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THESIS

**DESIGNATING DOMESTIC TERRORIST INDIVIDUALS
OR GROUPS**

by

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September 2010

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DESIGNATING DOMESTIC TERRORIST INDIVIDUALS OR GROUPS

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ABSTRACT

Terrorism is a crime committed by individuals with a political or social agenda designed to influence a government or its population. The U.S. government, state and local law enforcement agencies have, as a priority, the mission of protecting the homeland from the threats of terrorism-domestic or foreign. However, the U.S. government has not effectively defined what constitutes a domestic terrorist with the same processes and vigor used to identify international terrorists, gang members, or sex offenders. The lack of a workable definition and validation process for identifying a “domestic terrorist” places law enforcement and homeland security agencies in a position of having to balance the need to protect constitutional rights and the need to protect against the nation’s security threats. To this end, this thesis will identify the problems associated with a lack of a comprehensive definition, address the safeguards required in a definition to ensure constitutionally protected rights are not impinged, and will offer a working definition and designation process

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LIST OF ACRONYMS AND ABBREVIATIONS

9/11 Commission	National Commission on Terrorist Attacks upon the United States
ACLU	American Civil Liberties Union
ADC	Arab American Anti-Discrimination Committee
AEDPA	Antiterrorism and Effective Death Penalty Act
AGG	Attorney General Guidelines
ALF	Animal Liberation Front
APD	Anchorage Police Department
AR	Animal rights
ATF	Alcohol Tobacco & Firearms
AUSA	Assistant United States Attorney
C.F.R.	Code of Federal Regulations
CalGang	Los Angeles County Gang Database
CIA	Central Intelligence Agency
DHS	Department of Homeland Security
DIOG	Attorney General's Guidelines for Domestic FBI Operations, Domestic Investigations and Operations Guide
DoD	Department of Defense
DOJ	Department of Justice
DT	Domestic terrorism
DTO	Domestic terrorist organization
ECHR	European Convention on Human Rights
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act

FTO	Foreign terrorist organization
HLS	Huntingdon Life Sciences
HSPD	Homeland Security Presidential Directive
IACP	International Association of Chiefs of Police
INA	Immigration and Nationality Act
Intel	Intelligence
IRB	Institution Review Board
IT	International terrorism
KST	Known or appropriately suspected terrorist
LAPD	Los Angeles Police Department
LE	Law enforcement
MI5	United Kingdom Security Service Military Intelligence, Section 5
NCIC	National Crime Information Center
NCTC	National Counterterrorism Center
NSOR	National Sex Offender Registry
NSPD	National Security Presidential Directive
OECD	Organization for Economic Co-Operation and Development
RNC	Republican National Convention
SDGT	Specially designated global terrorist
SDN	Specially designated national and blocked persons
SDT	Specially designated terrorist
SHAC	Stop Huntingdon Animal Cruelty
SMART	Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking
SORNA	Sex Offender Registration and Notification Act

SST	State-sponsors of terrorism
TEL	Terrorism Exclusion List
TIDE	Terrorist Identities Data mart Environment
TSC	Terrorist Screening Center
U.S.	United States
U.S.C.	United States Code
UK	United Kingdom
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act and 2001
VGTOF	Violent Gang/Terrorist Organization File
WMD	Weapons of mass destruction

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EXECUTIVE SUMMARY

The United States has yet to implement an adequate process to validate and designate domestic terrorism individuals or groups or to widely track and share information concerning those individuals or groups with the greater homeland security community. This failure has had a deleterious affect, which has, at times, prompted law enforcement to impinge on the First Amendment Rights of U.S. citizens: the right of free speech, the free exercise of religion, and the right of assembly.

This is not to say there are not any government lists that touch on domestic terrorism adherents. In September of 2003, President Bush signed Homeland Security Presidential Directive (HSPD) 6 that directed the United State's Attorney General to establish a process to consolidate the government's approach to terrorist screening and provide for the appropriate and lawful use of terrorist information in a screening process. This directive led to the so named "*Watch List*" that is primarily used for affecting suspected foreign and domestic terrorists' travel. A second list, a subset of the Watch List, known as the Violent Gang/Terrorist Organization File (VGTOF), which was previously established to track and identify gang members, was to be used to track terrorist subjects as well. Until recently, these lists were the only repositories for agencies, such as the Federal Bureau of Investigation (FBI), to externally publish or identify domestic terrorism subjects/suspects, not groups, to the homeland security community. On April 21, 2009, domestic terrorist subject Daniel Andreas San Diego was placed on the publicly accessible FBI Most Wanted Terrorists list. This marked the first time a domestic terrorism subject was placed on a list that could be viewed by the public.

So where can the public and homeland security agencies go to find a complete list of designated domestic terrorists or groups? The answer is; there are no lists.

Individual states have developed laws and legislation providing for local law enforcement to take action against domestic terrorism activities within their own jurisdictions. Unfortunately, not only does this type of investigative and legislative diversity lend itself as an inefficient process for *connecting the dots* in a terrorism

investigation, the collection and retention of intelligence, when U.S. citizens are the target, promulgate significant First Amendment legal challenges, which further emphasize the need for uniformity throughout the nation. Additionally, although the current process has not yet failed catastrophically, homeland security agencies should recognize the inherent vulnerabilities in the current environment rather than wait for failure.

In order to address this problem, the United States' homeland security agencies, as a whole, must first acknowledge the significant ambiguity between the defining laws and regulations that address domestic terrorism investigations and intelligence collection across the nation. Secondly, homeland security agencies should leverage current technology combined with state, local, and tribal policies and procedures for the purpose of information sharing, collaboration, and full visibility of the domestic terrorism threat. Finally, identify a federal agency that will provide the national level leadership and guidance necessary to consolidate the nation's efforts in combating domestic terrorism.

Within the greater homeland security community, the FBI is perfectly poised to take on the challenge of developing a process to validate and designate domestic terrorism individuals and groups. The FBI's role in identifying, investigating and collecting intelligence against a domestic terrorism threat has been defined within numerous government presidential directives and legislative actions.

The mission of the FBI includes the protection and defense of the United States against terrorism and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, and international agencies (Federal Bureau of Investigation, 2009a). A unique component of this mission is the responsibility for identifying and investigating domestic terrorism within the United States.

In this thesis, the author purports that defending the United States from terrorism and protecting a citizen's constitutional rights are not mutually exclusive. To the contrary, by properly defining a process for designating domestic terrorism individuals or groups and a universal system to share information, homeland security agencies will be

able to avoid the *Hobson's choice* currently faced when balancing between protecting constitutional rights of U.S. citizens, intelligence collection, and providing for national security.

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I. INTRODUCTION

A. PROBLEM STATEMENT

In 2007 the National Strategy for Homeland Security was published by the Homeland Security Council (White House, 2007). Within the strategy was a strategic vision of the threat environment as seen through the eyes of the White House. In this strategy, domestic terrorism was noted as an overarching threat and was clearly identified in the statement:

The terrorist threat to the Homeland is not restricted to violent Islamic extremist groups. We also confront an ongoing threat posed by domestic terrorists based and operating strictly within the United States. Often referred to as “single issue” groups, they include white supremacist groups, animal rights extremists, and eco-terrorist groups, among others. (White House, 2007, p. 10)

The existence of domestic terrorist groups is not at issue. The real issues are twofold: (1) how do law enforcement and homeland security professionals define, identify, prevent, and disrupt domestic terrorism adherents, and (2) what are the challenges the government may face to fulfill such a mission? This researcher posits the federal government does not have adequate policies and procedures to assist law enforcement and homeland security professionals in properly defining, identifying, preventing, and disrupting acts of domestic terrorism. Additionally, due to the absence of these policies, the United States does not have a universally accepted process for defining and designating domestic terrorist individuals or groups that should be shared throughout the law enforcement and homeland security communities.

There are current policies and procedures defining and designating foreign terrorist organizations (FTOs).¹ The legal criteria for designating FTOs and the process to follow in doing so are defined within section 219 of the *Immigration and Nationality Act*

¹ For a more comprehensive review of the FTO process review the CRS report for Congress titled The “FTO List” and Congress: Sanctioning Designated Foreign Terrorist Organizations (Cronin, 2003), which may be found at <http://www.fas.org/irp/crs/RL32120.pdf>.

(INA), Title 8 U.S.C. 1189 and are further amended by the USA PATRIOT Act of 2001.² As such, the Secretary of State maintains the responsibility of designating and publishing FTOs on behalf of the United States government. The State Department is not alone in this process but is directed to consult with the Intelligence Community and the Attorney General prior to completing the designation process (State Department, 2009). There are currently 45 FTOs designated by the State Department, but there is no comparative domestic terrorist organization (DTO) list. Because there is no DTO list, one should ask, why?

In September of 2003, Homeland Security Presidential Directive (HSPD) 6 was signed by President Bush, which directed the Attorney General of the United States to establish a process to consolidate the government's approach to terrorism screening and provide for the appropriate and lawful use of terrorist information in a screening process (White House, 2003). The consolidated list is known as the Terrorist Screening Database (U.S. Department of Justice, 2009, p. 1) but is more often simply referred to as the "*Watch List*." The list born out of HSPD 6 does not provide for any of the benefits as realized by the FTO list by comparison.³ The so named Watch List is primarily used for alerting users to the possible encounters of suspected terrorists and for affecting domestic and international travel of suspected terrorists (U.S. Department of Justice, 2009). There is a second list, which is a subset of the Watch List, and is known as the Violent Gang/Terrorist Organization File (VGTOF) (U.S. Department of Justice, 2008). It was previously used to track/identify members of criminal gangs but is now being used to track and identify foreign and domestic terrorists who are under investigation by the FBI and other designating agencies (U.S. Department of Justice, 2009, p. ii).

