was made to a Wall Street Journal article arguing how 9/11 “presented a tremendous business opportunity” to insurers (Wall Street Journal, November 21, 2001). Referring to the article,

one legislator argued that insurance industry representatives “are running around telling people that they are not going to rewrite the insurance. That is not what they are telling other people where they know they can extract the dollars” (Congressional Record, November 29, 2001: H8579). Similarly, a legislative unease was also expressed as regards the anticipated temporary status of federal support, a recurrent theme from the very onset of discussions. One legislator reminded colleagues “that the federal budget is full of expenditures for long-lasting programs that were originally intended to be ‘temporary’” (Congressional Record, November 29, 2001: H8607).

With these skeptical legislative residues persisting, a more cautious approach towards the necessity of the legislation emerged. The rationale for federal support, that temporary involvement in the insurance industry was necessary to allow the industry to learn about terrorism risk, was again repeated. The Chairman of the committee introduced the draft legislation, arguing that “most people seem to believe that in time, that the insurance industry will be able to underwrite the terrorist risk. But they don’t now, at this point, have the experience and factual basis on which to make those calculations” (US Senate, June 13, 2002: S5473). This repetition of the temporary non-quantifiability and hence non-insurability of terrorism risk was qualified in one important aspect. The Chairman also argued that “where terrorism insurance is available, it is often expensive and significantly limited in both amount and the scope of coverage” (US Senate, June 13, 2002: S5473). The ranking member of the committee also noted that “terrorism insurance is available, it is true, in limited areas” (US Senate, June 13, 2002: S5479).

The seeming inconsistency of possible insurability in the future with evidence of its present insurability should be considered in the context of a further mitigating factor. The insurance industry and insureds had put together a formidable lobby to argue for federal financial support, giving some indication of the past, present and future ‘thankless task’ that awaited legislators. Legislators had been assailed from an array of parties backing federal financial support. The Administration was also in favor of legislation<sup>ii</sup>. Bi-partisan backing had been received from the Governors of 18 states and 30 senators (US Senate, June 13, 2002: S5478-79). Organizations associated with real estate, real estate finance and construction had contacted legislators<sup>iii</sup>. Numerous insureds described the unavailability, curtailed availability or the high price of terrorism risk insurance. Legislators while acknowledging that terrorism risk insurance was “a subject matter that can glaze over the eyes of even the most determined listener” (US Senate, June 13, 2002: S5478) had discovered that its future financial arrangements had the close attention of an assortment of influential observers.

The issue of the relative availability, cost and scope of insurance dominated the hearing as legislators sought to

<sup>ii</sup> The White House, the Treasury, the National Economic Council, the Director of the Office of Management and Budget and the Council of Economic Advisors were all referenced as supporting the legislation.

<sup>iii</sup> The Cleveland Municipal Schools District, Seattle Mariners Baseball Stadium, St Louis Art Museum, Amtrak, George Washington University, National Geographic Center, Golden Gate Bridge, Miami Football Stadiums, Hyatt Hotels, Las Vegas casinos, Baylor University, Disney World, the Mall of America, New York Hospitals among others were named as being in this category.

govern future insurance arrangements. Legislators employed current market arrangements to unbundle terrorism risk and its insurability into some of its constitutive properties. In a very practical way, legislators sought to learn at what price insurance had been sold and to whom: “insurance companies have sold terrorism insurance, not at the price we might have chosen, not to the people we might have chosen they sell it” (US Senate, June 13, 2002: S5484) for what properties: “certain properties are still having difficulty getting insurance.... They are generally in highly identifiable trophy properties.... But there is a large part of America that is not like that” (US Senate, June 13, 2002: S5490) and with what coverage: “most insurance policies already have an exclusion for chemical, biological and nuclear devastation” (US Senate, June 13, 2002: S5475). By examining a combination of insurance market developments, flows of finance and emerging insurance arrangements, terrorism risk was no longer conceptualized as an uninsurable, pervasive and nonspecific threat with risk society features, but as an insurable, regionally sensitive risk that with careful specification and pricing offered profitable opportunities to the insurance industry: “the marketplace has responded” (US Senate, June 13, 2002: S5474).

The widespread level of political lobbying for federal involvement was, however, a critical consideration. It was this lobbying rather than risk society characteristics of uninsurability that proved decisive. The issue of urgency was also repeated: “time is running out” (US Senate, June 13, 2002: S5501), with the corollary that legislation would inevitably be imperfect: “if my colleague is looking for perfection, I cannot give it to him” (US Senate, June 13, 2002: S5497). These pressures ensured the enactment in November 2002 of TRIA as legislators agreed to offer federal financial support to insurers in the event of another terrorist attack in the US. Private market insurance arrangements had, however, already been established without such support.

#### LEGISLATIVE ASSESSMENT OF THE TERRORISM RISK INSURANCE ACT, 2002

The anticipated temporary status of any legislation had been a dominant concern during past deliberations. Legislators established the expiration of TRIA after 3 years unless extended by Congress. The legislation also increased the amount of industry deductible each year, reinforcing a legislative belief and desire that the private insurance market might ultimately assume the full financial obligations of terrorism risk. A further provision in the legislation was a ‘make available’ clause requiring insurance companies to provide terrorism risk insurance to insureds who requested coverage. This provision expired after 2 years without Treasury approval being granted for its extension. Early in 2004, with insurance policies being negotiated for periods beyond the expiration date, hearings were held in both the House and Senate to discuss the extension of this provision, as legislators sought to learn about what had transpired in the insurance market since TRIA’s enactment and to consider future approaches to the government of terrorism risk.

At the House hearing, legislators in their opening remarks endorsed the extension of TRIA. The rationale for the extension was encapsulated by the ranking member: it “has worked to increase the availability of Terrorism Risk Insur-

ance.... It has also lowered the cost of such insurance .... I now believe that we might have decided to sunset this program too soon” (US House, April 28, 2004: 2). At the Senate hearing more polarized attitudes were immediately apparent. In opening statements, a legislator argued “we would make a serious mistake if we allowed this program to expire” with the next legislator responding “the industry is back with the same arguments ..... I am not sure why we should believe it this time, though” (US Senate, May 18, 2004: 3).

The insurance industry and insureds were indeed back with some of the same arguments, but also with new ones. At the Senate hearing supporters of a TRIA extension presented oral testimony (essentially the same organizations had presented written testimony to the House hearing), repeating the underlying thesis of the uninsurability of terrorism risk on the basis of its non-quantifiability and with it the specter of risk society<sup>iv</sup>. However, in the face of a growing legislative unease with this argument, insurers and insureds raised an assortment of terrorism risk images that also spoke towards its extension: anthrax attacks on the US postal system, bomb attacks in Jakarta, Istanbul and Madrid and imagined attacks on the World Trade Center “later in the day at lower floors” (US Senate, May 18, 2004: 84, 92, 83). This risk society specter of unknown future danger dominated the hearing, as the insurance industry had learned that terrorist attacks generally, irrespective of their connection to specific issues of insurability, proved influential with legislators.

Oversight of TRIA had been assigned to the Treasury which was required to conduct a comprehensive analysis of the performance of TRIA and to report this to Congress by June 2005. In response to legislative questions as to the Treasury’s current or likely future position on a TRIA extension, the Treasury pointed to the need to conduct further analysis to allow it to learn more about terrorism risk. In response to a legislator’s prompt that overwhelming insurance industry and insureds feedback called for an extension “for at least another couple of years”, the Treasury now sensitive to the extent of political lobbying commented “it is not clear, whether the information we have received to date is truly representative, or rather it is the case of a vocal minority” (US Senate, May 18, 2004: 16).

Testimony had also been requested from the Government Accountability Office (GAO) as to why the purchase of terrorism insurance had been low and concentrated in certain geographic areas<sup>v</sup>. The GAO concluded that others “may just perceive their overall risk exposure to be such that any amount they pay might be too high” (US Senate, May 18, 2004: 26). This line of questioning was resumed by a legislator who remembered that at an earlier TRIA hearing: “I was

<sup>iv</sup> Organizations represented among others were the Council of Insurance Agents and Brokers, Financial Services Roundtable, Independent Insurance Agents and Brokers, National Association of Professional Insurance Agents, Property Casualty Insurance Association of America, Reinsurance Association of America, Surety Association of America, Strategic Services on Unemployment and Workers Compensation and the Coalition to Insure against Terrorism (representing the principal consumers of commercial property and casualty insurance).