In 2003, the Congressional Research Service authored a report examining the FTO list and the sanctioning of designated FTOs. The report also set out to examine other

² The USA PATRIOT Act of 2001 Section 41 further defined the role of the Secretary of State in designating foreign terrorist organizations.

³ Specific legal ramifications for being designated as a foreign terrorist organization are outlined for review on the State Department Web site, which may be found at <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

terrorist lists emphasizing that the FTO list was “Not the Only U.S. ‘Terrorist List’” (Cronin, 2003, p. 3). The lists outlined within the report were; State-Sponsors of Terrorism, Specially Designated Terrorists, Specially Designated Global Terrorists, Specially Designated Nationals and Blocked Persons and Terrorist Exclusion list (Cronin, 2003).⁴ As stated in the report, “The FTO list has a unique importance not only because of the specific measures undertaken to thwart the activities of designated groups but also because of the symbolic, public role it plays as a tool of U.S. counterterrorism policy” (Cronin, 2003, p. 5). A review of these lists revealed that none house the identities of domestic terrorist individuals or groups.

Two additional lists of note are the publically available FBI’s Most Wanted Terrorist (Federal Bureau of Investigation, n.d.b.) and Domestic Terrorism lists (Federal Bureau of Investigation, n.d.a.), which are the FBI’s only externally published repositories for identifying a domestic terror subject (post-indictment) to law enforcement, selected communities of interest, or the public. Both lists provide information concerning fugitives who have been criminally charged and are associated with either international or domestic terrorism. For instance, FBI fugitive and animal rights extremist Daniel Andreas San Diego was recently added to the FBI’s Most Wanted Terrorist list (Federal Bureau of Investigation, n.d.b.). Interestingly, these lists do not identify known or suspected domestic terror subjects or groups, regardless of their criminal history or current threat, unless or until they have been charged with a federal crime, which is unlike the criteria used for placement on the FTO list.

Efforts to develop centralized lists that openly recognize domestic terrorists have been attempted in the past. In 2004, the Forty-sixth Legislature for the State of Arizona introduced bill SB 1081: Animal and Ecological Terrorism (Arizona State Legislature, 2004a). The legislation made it unlawful for groups or individuals to engage in animal or ecological terrorism, and made it mandatory for an individual who was convicted of the crimes enumerated within the bill to be subject to a *Terrorist Registration*. This list

⁴ Some of these lists are available via the Internet and may be viewed on the State Department Web site located at <http://www.state.gov/s/ct/list/#> and the Department of Treasury, Foreign Asset Control Web site located at <http://www.ustreas.gov/offices/enforcement/ofac/sdn/>.

would then be subsequently available for public view via an InternetWweb site (Arizona State Legislature, 2004b). Although the legislation was passed in the Senate, records reflect that in May of 2004, the bill was vetoed by Arizona Governor Janet Napolitano (Arizona State Legislature, 2004b)⁵. Shortly after the bill was vetoed, the Sierra Club of Arizona described the governor as an “All Star” for vetoing the “ridiculous animal and ecological terrorism bill” (Sierra Club, 2004). Additionally, the Sierra Club stated the legislature focused their time on undercutting constitutional rights, reverently referring to the vetoed bill (Sierra Club, 2004). If the bill would have been successful, the identities of convicted animal and ecological terrorists would have been made public, and law enforcement and homeland security agencies would have benefited through increased awareness of potential domestic terrorist adherents operating within their domain.

In the book *Transforming U.S. Intelligence*, author Jennifer Sims pointed out the possible bureaucratic friction in relation to civil liberties and public protection that may occur when collecting domestic law enforcement intelligence and sharing it with other agencies such as the Central Intelligence Agency (CIA) (2005, p. 56). It can be argued that Sims’ *friction* is also present within state agencies, as evidenced by the previous example. Henry Crumpton (2005), a contributing author to *Transforming U.S. Intelligence*, stated, “...domestic intelligence collection within the United States had to abide by the law” (p. 207). But with that said, Arizona’s attempt to create anti-terrorism laws fell victim to political/bureaucratic pressures. Crumpton went on to say that collection of domestic intelligence can and should “...enable law enforcement officers and other intelligence consumers to do their jobs, [i.e.]...intelligence and law enforcement can be mutually supportive” (p. 207). Therefore, in this example, it can be argued that if sufficient laws do not exist for public protection against domestic terrorists, law enforcement and protection of civil liberties will continue to come into conflict.

Outside of the bureaucratic challenges encountered by elected officials, the *9/11 Commission Report* also recognized the need for the protection of civil liberties while protecting the homeland from the threat of terrorism when it stated, “...Americans should

⁵ Governor Janet Napolitano is now the current United States Secretary of Homeland Security.

be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must strive to keep it” (National Commission on Terrorist Attacks Upon the United States [9/11 Commission], 2004, p. 394). When it comes to civil liberties, defining the differences between domestic terrorists and individuals or groups exercising First Amendment protected activities, is a fundamental challenge. The FBI has partially defined domestic terrorism as:

...the unlawful use, or threatened use, of violence by a group or individual based and operating entirely within the United States (or its territories) without foreign direction, committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. (Freeh, 2001)

In 2008, United States Attorney General Michael Mukasey published *The Attorney General’s Guidelines for Domestic FBI Operations* (Mukasey, 2008). The guidelines defined domestic terrorism for the purpose of Enterprise Investigations as “domestic terrorism as defined in 18 U.S.C. 2331 (5) involving a violation of federal criminal law” (Mukasey, 2008, p. 23). As Nathaniel Stewart (2005) pointed out in his published review of the state of Ohio’s common law history of terrorism, referencing research by Nicholas J. Perry, there are at least 19 definitions or descriptions of terrorism within federal law. During a 2008 audit of the U.S. Department of Justice’s Watchlisting Process, it was noted that “ATF officials suggested that there was a lack of clarity, consistency, and understanding of the definitions of terrorism and terrorist acts among law enforcement agencies” (U.S. Department of Justice, 2008, p. 18). The context in which the term terrorism is referred to may be found in hundreds of other government and federal agency documentation as well (Martin, 2006).

The final challenge in establishing a process to validate and designate domestic terrorists is to determine what agency should be responsible for the development of the associated protocols and processes. By way of example, the FBI currently has lead agency responsibility for investigating terrorism within the statutory jurisdiction of the United States (28 C.F.R. 0.85). The FBI’s role in investigating terrorism has been defined within Presidential Directives and federal legislation. The *National Security Presidential*

Directive 46 (NSPD 46), *Homeland Security Presidential Directive 15* (HSPD 15)⁶ and the USA PATRIOT Act of 2001 are three of the most recent government documents defining the FBI's responsibilities with respect to investigating terrorism (9/11 Commission, 2004). Individual states have also developed laws and legislation that provide for local law enforcement to take action against terrorism adherents within their area of responsibility (Stewart, 2005).⁷ White (2006) noted that notwithstanding the nature of the criminal actions perpetrated by domestic terrorism adherents, any law enforcement or homeland security agency could respond and call it something other than domestic terrorism (p. 231).

In combination with determining who should be developing a process, Sims (2005) identified the need for establishing protocols when it comes to domestic intelligence collection and information sharing, and stated, "...such protocols which would be openly arrived at, could serve as a mechanism for public discussion of the modalities for federal intervention in the cause of domestic intelligence, whether by the CIA, FBI, the DHS, or Northern Command" (p. 56). Crumpton (2005) also argues that law enforcement and intelligence collection are not mutually exclusive (p. 207), while White (2006) posits that what is needed when it comes to law enforcement is a clear "framework that [explains] their counterterrorist role" (p. 231). Notwithstanding, the overall collection of domestic intelligence is not limited to federal entities. Information sharing and counterterrorism cuts across all disciplines, both federal and non-federal. Therefore, it can be argued that established protocols for collecting domestic intelligence against potential domestic terrorism adherents will play an essential role in how law enforcement and homeland security communities operate while conducting their day-to-day activities.

Unlike the FTO list, which addresses international terrorism (U.S. Department of State, 2009), this researcher identified only one validation and designation process, with

⁶ National Security Presidential Directive 46 and Homeland Security Presidential Directive 15 are classified documents and not available to the general public for review.

⁷ Stewart's research reflected Ohio was just one of several states that enacted antiterrorism statutes after the 9/11 attacks.

established protocols, by any federal government agency for identifying individuals engaged in domestic terrorism for inclusion on a government list. That list is the Consolidated Terrorist Watch List housed within the Terrorist Screening Center (TSC), which is managed by the FBI (Terrorist Screening Center, 2009). The aforementioned protocols are outlined in a document that is classified *Sensitive Security Information* and is not available for review by the general public. This researcher was not able to find any validation and designation processes or protocols for domestic terrorist groups in support of nomination to any government terrorist listing. The TSC has published limited criteria for nominating individuals suspected of being domestic terrorists as part of the Watch Listing process (Terrorist Screening Center, 2009). It is noteworthy to mention that this criterion does not apply to the nomination of domestic terrorist groups.

The Attorney General's Guidelines for domestic FBI operations issued by Attorney General Mukasey in September of 2008 outlined the criteria for initiating FBI investigations with reference to investigating groups believed to be involved in domestic terrorism (Mukasey, 2008, p. 23). However, these guidelines do not provide direction on how to validate and designate or establish and publish domestic terrorist groups onto any law enforcement or homeland security terrorism list.