<sup>v</sup> Indicative of legislative efforts to learn more about terrorism risk, legislators commissioned numerous reports from the GAO, including analytical studies of international programs to insure catastrophic risk (Terrorism Insurance: Alternative Programs for Protecting Insurance Customers, GAO 2001), the relationships between terrorism risk insurance and economic activity (Terrorism Insurance: Rising Uninsured Exposure to Attacks Heightens Economic Vulnerability, GAO 2002) and possible capital market involvement in emerging insurance technologies (Catastrophic Insurance Risks: Status of Efforts to Securitize Natural Catastrophe and Terrorism Risk, GAO 2003).

told basically.... that the whole marketplace would literally fall apart... because there was no terrorism insurance available" (US Senate, May 18, 2004: 32). The GAO replied that finance providers "where they believe the risk is low or non-existent, they are not demanding that there be that kind of coverage" (US Senate, May 18, 2004: 33).

The significance of these findings lies in their contrast to the insurance industry's argument of the non-insurability of terrorism risk on the basis of risk society arguments of unknown future danger. The findings indicated that insureds and financiers had assessed the likelihood and possible costs of attacks on the basis of their own heuristics. These local risk assessments constituted rudimentary yet nevertheless important knowledge to unbundle terrorism risk from the perspective of the demand for insurance and assess its cost.

Legislators also heard from a vocal opponent of the extension of TRIA. The Director of Insurance for the Consumers Federation of America, a taxpayer advocacy group which had argued against federal support from the earliest TRIA deliberations, presented testimony. He introduced himself as an actuary and the former Federal Insurance Administrator under Presidents Ford and Carter who had administered a federal reinsurance program introduced in the 1970's to support insurance writing after rioting in US inner cities: "the private reinsurance market developed under our program because the price we charged was actuarially sound. It was not free", adding "it is amazing how little competition you will get from the private sector when you charge zero for something" (US Senate, May 18, 2004: 29). His testimony focused on a terrorism risk insurance model produced by the Insurance Service Office (ISO).

The ISO was described as an insurance advisory organization licensed in almost all of the states, with many insurers following ISO "for their own rating of risk. This is particular true for terrorism insurance" (US Senate, May 18, 2004: 71). Based on ISO calculations, legislators were provided with a detailed analysis of the private market quantification and pricing of terrorism risk. The ISO analysis had divided the US into three categories: high risk of terrorist attack (New York, San Francisco, Washington DC and Chicago), medium risk (Boston, Seattle, Los Angeles, Houston and Philadelphia) and low risk (the rest of the country): terrorism insurance rates are very low in the low risk areas. For example, a \$10 million building with \$5 million of contents would pay only \$300 to insure terrorism risk in 2005.... In the five moderate-risk cities, the cost is \$6,200 for that building, and in the four high-risk cities, the cost would be \$50,000. ... In the high-risk cities, costs would rise to an estimated \$71,500 if TRIA expired. In other words the rate would go up about 50 percent. In the lower-risk areas the change would be very modest, and in the moderate risk areas also, only \$326 more (US Senate, May 18, 2004: 29-30).

The veracity of the numbers was not questioned. The witness concluded insurers "can predict, not with precision, because this is not a precise thing... but you can predict... it is doable and it is being done" adding "there is, therefore, no justification for renewing TRIA in its current configuration. The private sector can and will respond to the withdrawal of TRIA" (US Senate, May 18, 2004: 69, 78). No follow up questions or exchanges ensued for the rather innocuous reason that the hearing was in danger of overrunning its allotted

time with no panel witnesses amplifying on prepared testimony. Nevertheless, local, calculable insurance compensation had in contrast to risk society arguments been established and was empirically verifiable.

The initial risk society influenced rationale for TRIA was to provide a transitional period during which the insurance industry might acquire the necessary knowledge to price and hence insure terrorism risk in the private market. As legislators learned that terrorism risk could be priced both with and without federal support, a further rationale became the increased availability and reduced cost of insurance with federal financial support. The trajectory of TRIA now included the counter-proposal that in contrast to risk society, private initiatives and market developments were being impeded by supply and price distortions created by federal financial support, jeopardizing the legislation's original intention of a temporary involvement. One constant, however, was that by this stage legislators had learned that the 'thankless task' of governing terrorism risk insurance included worrying about the political ramifications from the insurance industry and insureds of terminating the legislation.

### **TERRORISM RISK INSURANCE ACT EXTENSION**

The Terrorism Risk Insurance Act Extension (TRIAE) was signed into law 3 days before the Congressional recess in December 2005, and days before TRIA was set to expire. The legislation extended TRIA for a further 2 years. The details of TRIAE reflected a reconceptualized concern within the White House, Treasury, and among many legislators that TRIA had impeded the development of the private insurance market. Increased program triggers, insurer deductibles and industry retentions, along with reductions in the scope of certified coverage were all intended to encourage the relocation of terrorism risk insurance exclusively in the private market. All of these determinations of the distribution of the costs arising from terrorist attacks emerged from the calculations and programs of government practices and not from any essential risk society doctrine. These modifications appeared an initial Administration reluctance to endorse any extension. Such reluctance had been influenced by two further pieces of evidence.

The Congressionally mandated Treasury report assessing the performance of TRIA had been made public in June 2005. It argued against an extension of TRIA on the basis that it "is likely to hinder the further development of the insurance market by crowding out innovation and capacity building" (Department of Treasury, 2005). A study by the Congressional Budget Office (2005) stated that TRIA "subsidizes insurance and dampens incentives for mitigation activities". The passage of TRIAE in the face of such opposition was the product of the alignment of distinct yet interconnected pressures.

Firstly, lobbying efforts to prolong the enhanced profit potential of terrorism risk insurance made possible by TRIA were still influential. The National Association of Professional Insurance Agents (2005), for example, conducted "nationwide grassroots action campaigns that produced 1500 contacts with Members of Congress in 24 hours" as "it pulled out all the stops to make sure that Congress made the right decisions". A second factor was the contingent intersection of TRIA with other current political agendas. The

'war on terror' and the US invasion of Iraq, as highly visible domestic issues, would play increasingly significant roles in the future legislative trajectory of TRIA with "lawmakers... not concerned about disapproval from the administration. 'I would be surprised if the President's first veto was on a terrorism insurance bill'" (Schor 2005).

No Presidential veto materialized. The significance of this seemingly rather innocuous observation should not be lost. As risk society arguments became increasingly superfluous to the legislative trajectory of terrorism risk insurance, a more potent rationale for the legislation emerged. While some of the same rationales that had shaped terrorism risk insurance legislation up to this point still constituted influential considerations, it was the reworking of these rationales within a new security paradigm that proved decisive. As the insurability of particular properties receded from the government agenda different imperatives emerged. Risk society arguments became reworked within a 'weapons of mass destruction' framework; lobbying reworked to promote a permanent rather than temporary involvement; and insecurity reworked to align with the 'war on terror'. The potency of these combinations remained unknown at the time of the passage of TRIAE, as reactions to the enactment indicate. To both opponents and proponents of the legislation, TRIAE marked the likely termination of federal involvement. A representative of the Consumers Federation of America argued "there's no way Congress will extend it again" (Treasury and Risk 2005). Similar sentiments were expressed by the insurance industry: "clearly Congress and the White House have no appetite at all for helping insurers assume risks they feel the industry should otherwise be able to handle" (Treasury and Risk 2005). Such sentiments proved unfounded.

### CATASTROPHIC TERRORISM RISK

In September 2006 a Congressional hearing entitled "Protecting Americans from Catastrophic Terrorism Risk" was held to evaluate the performance of TRIAE. Qualifying terrorism risk with a catastrophic dimension proved influential in that a narrower evaluative framework was introduced to the issue of insurability. Two pieces of documentary evidence, one available and one unavailable at the time of the hearing, proved significant. The GAO had submitted a Congressional commissioned study for legislators to learn about the specific issue of the capacity of the insurance markets to insure against losses from unconventional weapons or 'weapons of mass destruction' (GAO 2006). This report was provided the day before the hearing and essentially unbundled insurability in the context of catastrophic terrorism risk. TRIAE also required the President's Working Group on Capital Markets (PWG) to submit a report to Congress by September 2006 on the overall performance of TRIAE. This report was provided 3 days after the hearing and unbundled insurability in terms of the legislative trajectory of terrorism risk insurance, in particular the progress of private market developments.