To summarize the problem, there is a long history of domestic terrorist activity within the United States perpetrated by groups and individuals seeking political and social change (Brannan, 2002, p. 6). These individuals and groups include the Black Panther Party, Weather Underground, Covenant Sword and the Arm of the Lord, Ku Klux Klan, Earth Liberation Front, Animal Liberation Front, and Timothy McVeigh—perpetrator of the horrific Oklahoma City truck bombing (Brannan, 2002). Despite this history, none of these groups or individuals are identified on any government list as a domestic terrorist or terrorist organization. Furthermore, without properly defining and implementing processes for designating domestic terrorism individuals or groups, law enforcement and homeland security agencies will not be able to take pre-emptive action afforded by information sharing activities that could enable the avoidance of a *Hobson's choice* impingement upon First Amendment Rights.

B. RESEARCH QUESTION

This research addresses important and critical questions related to how the United States deals with terrorism initiated by those on the domestic front. Specifically, it identifies the need for the United States to define a process to validate and designate a domestic terrorist or domestic terrorist group. This straight-forward proposal for designating citizens and legal residents in an articulate manner forces us to consider and explore four additional but related issues: (1) Will domestic terrorism designation aid homeland security communities in their respective counterterrorism missions; (2) Will constitutional civil liberties and First Amendment protected activities, (i.e., freedom of speech, etc.) be in conflict with a designation and validation process; (3) Should a United States citizen be “branded” a terrorist much like a gang member or a sex offender; and finally, (4) What federal agency should be responsible for developing a designation process?

C. ARGUMENT

“The prevention of terrorist attacks must be viewed as the paramount priority in any national, state, tribal, or local homeland security strategy,” so stated the International Association of Chiefs of Police (IACP) in a report meant to inform the next President of the United States who took office in January of 2009 (Ruecker, 2008, p. 7). The report went on to state the federal government needed to put forth more efforts, “...to improve the ability of law enforcement and other public safety and security agencies to identify, investigate, and apprehend suspected terrorists before they can strike” (p. 7).

This researcher also recognizes the importance of identifying terrorists and preventing future attacks. Therefore, this thesis presents two overarching recommendations for consideration by the United States homeland security community: (1) Establish a nationwide process that will identify, validate, and designate individuals or groups involved in domestic terrorism activities; and (2) assign the Federal Bureau of Investigation (FBI) as the lead federal agency to take on this challenge.

The premise behind the designation of domestic terrorists and groups follows the same logic as other nationally recognized criminal and international terrorism designation processes, which serve “important public safety purposes,” as stated in the National Guidelines for Sex Offender Registration and Notification Act (SORNA) Final Guidelines of 2008 (U.S. Department of Justice, 2008, p. 3). Additionally, lists such as the foreign terrorist organization (FTO) list, “...brings legal clarity to efforts to identify and prosecute members of terrorist organizations and those who support them” (Cronin, 2003, p. 7). Cronin further emphasized the importance of the FTO list in her congressional research report of 2003, where she stated, “...the FTO list...provides lucidity...of coordinating the actions of Executive agencies, by giving them a central focal point upon which the efforts converge. U.S. counterterrorism is therefore potentially more effective....And these measures arguably make Americans more secure from terrorist attacks” (Cronin, 2003, p. 7). Currently, this researcher has not identified any government sponsored domestic terrorism list that provides for the same advantages as SORNA or the FTO list.⁸ Therefore, arguably Americans may be less safe from a purely domestic terrorist attack due to the absence of a domestic terrorist list.

In recognition of the need for the development of a domestic terrorist validation and designation process, this researcher posits the FBI as the legitimate agency to take on such a challenge. Mintzberg, Ashland & Lampel describe legitimacy as a function of three systems: formal authority, established structure, and certified expertise (1998, p. 240). First and foremost, there are compelling statutory authorities for the FBI to take a leadership role in the development of a domestic terrorist list. For example, the FBI’s responsibility to investigate terrorism is defined within 28 C.F.R. 0.85 that states, the FBI shall, “...Exercise Lead Agency responsibility in investigating all crimes for which it has primary or concurrent jurisdiction and that involve terrorist activities or acts in

⁸ SORNA authorizes the Attorney General thru the use of federal law enforcement to assist in locating and apprehending sex offenders who violate registration requirements. Groups who are identified on the FTO list are subject to financial and criminal sanctions from numerous federal law enforcement and regulatory agencies. Conversely, the domestic terrorists who are placed on the *watch lists* such as the No-Fly and VGTOF are not subject to any criminal or regulatory actions. It should be noted the No-Fly list and VGTOF do not house information identifying domestic terrorism groups.

preparation of terrorist activities within the statutory jurisdiction of the United States” (28 C.F.R. Section 0.85). Additionally, 28 C.F.R. Section 0.85 further states, “if another [non-FBI] Federal agency identifies an individual who is engaged in terrorist activities or in acts in preparation of terrorist activities, that agency is requested to promptly notify the FBI” (p. 2).

FBI investigations and operations are governed by the *Attorney General’s Guidelines for Domestic FBI Operations* (Mukasey, 2008). These guidelines apply to domestic investigative activities of the FBI including domestic terrorism investigations. The guidelines incorporate oversight measures, “...to ensure that all FBI activities are conducted in a manner consistent with law and policy” (Mukasey, 2008, p. 6). Additionally, the FBI is currently responsible for the nomination of all purely domestic terrorism subjects to the Terrorist Screening Center for watch listing purposes (U.S. Department of Justice, 2009a, p. vii). The FBI has inculcated the responsibility for counterterrorism into its culture and currently lists counterterrorism as its number one priority investigative program (Federal Bureau of Investigation, 2007a). The structure and resources devoted to the FBI’s Counterterrorism Division further illustrates the emphasis the agency places on counterterrorism operations.⁹

Building on statutory obligations and processes already in place, the FBI has been “...recognized throughout the world, and they became the only agency that could coordinate thousands of local U.S. police departments in a counterterrorism direction” (White, 2006, p. 230). Additionally, the FBI’s vision, as explained by the FBI’s *National Information Sharing Strategy*, [is] “...committed to sharing timely, relevant, and actionable intelligence to the widest appropriate audience” (Federal Bureau of Investigation, 2008).

In light of the continued threat of future domestic terrorist actions by actors who are both known and unknown, a validation and designation process will enable

⁹ FBI Director Mueller stated in his 2007 testimony before the Senate Committee on Homeland Security and Governmental Affairs that the FBI realigned its priorities and transformed itself into a national security agency (Federal Bureau of Investigation, 2007a).

information-sharing between all agencies thereby fostering an environment for law enforcement and homeland security agencies to better understand and prevent attacks by domestic terrorists.

D. VALUE INNOVATION

The *value innovation* is to incorporate the law enforcement and homeland security communities of interest into a domestic terrorism investigative and intelligence collection process. In their book *The Blue Ocean Strategy*, Kim and Mauborgne (2005) describe *value innovation* as “... instead of focusing on beating the competition, you focus on making the competition irrelevant by creating a leap in value for buyers and your company, thereby opening up new and uncontested market space” (p. 12). The FBI has consistently employed the same strategy when addressing domestic terrorism. This strategy has primarily consisted of the FBI identifying and investigating domestic terrorism adherents either by relying on referrals from state and local law enforcement and other communities of interest or by independently developing intelligence that would promulgate an FBI investigation. Unfortunately, as White pointed out, law enforcement may label terrorism something else, such as a regular crime, and as such, believes that “most domestic terrorism goes unnoticed” (2006, p. 230). Once the domestic terrorism investigations begin, the FBI assumes the responsibility to advance the investigations (i.e., entering domestic terrorism subjects into VGTOF) (U.S. Department of Justice, 2009a, p. vi). Unfortunately, the mere existence or results of the investigations of the identified domestic terrorism adherents may never be known outside a select group of communities of interest.¹⁰ Unlike international terrorists groups, criminal gangs, and child sex offenders, whose existence are made known through various public and law enforcement sensitive lists (e.g., SORNA, FTO, and the Los Angeles Police Department’s (LAPD) Gang Injunctions list),¹¹ the FBI has consistently employed a

¹⁰ Subjects entered into VGTOF are not published directly to local law enforcement or the National Counterterrorism Center unless specific inquiries are made by a specific agency.

¹¹ The Los Angeles Police Department’s *Current Gang Injunctions* list identifies validated gangs through a public Web site that can be viewed at http://www.lapdonline.org/gang_injunctions/content_basic_view/33163.

domestic terrorism strategy effectively grabbing a larger share of domestic terrorism investigations and intelligence collection that may result in a zero-sum game in the fight against domestic terrorism adherents. Although the overarching issue is to prevent future terrorist attacks, the FBI should define a supporting strategic initiative for the development of a process that would incorporate the over 800,000 full time law enforcement officers, Intelligence Community members, and homeland security employees located throughout the nation (U. S. Department of Justice, 2009b). The essence of this premise was also identified within the *9/11 Commission Report*:

The FBI is just a small fraction of the national law enforcement community in the United States, a community comprised mainly of state and local agencies. The network designed for sharing information, and the work of the FBI through local Joint Terrorism Task Forces, should build a reciprocal relationship in which state and local agents understand what information they are looking for and, in turn, receive some of the information being developed about what is happening, or may happen, in their communities. In this relationship, the Department of Homeland Security also will play an important part. (9/11 Commission, 2004, p. 427)

This thesis supports the argument that the development of a process to validate and designate domestic terrorism individuals and groups would complement the nation's counterterrorism strategy. As stated by White (2006), "It would be helpful if law enforcement officers had a practical framework that explained their counterterrorist role" (p. 231).