The GAO (2006:4) report concluded that as regards catastrophic terrorism risk: "any purely market-driven expansion of coverage is highly unlikely in the foreseeable future". This finding dominated discussions within the hearing and was repeated in the Chairman's opening statement (US House, September 27, 2006:1). The finding was also imme-

diately attached by some legislators, the insurance industry and insureds to the wider issue of terrorism risk insurance, displacing as central considerations the anticipated temporary status of the legislation and concerns that it had impeded private market developments. This conceptualization of terrorism risk insurance as it related to catastrophic events also provided a convenient connection to national security themes: "there has to be certainly the possibility of a hydrogen attack on New York City. It would be trillions of dollars in losses" (US House, September 27, 2006: 23). Within such a security paradigm, a justification for the removal of the temporary status of TRIAE existed: "the commonsense approach... is to have a permanent Federal backdrop" (US House, September 27, 2006: 8 and 20-21). For proponents of a further extension of TRIA, the unavailability of catastrophic terrorism risk insurance suggested that the early self-evidence of a temporary federal involvement now be replaced by the equal self-evidence of its necessary permanence.

The PWG (2006: 2) report offered a more comprehensive survey of terrorism risk insurance. Focusing on limited private market developments, the report concluded "TRIA appears to negatively affect the emergence of private reinsurance capacity because it dilutes demand for private sector reinsurance". The PWG concurred with the GAO as regards the limited private market for catastrophic terrorism risk. In adding the addendum, however, that this could be attributed to "the nature, scale and uncertainty of damage and losses from C[hemical] N[uclear] B[iological] R[adiological] events - however caused - and less to do with terrorism specifically", the PWG sought to solicit a broader discussion of TRIA outside of the restricted parameters of catastrophic terrorism risk (PWG 2006: 5).

The seemingly inevitable confrontation between a skeptical Administration, a divided Congress, insurers and insureds over future legislation did not occur. In November 2006, the results of the mid-term Congressional elections gave control of both Houses to Democrats and with it the chairs of committees overseeing TRIA. In an Insurance Information Institute survey (Walmsley 2006/7), 89% of US property and casualty insurance executives polled believed that Congress would "move quickly to extend the law for a significant period or to provide a permanent backstop". Such optimism was not without foundation, during 2005 Congressional TRIAE deliberations a legislator who in 2007 would assume the Chair of the House Financial Services Committee had indicated that "whether the market can or cannot do this is not to me the primary issue" (US House, July 27, 2005: 6). Instead, on the basis of national security, the financial costs of terrorism risk rather than being an issue of private insurance market capabilities "ought to be broadly shared. This is a case for totally socializing the risk" (US House, July 27, 2005: 5).

### TERRORISM RISK INSURANCE PROGRAM AND REAUTHORIZATION ACT (TRIPRA) OF 2007

Between February and April 2007, hearings were held in both Houses of Congress, with terrorism risk now becoming almost exclusively conceptualized from the perspective of the 'war on terror' and US international military actions. Earlier insurance industry rationales for legislation on the

basis of risk society arguments of uninsurability, non-quantifiability and the need for a temporary period to learn more about the risk received little attention. Administration and legislative concerns that federal intervention was impeding the development of private market initiatives were similarly neglected. The insurance industry in 2001 had agreed to the diplomatic disconnection of the events of 9/11 and acts of war, resulting in insured losses of \$40 billion. The connection of terrorism risk insurance with war now appeared both politically viable and financially opportune. The insurance of specific properties against specific terrorist attacks receded into the legislative background as insurers and insureds promoted an environment of ubiquitous yet ethereal insecurity: “the Federal government, in fact, is telling us that we are at war on terrorism. War, by its nature, is not insurable” (Veghte 2007: 4); and “whatever ones views of the wars in Iraq and Afghanistan, the threat of attack to our country does not seem to be diminishing” (Coalition to Insure against Terrorism 2007: 4).