An effective way to display a diagnostic view of the *value innovation* used in this thesis is through the use of a *strategy canvas* (Figure 1). As Kim & Mauborgne (2005) describe, a *strategy canvas* may be used to identify the current state of an industry and also visually represent uncontested market space. In this case, the canvas depicted in Figure 1 has identified the current and preferred state of defining domestic terrorism, agencies collecting intelligence, civil liberties concerns (perception), published domestic terrorist lists, and a validation/designation process. The deficiencies between current and the preferred *value innovations* are clearly represented.

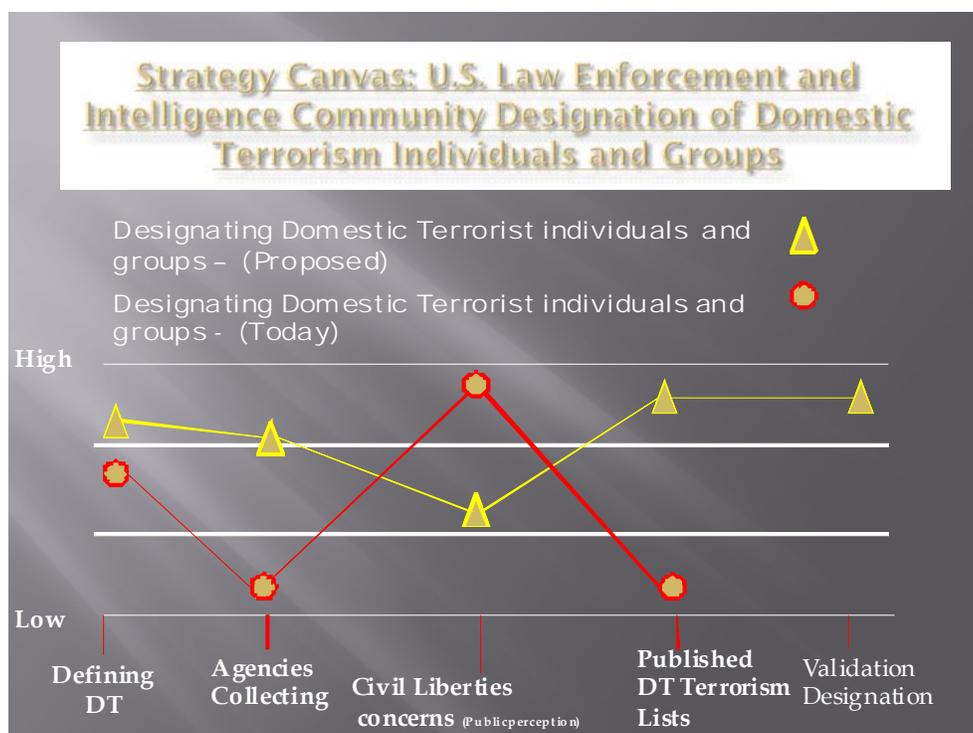


Figure 1. Strategy Canvas (After Kim & Mauborgne, 2005)

The development of a legally defensible validation and designation process for domestic terrorism adherents would have a positive shift from the present state, as depicted by the circles, to a preferred innovative state, as depicted by the triangles. The preferred state would provide for the following:

1. Defining Domestic Terrorism

As previously stated, there is no universally accepted definition of terrorism (Martin, 2006) or domestic terrorism as borne out by the interviews in support of this research (Appendix I). This research has identified a useable definition for the purpose of validating and designating domestic terrorism adherents, thereby offering more clarity for law enforcement and homeland security agencies.

2. Agencies Collecting

The collection and retention of intelligence, when U.S. citizens are the target, promulgate significant constitutional challenges. As previously mentioned, ATF officials suggested there was a lack of clarity, consistency, and understanding of defining terrorist acts among law enforcement (U.S. Department of Justice, 2008, p. 18). It can be argued these same issues affect the greater Intelligence Community.¹² Additionally, due to narrow and sometimes unpublished collection requirements pertaining to domestic terrorism, local, state, and federal law enforcement agencies are unclear on what to collect. Therefore, it may be further argued establishing a clear and concise validation and designation process will permit more agencies to begin collection of intelligence surrounding domestic terrorism adherents.

3. Civil Liberties

The United States government has an obligation to protect civil liberties and the constitutional rights of all its citizenry (9/11 Commission, 2004, p. 234). As such, the agencies responsible for protecting the citizenry from the threat and actions of terrorists are often challenged by differentiating between constitutionally protected civil liberties and the potential actions of terrorist(s). Conversely, citizens expect the government to operate within the guidelines of the constitution. By openly publishing legally defensible validation requirements to define a domestic terrorism adherent, this research suggests the ambiguity surrounding impinging on civil liberties by law enforcement will be greatly diminished. This concept is further supported by the resultant interviews conducted in support of the research (see Appendix A, question 11).

¹² The U.S. Intelligence Community consists of 18 agencies which includes the FBI. Further information concerning the Intelligence Community may be reviewed at <http://www.intelligence.gov/1-members.shtml>.

4. Published Domestic Terrorism Lists

This research has determined there is only one mechanism to publish the identities of suspected domestic terrorism adherents (with limited distribution) and no mechanism to publish the identities of suspected domestic terrorism groups. Domestic terrorism adherents may be identified through the inquiries made to the Consolidated Terrorist Watchlist (Terrorist Screening Center, 2009). Post-indictment, a domestic terrorism adherent may be identified within the FBI's Most Wanted Terrorist list and Wanted Domestic Terrorist list (Federal Bureau of Investigation, 2009). There are no government published lists of groups who are suspected of sponsoring domestic terrorism or individuals convicted of crimes associated with domestic terrorism. Domestic terrorism validation and designation processes and corresponding lists will provide clarity and a better understanding of the domestic terrorism threat to the greater homeland security community.

5. Validation and Designation

The research has determined there are no universally accepted validation requirements defining domestic terrorism adherents. The FBI has an established watch list nomination process for their field agents (U.S. Department of Justice, 2009a). Outside of the FBI's watch list nomination process, this research did not identify any federal domestic terrorism validation protocols to be followed by the greater homeland security community.

E. SIGNIFICANCE OF RESEARCH

The benefits of this thesis will have the potential to address several areas critical to homeland security to include detecting, disrupting, or preventing another domestic terrorism attack. First, establishing a national level domestic terrorism validation and designation process will provide for a national effort in standardizing domestic terrorism investigations and intelligence collection (Interview of Intelligence Community Official, 2009). Additionally, the process would increase public awareness "...[because] today

people do not know who are subjects and who are not” (Interview of Biomedical Research Advocate, 2009). This standardization will, in turn, help to alleviate public fears of increased loss of civil liberties due to increased domestic intelligence and law enforcement actions (Interview of State Law Enforcement Official, 2009). As stated in the *9/11 Commission Report*, “We must find ways of reconciling security with liberty, since the success of one helps protect the other” (9/11 Commission, 2004. p. 395).

When a crime is labeled with the term *terrorism*, public fears increase but most governments permit security forces greater latitude to address terrorism even though it may be a local crime (White, 2006, p. 231). Therefore, developing a domestic terrorism validation and designation process will assist law enforcement, homeland security professionals, and elected officials in understanding the threats that may be operating in their areas of responsibility. In turn, the information may also be used for budget enhancements or legislative actions to aid in countering these newly identified threats (Interview Department of Justice Law Enforcement, 2009).

This research has also uncovered that a validation and designation process could be a double-edged sword and may not be endorsed by some civil liberty advocates who may purport that mere membership in a group does not necessarily imply the member is committed to take part in acts of violence (Interview Civil Liberties Advocate, 2009). But, to counter this concern, a member of the state law enforcement community stated, a “[validation process]...may make it easier to identify members of DT groups. Probably not make it any more difficult than it is today” (Interview of State Law Enforcement Official, 2009).

F. METHODS

The literary research concerning the subject matter of this thesis has yielded information that was widely ambiguous (i.e., *what is terrorism, who is a terrorist or terrorist group*). Reviewing literature alone did not permit the researcher to go behind the

written word. Therefore, in order to obtain the data necessary to better illustrate the issues being explored the researcher employed the qualitative research methods of interviews and case studies.

1. Interviews: A Qualitative Approach to Research

The purpose of the interviews conducted in this research was to assist the researcher in identifying qualitative salient points of specificity that were used to introduce another perspective in illustrating the usefulness of developing a process for validating and designating domestic terrorist individuals and groups. Defining terrorism has an element of interpretation that historically has been ambiguous from literary research conducted to date.¹³ Following the suggestions outlined in Leedy and Ormrod's book, *Practical Research, Planning and Design*, (2005), this researcher believes the qualitative method of research employed was the most beneficial means to obtain research data to address this quantitative gap. As stated by Leedy and Ormrod:

Qualitative researchers operate under the assumption that reality is not easily divided into discrete, measurable variables. Qualitative researchers are often described as being the research instrument because the bulk of their data collection is dependent on their personal involvement (interviews, observations) in the setting. (2005, p. 96)

As a federal law enforcement officer with over 20 years of experience investigating a myriad of local, state, and federal crimes including acts of terrorism, both foreign and domestic, this researcher was able to apply personal knowledge to bring additional value-added insights to the research. This experience also assisted in the identification and selection of the interview subjects. As suggested by Leedy and Ormrod, "Rather than sample a large number of people with the intent of making generalizations, qualitative researchers tend to select a few participants who can best shed light on the phenomenon under investigation" (2005, p. 96). In keeping with this guidance, the interview subjects selected represented individuals the researcher felt could provide "typical perspectives and perceptions" (p. 147), which is directly related to the

¹³ See Chapter I part G, Literature Review.

research. A total of 11 interviews were conducted and included representatives from the United States Department of Justice, American Civil Liberties Union, senior officials of a statewide law enforcement agency, an advocate for biomedical research, and a law enforcement official from the United Kingdom.

The selection of these individuals was largely based on their historic and current involvement in addressing issues surrounding the enforcement of criminal and terrorism laws within the United States and abroad. The interview subjects were identified and questions were developed relating to the overall argument and issues discussed within this thesis. The interviews allowed the researcher to gather a wider range of information not readily available in the literature. A total of 23 questions were presented to the subjects. By way of example, the questions posed were used to determine: How do the interview subjects define terrorism and terrorists? Would a validation process for domestic terrorism be a detriment or an added utility to the United States Counterterrorism effort? Will a validation and designation process reduce infringement on civil liberties? Is the FBI the correct agency to develop a validation and designation process?

Additionally, the interviews allowed the researcher to interact directly with the subjects, exploring the responses and “emergent” theories that assisted in explaining the topics under study (Leedy & Ormrod, 2005, p. 95). All but one of the interviews was conducted in person. The final interview was conducted via the internet through a series of interactive electronic mail messages. The identities of the interview subjects remain anonymous in accordance with the academic policies of the Naval Postgraduate School’s Institution Review Board (IRB) process. The responses of the interview subjects are used throughout this thesis and are summarized in Appendix A.

2. Case Studies: Application and Concepts

Two case studies were analyzed for the purpose of providing a practical application of the arguments and issues presented within the thesis. This researcher believes that these case studies will assist the reader to draw conclusions about the extent

to which its findings might be “generalizable” to the context of the research (Leedy & Ormrod, 2005, p. 136). The case study analysis generally followed the five step process as described by Leedy and Ormrod referencing the work of J.W. Creswell: organization of details, categorization of data, interpretation of single instances, identification of patterns, and synthesis and generalizations (p. 136).

The first case study analyzed the activities of an Animal Rights Extremist Group known as Stop Huntingdon Animal Cruelty (SHAC). SHAC and its members were successfully prosecuted in federal court in March 2006 (U.S. Department of Justice, 2006). The researcher argues throughout the case study that the application of a coherent process for validating and designating SHAC and its members as a domestic terrorist group, prior to their arrests and convictions, may have identified, disrupted, or prevented criminal acts of violence and terrorism.¹⁴

The second case study used a comparative analysis of legal authorities utilized by the United States and the United Kingdom for the purpose of collecting intelligence against terrorists who are citizens of their respective countries. The collection of intelligence against U.S. persons is a significant issue to all citizens as emphasized in the *Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction* 2005 (U.S. Senate, 2005, p. 335). The researcher looks at the U.S. person dilemma with regard to the standards required of federal law enforcement agencies to collect electronic communications and intelligence against U.S. persons suspected of being domestic terrorists as compared to like standards used by the United Kingdom.¹⁵

G. LITERATURE REVIEW

The literary analysis of the critical information pertaining to the subject matter provided significant insight into what would be required to develop a process to validate and designate domestic terrorist individuals and groups. The research brought to light two

¹⁴ The Stop Huntingdon Animal Cruelty (SHAC) case study is located in Chapter V, Section A.

¹⁵ The U.S. Person Dilemma case study is located in Chapter III Section C.

fundamental aspects: there is no “universally” accepted definition of a terrorist or terrorism (Federal Bureau of Investigation, 2007, p. iv), and there is no government process for validating and designating domestic terrorist groups for inclusion in a government list (Robinson, 2006). Recognizing both of these factors are essential steps toward developing a legally defensible validation process in support of designating domestic terrorism adherents.

This thesis is in support of the government ultimately defining who is a domestic *terrorist*; therefore, it is important to define terrorism in a manner that would refrain from; “...[impinging] unduly on democratic rights and freedoms” (Golder & Williams, 2004, p. 294). As stated in the Constitution of the United States, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition...” (Constitution, Amendment I). With the protection of civil liberties always being of paramount importance, “...most people seem to believe that terrorism is bad and should be eradicated” (Bogner, 2007, p. 4). But in order for the United States to eradicate terrorism, one must first identify who the terrorists are. Bruce Hoffman has written, “...everyone agrees ‘Terrorism’ is a pejorative term” (2006, p. 23). With this in mind, to label someone a terrorist infers a “moral judgment” upon them (Hoffman, 2006, p. 23). Therefore developing a validation and designation process would be of little value if it were at the cost of sacrificing the constitutional rights of our citizens.¹⁶

1. Defining Terrorism

The myriad definitions of what constitutes a terrorist or terrorism is not confined to the United States (Martin, 2006). The international community is just as undecided. Golder and Williams emphasized this dilemma in a University of New South Wales,

¹⁶ Golder & Williams briefly discussed a Canadian Supreme Court case, *Suresh v Canada*. The ruling discussed the core values of liberty, the rule of law, and principals of fundamental justice and further stating “it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values” (Golder & Williams, 2004, p. 294).

Australia, *Law Journal* article stating, “Some have likened the search for the legal definition of terrorism to the quest for the Holy Grail” (2004, p. 270). This research has established that social, political, academic, legal, and law enforcement entities from several governments have published opinions, enacted legislation, and developed laws for the purpose of trying to protect its citizenry from acts of terrorists (Golder & Williams, 2004).

Within the United States defining terrorism has met with much the same fate as international definitions. In his book, *Inside Terrorism*, Bruce Hoffman (2006) identifies the varying definitions within the U.S. government. He examines the definitions offered by the FBI, Department of Homeland Security (DHS), U.S. State Department, and the Department of Defense (DoD). Hoffman draws reference to Alex Schmid who, according to Hoffman, devoted more than a hundred pages of the book *Political Terrorism: A Research Guide*, trying to find a broadly acceptable explication of the word *terrorism* (2006, p. 33). But Hoffman recognizes each agency’s definition is fashioned to reflect the priorities of their interests/jurisdictions. For example, the FBI’s definition encompasses both social and political aspects (Hoffman, 2006), whereas the DoD definition is more complete by including the threat of violence as well as the targeting of whole societies but neglects to address social issues (Hoffman, 2006).

Due to the countless and almost infinite opinions, definitions and debates associated with defining terrorism, for the purpose of this research the researcher concentrated on how the United States defines what constitutes a terrorist and terrorism. Due diligence was made in understanding the composition of these terms within the international community as well. Because this thesis is in support of developing a designation process that will be applied to domestic terrorists, is there a difference between domestic terrorism and an international terrorism?

a. Domestic and International Terrorism: Why Draw a Distinction?

The FBI places the terrorist threat facing the United States into the categories of domestic and international (Federal Bureau of Investigation, 2002). In 2002,

FBI Domestic Terrorism Section Chief James Jarboe provided congressional testimony describing International and domestic terrorism by stating:

International terrorism involves violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state...are intended to intimidate or coerce a civilian population, influence the policy of a government. These acts transcend national boundaries in terms of means by which they are accomplished, the persons they appear intend to intimidate, or the locale in which perpetrators operate... Domestic terrorism is the unlawful use, or threatened use, of violence by a group or individual based and operating entirely within the United States (or its territories) without foreign direction, committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. (Federal Bureau of Investigation, 2002)

David Brannan (2002) suggests the distinguishing differences between the two types of terrorism are “whether the terrorists who carry out the attack are citizens of or residing in the country attacked and whether they are directed from abroad” (p. 4). He further argues whether drawing a distinction between the two, “domestic and international, are at all helpful or relevant in today’s threat environment” (Brannan, 2002, p. 4). Golder and Williams’s research examined how six common law countries defined terrorism; Australia, United States of America, United Kingdom, Canada, New Zealand, and South Africa. An analysis of their research revealed only the United States draws a legal distinction between *domestic* and *international* terrorism (Golder & Williams, 2004).

The internationally based Organization for Economic Co-Operation and Development (OECD) Insurance sub-committee published a report in 2004 that attempted to define terrorism for the purpose of compensation. As defined within the report, the OECD has a membership of approximately 30 countries who support democracy and a market economy. The report attempted to address the historical account of terrorism, elements used to help define terrorism, and development of a check-list for defining terrorism for the purpose of compensation. An analysis of the report revealed, of

the 19 countries whose definitions of terrorist's acts for the purpose of compensation in OECD countries, only the United States drew a distinction to terrorist acts "...committed by one or more individuals acting on behalf of any foreign person or foreign interest" (Organization for Economic Co-Operation and Development Insurance Committee [OECD], 2004, p. 25). Once again the United States drew a distinction between International and domestic terrorism. All other countries, within the report described terrorism adherents as organizations or individuals who perpetrated criminal actions upon their nation state, regardless of geographic location or citizenship of the perpetrator. In this example, the distinction deals with defining the perpetrators so the insured may claim compensation after an event has occurred. Additionally, according to the report, the insurer may use these criteria for setting premiums based on "characteristics of the risks" (OECD, 2004, p. 19).