Such fluid conceptualizations of terrorism risk enabled issues of insurability to be connected to a range of increasingly more tenuous yet influential incidents of insecurity. To the orchestrated slogan “better TRIA than FEMA” (Bailey 2007, Cotton 2007) legislators were asked to remember the widely perceived inadequate performance of the Federal Emergency Management Agency to administer restoration funds after Hurricane Katrina. Legislators too also sought to take advantage of the convenient connectivity of terrorism risk insurance to other security issues. A legislator from hurricane prone Florida proposed that a federal natural catastrophe fund similar to TRIA be made available to support homeowners insurance. Legislative rejection of the proposal provoked the disparaging response that proponents of TRIA “speak out of the opposite sides of their mouths..... the same people will argue that the creation of a natural catastrophe fund is simply a bailout, that it will supplant the private market, or that taxpayers will be subsidizing high-risk areas” (Brown-Waite, 2007). In December 2007, TRIPRA was enacted into law extending financial support for a further 7 years.

## CLOSING OBSERVATIONS

Although generally invisible to the US public, over a six year period terrorism risk became transformed from being a largely ignored threat insured at no cost and as a routine addendum to other coverage into a financially significant and contentious issue for legislators, the insurance industry and insureds. Apart from administrative costs, no federal cash dollars have as yet been disbursed for terrorism risk insurance contributing to its relative public obscurity.

9/11 provided the initial and decisive momentum for the emergence of discussions of terrorism risk insurance. At all subsequent legislative hearings preliminary remarks referenced 9/11. At that time, the unfamiliarity of terrorism risk was evident in discussions as the various parties sought to learn more about its insurability. The insurance industry immediately raised the specter of risk society and the non-quantifiable uninsurable dimension of the threat. The initial rationale for federal financial support of the insurance industry was explored within this environment. The insurance industry incurred losses of \$40 billion as a result of 9/11.

Uncertainty about the insurability of terrorism risk and the size of possible future exposures were immediate considerations. The insurance industry realized that a combination of a risk society specter of unknown future danger and a legislative unfamiliarity with insurance practices constituted a potent fusion to justify federal support. Yet the industry also realized that with improvised risk assessments, careful coverage specification and appropriate pricing, terrorism risk was insurable with or without federal involvement. As a line of business, however, its profit potential was enhanced by federal reinsurance.

Legislators in seeking to govern the unfamiliar threat immediately rejected any unreserved acceptance of risk society doctrine. Instead, legislators sought to evaluate its validity from the perspective of the necessity and legitimacy of federal financial intervention and alternative possible future insurance arrangements. In doing so, a concern to explore the governmental possibilities of terrorism risk insurance occurred alongside the specter of risk society. The interactions between government endeavors and risk society concepts were always in unstable interaction, influencing and being influenced in turn. Government practices could never completely disentangle themselves from risk society themes, with risk society themes themselves becoming modified during the course of government endeavors.

As insurers and legislators unbundled terrorism risk, the inapplicability and increasing unacceptability of risk society arguments became apparent. The enactment, anticipated demise and resurgence of the legislation had a discontinuous association with risk society. Of significance was how, why and with what implications the specter of risk society retained an uneven presence influencing government endeavors. In early deliberations risk society retained sufficient plausibility to be an overarching theme. Subsequently it did not. The interconnectivity of risk society, government and insurance arrangements with such themes as the ‘war on terror’ and ‘weapons of mass destruction’, while with no essential imperative, were perhaps unsurprising in the context of the unfolding of other emerging security priorities. Connectivity to intense political lobbying and hurricane Katrina reflected opportunistic ventures, yet ones intrinsic to the practice of government. A change in Congressional leadership constituted a decisive yet contingent influence upon the legislation. While the specter of risk society, uninsurability and its connection to future catastrophic destruction never completely disappeared from deliberations, by 2007 the hesitancy of risk society arguments contrasted with the clamor of ‘better TRIA than FEMA’: illustrative of the ‘thankless task’ of governing alongside the specter of risk society.

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