Within the United States, there are legal and jurisdictional elements to the distinction between domestic and international terrorism. According to a Congressional Research Report, Elizabeth Martin (2006) brings attention to the hundreds of federal statutes and regulations that address terrorism. Within Martin's report only the more prevalent of the statutory definitions were presented, and of these, only one definition, Title 18 United States Code (U.S.C) 2331, defines both *international and domestic terrorism*. In summary, both definitions have a majority of the same content. The differences lay within defining geographic location of the perpetrators. For example, within this statute, international terrorism is defined as actions that "...occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum" (Title 18 U.S.C. 2331). It also defines domestic terrorism as actions that "...occur primarily within the territorial jurisdiction of the United States" (Title 18 U.S.C. 2331). The FBI utilizes these definitions for the purpose of investigating both international and domestic terrorism (Mukasey, 2008).

In a report on the proceedings of an international law seminar, Dr. Larissa Van den Herik (2007) outlined three important points relating to the definition of terrorism: the distinction between domestic and international terrorism, implications of qualifying a certain act as an act of terrorism, and the dangers of misusing the term terrorism. Van den Herik argues that the “boundaries between these two forms of terrorism, [domestic & international], are hard to draw” (p. 3). She further noted that although international law recognizes both forms of terrorism it only seeks to regulate international terrorism. In other words, international law places the burden of defining domestic terrorism on the individual nation.

It could be argued, as Brannan (2002) suggests, that the United States has made the distinction between domestic and international terrorism because policymakers do not see the domestic threat to be as dangerous as the international threat. Looking back at the purely domestic terrorist activity perpetrated in the 1960s and 1970s, Brannan argues “these domestic groups were not taken as seriously as foreign-based groups” (p. 7).¹⁷ But, as previously noted, the United States Code (USC) has made a distinction between domestic and international terrorism. Therefore, regardless of the underlying political or bureaucratic reasons that may be at play, the United States has established the legal parameters for defining domestic terrorism per Title 18 U.S.C. 2331 to be:

5) the term “domestic terrorism” means activities that—

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

¹⁷ Brannan examined the religious based and left wing and right wing groups such as the Covenant Sword and the Arm of the Lord, Ku Klux Klan, Black Panther Party, and the Weather Underground.

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States. (Title 18 U.S.C. 2331)

b. Defining the Act of Terrorism

A fundamental understanding of the term terrorism was found in the *Oxford Dictionary of Philosophy*, “Terrorism: The intentional use of Violence, particularly in order to sow widespread fear, for political ends [emphasis added]” (Blackburn, 1996, p. 374).

The *Oxford Dictionary* (1996) also brought reference to the French Engineer, Georges Sorel, who in the late 1800s and early 1900s attempted to provide “reflection” on the violence of his day (p. 375). His belief was what some would consider far left liberalism (Blackburn, 1996). He conveyed a message of trying to understand why some may use violence against the state due to perceived oppression. Sorel also explained the use of violence against those who appear to be sympathizers in order to lure them into collaboration with the government they wish to overthrow (Blackburn, 1996). This may be one of the earlier explanations of why one man’s terrorist is another man’s freedom fighter.

According to Bruce Hoffman (2006) terrorism is “fundamentally and inherently political.... [and] terrorism is thus violence” (p. 2). Ted Gurr “argues terrorism is a tactic used by the weak to intimidate the strong and, in turn, used by the strong to repress the weak” (White, 2006, p. 228). The United States Code Title 18 U.S.C. 2332b (g) specifically defines a federal crime of terrorism as “...an offense that (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct...” (Title 18 U.S.C. 2332b (g)). The statute further identifies specific violations of federal criminal law such as destruction of aircraft, use of biological and chemical weapons, arson, bombing of public facilities, to name a few (Title 18 U.S.C. 2332b(g)). If an individual were to commit one of the enumerated acts as

identified within 2332b(g) they may be subject to being defined as perpetrating a crime of terrorism. Accordingly, once again federal statute 18 U.S.C. 2331 may be applied in support of further defining an act of terrorism. These statutes follow the Oxford definition as well as Hoffman (2006) and Gurr's (White, 2006) arguments in combination that terrorism is political, violent, and a tactic.

The previously mentioned OECD report added historical content to this research. According to the report, the League of Nations attempted to define terrorism in 1937. During this time in history, they looked at terrorism as an attempt, through the use of criminal acts, to create terror in the minds of people or groups of people (OECD, 2004, p. 10). As time moved forward, this convention was not embraced. The OECD set out to establish a checklist that could be used to define terrorism for the purpose of compensation. The OECD report identified two main elements that may be applied when defining terrorism, "Means and Effect and Intention" (p. 2). According to this report, the writers identified these elements through consultation with international member countries. Ultimately, understanding that these elements alone could not be used to define terrorism, they looked further to identifying what actions may be considered acts of terrorism for the purpose of compensation. These acts were defined as those acts causing "serious harm" (OECD, 2004, Appendix). According to the report, unfortunately, the OECD fell short of completely defining "serious" and left the nation states affected by terrorism to decide the meaning themselves.

As stated previously, the United States Federal Criminal statutes define acts of terrorism in two categories, domestic and international; however, according to the OECD report, for the purpose of civil compensation, an act of terrorism is only defined as acts committed by a foreign person or group. Additionally, the damage caused by the act must meet a certain monetary loss threshold before compensation is awarded. The report defines this as follows:

Terrorism Risk Insurance Act of 2002—Public Law 107-279 an act certified by the Secretary of the Treasury in concurrence with the Secretary of State and the Attorney General of the United States; Any certification or decision not to certify an act or event as an act of terrorism

shall be final and may not be subject to judicial review; Acts or events committed in the course of war declared by Congress, or losses resulting from acts or events which, in aggregate, do not exceed \$5,000,000.00, shall not be certified as terrorist acts; Intention of Terrorist act; Part of an effort to coerce the civilian population of the United States, or to influence policy or affect the conduct of the US by coercion; Committed by one or more individuals acting on behalf of any foreign person or group; Means used, Violent act or dangerous act; Targets/effects, endanger human life, property or infrastructure;. Result in damages within the United States, or outside the US in the case of an attack of an air carrier or vessel, or premises of a US mission. (OECD, 2004, ANNEX III, p.25)

Clearly absent from this criteria/definition are the words “domestic persons” and further defining the predicate of the violent and dangerous acts. Interestingly, this policy places a monetary aspect to the terrorism equation. This monetary aspect may be hotly contested if the insured was to suffer significant damage; such as what is seen by the victims of low level animal rights/eco-violent extremists or homegrown violent Muslim extremists who are operating without foreign direction.

In the book *Thinking Like a Terrorist*, author Mike German (2007) defines terrorism as; “terrorism = a crime” (p. 34). He came to this conclusion by examining a definition by A.P. Schmid of the United Nations Office on Drugs and Crime (German, 2007). Additionally, as the basis for his argument, German draws on his work as an FBI agent investigating domestic terrorists. He actively compares his definition to the portion of the U.S. Code of Federal Regulation (CFR) (German, 2007), which defines terrorism as:

...the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. (28 Code of Federal Regulations Section 0.85)

In German’s opinion, the latter part of the CFR definition goes too far because it incorporates a political element, and it is not a legally binding definition in a court (2007). Additionally, he discounts the adherent’s intent/motivation and state of mind. According to German (2007), the CFR is used merely for the purpose of giving the FBI jurisdiction. German’s definition is shallow as compared to other readily accepted

elements of defining terrorism. German primarily focuses on the acts of violence by a terrorist and not necessarily the relevance to the reasons why the acts were done. He discounts the political or social agenda of the terrorist and strictly concentrates on the overt acts. In his words, “The unlawful use of force and violence against a person or property would have been good enough for me” (German, 2007, p. 34). His emphasis on the rule of law is his primary endgame “...using techniques that identify a suspect but do not produce admissible evidence against him or her is counter-productive in the long run” (German, 2007, p. 149). The strict adherence to the rule of law, when it comes to defining a terrorist or act of terrorism, is a new element that German has introduced into the terrorism equation. Nevertheless, it can be argued this is a myopic approach for the purpose of proactive intelligence collection that will be needed to identify domestic terrorism adherents.

Jonathan White (2006) emphasizes the importance of understanding the underlying purpose of a criminal act, “Terrorism has a political meaning beyond the immediate crime, even though a terrorist incident may be nothing more than a localized crime” (p. 231). It could be further argued not all intelligence collected against a terrorist or group will be used as evidence in court proceedings; however, this does not reduce the value of the intelligence. A group who uses criminal acts in violation of federal criminal law for the furtherance of political or social goals may be subject to an Enterprise Investigation promulgated by the FBI. According to the 2008 Attorney General’s Guidelines for Domestic FBI Operations (DIOG), an Enterprise Investigation may be initiated on a group or organization if there is a reasonable indication that a group or organization “may be engaged in” or “in planning or preparation or provision of support for:... domestic terrorism” (Mukasey, 2008, p. 23). Following German’s argument, he is not interested in the underlying motivations (political or social change) of the criminal but only that a crime was committed. Therefore it can be argued, the

collection of intelligence for the purpose of understanding the threat (i.e., motivation/ideology, which could be leveraged later to prevent an act of terrorism) would have been of no use to FBI Agent Mike German.¹⁸

Jonathan White (2006) argues, “The factor separating the average criminal from the average terrorist is *motivation*” (p. 234). White cites the work of Brent Smith, “according to Smith, terrorists remain criminals, but they are motivated by ideology, religion, or a political cause” (2006, p. 234).

The United States Sentencing Guidelines may further show the importance of recognizing *motivation* when considering the disposition of an individual convicted of a federal crime associated with terrorism (U.S. Sentencing Commission, 2008). When it comes to applying an enhancement to the sentence of a defendant, the guidelines use specific language that states:

...the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied. (United States Sentencing Commission, 2008, 3A1.4)

The practical application of this guideline is described by an Assistant United States Attorney (AUSA) within the District of Alaska. According to the AUSA:

...the Sentencing Guidelines offer a terrorism sentencing enhancement if convicted of a criminal act specified within the enhancement language. For example, if the defendant is convicted of a crime of arson and the prosecution can show the defendant did it in support of terrorism, the defendant will receive a twelve level enhancement to his sentence even though the defendant was not convicted for a terrorism crime. (Assistant United States Attorney District of Alaska, personal communication, July, 2008)

¹⁸ Mike German writes, “‘The unlawful use of force and violence against persons or property’ would have been enough for me. The second half, which discusses the intent driving the terrorist’s use of unlawful force, unnecessarily complicates the issue” (2007, p. 34).

Susan Tiefenbrun (2003), Professor of Law, Thomas Jefferson School of Law, San Diego, California, approached defining terrorism by first “distinguishing between three different conceptions of terrorism: terrorism as a crime in itself, terrorism as a method to perpetrate other crimes, and terrorism as an act of war” (p. 360). In order to further distinguish between the three concepts, Tiefenbrun identified five basic structural elements of the crime of terrorism:

1. The perpetration of violence by whatever means;
2. The targeting of innocent civilians;
3. With the intent to cause violence or with wanton disregard for its consequences;
4. For the purpose of causing fear, coercing or intimidating an enemy;
5. In order to achieve some political, military, ethnic, ideological, or religious goal (Tiefenbrun, 2003, p. 362).

Tiefenbrun does not use the word *motive* within these structural elements. Although, it can be argued *motive* is embedded in phrases such as *with the intent to*, *wanton disregard*, *purpose of causing fear*, *coercing or intimidating* and *to achieve political, military, ethnic, ideological, or religious goal*.

2. A States View of Terrorism

To place this research in further context, looking at how the United States defines a terrorist act, it was important to look at not only federal law, but state law as well. Shortly after the attacks of September 11, numerous states, from Alabama to Wyoming, enacted anti-terrorism legislation. Nathaniel Stewart (2005) provided an examination of the state of Ohio’s progression in defining terrorism and its common law origins. Stewart’s work “offers an ‘interpretative tool’ and historical context for courts and theorists to employ in those efforts and in assessing any future crimes of terrorism” (2005, p. 95). Stewart’s references to federal law are consistent with the previous research, which provides that there are numerous definitions or descriptions of terrorism. He also recognized through further examination these different definitions revealed they

often ignored the social and political nature of terrorism. Stewart identified the definition as published within the *USA PATRIOT Act* brought about similarly inspired state laws (2005).

According to Stewart, Ohio law defines terrorism using words such as, *intimidate or coerce civilian populations, influence the policy of any government, affect the conduct of any government, and influence the policy of any government* (2005). Ohio further equated terrorism with *felony offenses of violence* and specifically enumerated these offenses to include *the disruption of; public services, television, radio, telephone, mass communication, law enforcement, firefighting, computer systems, and contaminating substances for human consumption with hazardous chemical, biological, or radioactive material* (Stewart, 2005). Ohio effectively introduces a new element into the terrorism definition by adding *purpose* into the equation. The Ohio terrorism statute consists of the following elements: commit one of the specified criminal offenses; do so with the purpose to intimidate, coerce, influence, or affect either a civilian population, or governmental policy, or conduct (Stewart, 2005, p. 103). Within the rule of law, according to Ohio, for the government to prove someone is a terrorist, they must prove to the court; the subject committed an act of violence and intended that those acts be for the purpose to influence or coerce the government or society (Stewart, 2005). Ohio defines *purpose* as:

A decision of the mind to do an act with a conscious objective of producing a specific result or engaging in a specific conduct. To do and act purposely is to do it intentionally. The purpose with which any person does any act is known only to himself, unless he expresses it to others or indicates it by his conduct. (Stewart, 2005, p. 104)

The injection of purpose into the equation is what differentiates the acts committed during a reign of terror from acts of terrorism. Simply put, one can be terrorized, but those acts are not necessarily linked to an act of terrorism as we most often think within the homeland security forum.

3. Designating Domestic Terrorist Groups and Individuals

Within the United States, there are several *Presidential Directives* and legislative actions that provide for the investigation of terrorism by government agencies. As previously mentioned, there are several laws and legislation that provide for law enforcement to take action against terrorism activities within its own jurisdictions. In September of 2003, President Bush signed *Homeland Security Presidential Directive (HSPD) 6*, which directed the Attorney General of the United States to establish a process to consolidate the government's approach to terrorism screening and provide for the appropriate and lawful use of terrorist information in a screening process. This directive led to the so named "Watch List," which is primarily used for affecting suspected terrorists' travel.

Perhaps the most well-known list within the international community dealing with terrorism is the Foreign Terrorist Organizations (FTO) list. The Secretary of State is responsible for designating and publishing FTOs on behalf of the United States government. The legal criteria for designating FTOs and the process by which to follow are defined within section 219 of the *Immigration and Nationality Act (INA)*, (Title 8 U.S.C. 1101). In 1996, the United States amended section 219 with the Antiterrorism and Effective Death Penalty Act (AEDPA).

This act provides the Secretary of State authority to designate an organization as a *foreign terrorist organization* if three conditions are met:

1. The organization is foreign.
2. The organization engages in terrorist activity.
3. The terrorist activity threatens the security of the United States citizens or the national security of the United States. (U.S. State Department, 2010)

Currently, there are approximately 45 FTOs designated by the State Department.¹⁹ The State Department is not alone in this process. It is directed to consult

¹⁹ The foreign terrorist organization list is continually being updated and may be viewed at the State Department Web site located at <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

with the Department of Treasury and the Attorney General prior to completing the designation process. In December of 2002, *Presidential Executive Order 13224* further clarified the FTO designation process (White House, 2001).

A review of a report, authored by the Congressional Research Service, dated October 21, 2003, titled *The FTO List and Congress: Sanctioning Designated Foreign Terrorist Organizations*, identified that there are several lists but the best known is the State-Sponsors of Terrorism list (Cronin, 2003, p. 3). As of the writing of this thesis there were four countries on this list: Cuba, Iran, Sudan, and Syria. The validation process for designation to this list consisted of the Secretary of State identifying to Congress the countries that consistently provided support for acts of terrorism (Cronin, 2003). Being designated by this process also provides for other sanctions and laws that penalize persons and countries engaging in certain trade with state sponsors.²⁰ Listed countries may also be subjected to export controls by the U.S. government.

Additional lists worth mentioning are the Specially Designated Terrorist (SDT) list and the Specially Designated Global Terrorist (SDGT) list (Cronin, 2003). Later in 2002, the SDT, SDGT, State Sponsors, and the FTO lists were placed together in an all encompassing list named Specially Designated Nationals and Blocked Persons (SDN) list (Cronin, 2003). These lists are targeted at blocking terrorist financing and provide for economic sanctions by the United States (Cronin, 2003). Additionally, there is a Terrorism Exclusion List (TEL) that authorizes the Secretary of State, in consultation with the Attorney General, to designate terrorist organizations strictly for immigration purposes (Cronin, 2003, p. 4).

Cronin (2003) indicates the advantage of using the formal FTO designation is the list provides legal clarity for law enforcement purposes, and that the list further assists decision makers with a focal point for counterterrorism efforts (p. 7). In effect, all agencies have an understanding: if someone appears on the list he or she may be subject to further scrutiny.

²⁰ The State-Sponsors of Terrorism list is continually being updated and may be viewed at the State Department Web site located at <http://www.state.gov/s/ct/c14151.htm>.

According to Cronin, “Having a focal point for agency coordination enhances the effectiveness of government implementation and may also serve as a deterrent to organizations that consider engaging in illegal behavior” (2003, p. 7). It can be argued this same logic could apply to domestic terrorism, if the same process were to exist. Another advantage of the FTO list is that “...the groups identified on the FTO list are stigmatized” (Cronin, 2003, p. 8). Cronin posits that by publicizing groups that have been formally designated, potential donors may be less willing to contribute for fear of the legal ramifications (2003).

As Cronin points out, one of the more notable disadvantages to the FTO list is the in-effectiveness of addressing lone actors who may be acting as a want-to-be for the benefit of the group they are endorsing, but not yet a member (2003 p. 8). This may be representative of the home grown Al’ Qaida inspired threat developing in the United States. Another disadvantage is the “inflexibility” of the list. For example, groups may change their names/characteristics quicker than the designation or redress process would permit (Cronin, 2003). This particular disadvantage, when it comes to an equivalent Domestic Terrorism Organization list, was also an issue of concern noted during an interview of a Department of Justice Law Enforcement Official (March, 2009).

A thorough review of all the lists available at the State Department and Treasury Department Web sites revealed that there were no lists identifying domestic terrorists.²¹

4. Criminal Validation Processes

On the state and local level, several validation processes have been established to address gang membership and child sex offenders. For example, the Los Angeles Police Department has established a legally defensible validation and designation process for identifying local gang members. Once gang members have been validated, criminal investigations, and the collection of intelligence in support of the same may be initiated against the validated subjects (T. Angeles, personal communication, March 5, 2010).

²¹ The lists reviewed were located at the State Department Web site located at <http://www.state.gov/s/ct/list/#%20dn/> and the Department of Treasury, Foreign Asset Control Web site located at <http://www.ustreas.gov/offices/enforcement/ofac/sdn/>.

The Los Angeles Police Department also uses a process called *gang injunctions* (Los Angeles Police Department, 2009). There are currently 37 active injunctions in the city of Los Angeles involving 57 gangs (Los Angeles Police Department, 2009).²² The purpose of the injunction is to be that of a civil process to declare a gang's public behavior a nuisance (Los Angeles Police Department, 2009). Once declared, special rules may be directed toward the gang's activity. The identity/name of the gang is subsequently posted on a public Web-site. The purpose of the injunction is also to "...address the neighborhood's gang problem before it reaches the level of felony crime activity" (Los Angeles Police Department, 2009). Numerous gangs are currently listed, including: Toonerville Gang, 18th Street, 42 Street Gangster Crips, Krazy Ass Mexicans, and Rolling 60s Neighborhood Crips (Los Angeles Police Department, 2009).

Another criminal designation process is The Sex Offender Registration and Notification Act (SORNA), which stems from the Adam Walsh Protection and Safety Act of 2006. This act establishes a set of comprehensive standards for sex offender registration within the United States (U.S. Department of Justice, 2008b). The national sex offender registry is broken down into two different registries. The first is the National Sex Offender Registry (NSOR), which is the responsibility of the FBI to maintain through the use of the National Crime Information Center (NCIC), and the second is the Office of Justice Programs' Dru Sjodin National Sex Offender Public Registry that may be viewed on a public Web-site (U.S. Department of Justice, 2008c). Some of these registries house the names of, "individuals convicted of criminal offenses against minors, convicted of sexually violent offenses, and individuals who are designated as sexually violent predators" (U.S. Department of Justice, 2008c, p. i).

5. Civil Liberties

As stated in the *9/11 Commission Report*:

²² The Los Angeles Police Department's Gang Injunction web site is continually being updated and may be viewed at http://lapdonline.org/gang_injunctions/content_basic_view/33163.

...while protecting the homeland, Americans should be mindful of threats vital to personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right. This shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life. (9/11 Commission, 2004, p. 394)

The importance of protecting civil liberties was further emphasized in a 2005 report from Congress to the President whereby, when referring to the roles and responsibilities of the United States Intelligence Community, “All intelligence activity within the United States—whether conducted by the CIA, FBI, or Department of Defense—remains subject to Attorney General guidelines designed to protect civil liberties” (United States Senate, 2005, p. 451). Summarizing all issues and recommendations in totality, it can be argued that when it comes to monitoring, collection of intelligence, and conducting criminal investigations against U. S. persons, the protection of civil liberties will always be at the forefront. The U.S. Constitution, federal laws, and other civil liberty legislative actions, such as the Privacy Act of 1974 and Title 5 U.S.C. 552a, *Records Maintained on Individuals*, afford fundamental protection of civil liberties to all persons residing within the U.S.

The protection of civil liberties goes to the heart of trying to differentiate between what is protected speech and that of inciting violence. Stewart suggests that common law takes into account these differences by citing Ohio case *State v. Loless 1986* (2005). This opinion clearly placed boundaries on free speech. In this case, the court offered the following opinion:

The right of free speech is not without limits...While the right of free speech entitles citizens to express their ideas, beliefs, and emotions, regardless of their popularity, it does not extend to the threatening of terror, inciting riots, or verbalizing of false information that induces panic in a public place. (Stewart, 2005, p. 105)

In 2004, Elizabeth Mullen, Christopher Bauman, and Linda Skitka, published a study in the *Personality & Social Psychology Bulletin*. The study, titled *Political Tolerance & Coming to Psychological Closure Following the September 11, 2001*,

Terrorist Attacks: An Integrated Approach, primarily examined political tolerance in the post-9/11 world. According to their study, a reaction that Americans displayed after the September 11 terrorist attacks was the willingness to sacrifice some of their civil liberties (Mullen, Stitka, & Bauman, 2004, p. 743). Mullen et al. further argued as time moved forward away from the terrorist event and citizens attempted to return to normalcy, their perception of the situation changed, which causing them to become more resilient and politically tolerant. As the diversity of the U.S. continues to expand, civil liberties may be defined through the eyes of the perceived victims, not necessarily the current laws. When it comes to civil liberties, the balance a country strikes will be reflective of the country's core values and societal choices (Boyne, 2009, p. 5).

6. Summary

The research conducted to date has established that there is no national or international accepted definition for domestic or international terrorism and that there is no process to designate domestic terrorist groups by the United States government as a whole. The advantages to developing such a domestic terrorism validation and designation process could be in keeping with the same advantages as realized by the FTO, such as public awareness and a unified focal point for homeland security agencies. A possible disadvantage may be the perceived loss of civil liberties. Developing a legally defensible validation process may be one of the unique challenges in this process. Although further research is required, the precedence in developing a validation and designation process for other criminal enterprises, such as criminal gangs and sex offenders, may have a direct correlation to a domestic terrorism validation and designation process.

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II. DEFINING TERRORISM

A. RULES OF THE GAME

The United States government, state, and local agencies have all identified the need to protect its citizenry from the perpetrators of terrorism (Stewart, 2005). As the research has borne out, German (2007) and the FBI have both stated in part that acts of terrorists are nothing more than crimes committed by identifiable criminal elements. The FBI, in a report published through the Department of Justice, *Terrorism 2002–2005*, stated:

In accordance with U.S. counterterrorism policy, the FBI considers terrorists to be criminals. ...there is no single federal law specifically making terrorism a crime. Terrorists are arrested and convicted under existing criminal statutes. (Federal Bureau of Investigation, 2005, p. iv)

But the research also brings forth the significance of what sets terrorism apart from the actions of criminal gangs and sex offenders, which as White (2006) emphasized, as a *political meaning beyond the crime* (p. 231). During recent testimony before the Senate Judiciary Committee, FBI Director Robert Mueller stated:

Today, we still face threats from al Qaeda. But we must also focus on less well-known terrorist groups, as well as homegrown terrorists. We are also concerned about the threat of homegrown terrorist...We must also focus on extremists who may be living here in the United States, in the very communities they intend to attack. (Mueller, 2009)

It can be further argued criminal actions, regardless of the perpetrator's motivations, will always be of significant consequence to the public.²³ But as FBI Director Mueller emphasized, it is also necessary to focus on extremism (Mueller, 2009). But what is an extremist, and does it imply that if someone is an extremist he is also a terrorist? With this seemingly unanswered question, this researcher argues that the effects

²³ Based on the author's 20 years of law enforcement experience, victims of crime are not necessarily concerned with a perpetrator's motivations just the consequence of the criminal actions.

of the ambiguity of defining what a domestic terrorist is, or is not, has led to countless legal and law enforcement challenges. For example, local, state, and federal law enforcement officials must attempt to define what constitutes a *domestic terrorist* based on their own legislative or local laws. This has created nationwide discrepancies among law enforcement and governing bodies.

One such example was Arizona's attempt to use legislation for the purpose of developing and defining a terrorist registration process in 2004. The purpose of the Arizona legislation was not only to define what animal and ecological terrorism was but also to identify the adherents of such terrorism (Arizona State Legislature, 2004).

Another example of note was illustrated by Minnesota's Ramsey County Sheriff and District Attorney's offices that leveraged a local law, *Conspiracy to Riot in Furtherance of Terrorism*, during the 2008 Republican National Convention (RNC), while investigating and attempting to prosecute the actions of a group called the RNC Welcoming Committee (MinnPost.com, 2009; Star Tribune, 2008). The actions of law enforcement and protesters as well as criminal charges brought forward by local prosecutors gave rise to heated debate throughout the community at large. Was the RNC Welcoming Committee just exercising their First Amendments Rights or were they criminals bent on using violence to influence the populous. After the RNC events, the *Star Tribune* (2009) reported that the terrorism charges against some of the Welcoming Committee were dropped, and the county attorney denied that politics played a role in the decision.

Yet, another article drew attention to the use of a Minnesota terrorism law enacted in 2002. In 2008, the *St. Paul Pioneer Press* published the article "RNC terrorists? Or Just Young People Speaking Their Minds?" which drew attention to the ongoing debate of trying to collect intelligence and preventing violent actions, all while trying to preserve the right of free speech. Emily Gurnon of the *St. Paul Pioneer Press* (2008) quoted Ramsey County Attorney Susan Gaertner as saying, "This is no way an effort to get at dissent and free speech. This is an effort to get at violent and destructive behavior" (p. A1).

In reviewing these examples, it is clear why domestic law enforcement agencies find it difficult to define and identify domestic terrorism adherents while trying to collect, retain, and disseminate information. Discrepancies were also clearly evident in examining the vast majority of responses provided by the interview subjects of this research (Appendix A). Notably, almost all of the interviewees relied on their own agency definition, or personal beliefs, to provide a definition of a terrorist.

An audit report of the Terrorist Watch List Nomination Process conducted and published by the U.S. Department of Justice (2008) further emphasized the ambiguity of defining terrorism. According to the report:

ATF officials suggested that there was a lack of clarity, consistency, and understanding of the definitions of terrorism and terrorist acts among law enforcement agencies. Therefore, in some circumstances, the ATF is not sharing potential domestic terrorism information with the FBI. (U.S. Department of Justice, 2008a, p. 18)

Based on the desire to preempt or prevent future terrorist attacks by *domestic terrorists*, the United States must first define what a *domestic terrorist* is. By evaluating the information obtained from this research that included interviews, coupled with the analysis of academic literature and various federal and state and local laws, this research has concluded that a domestic terrorist or group may be defined by the following equation:

Criminal Action²⁴ + Motivation = Domestic Terrorism

This equation incorporates Mike German's (German, 2007) opinion of *crime = terrorism*, and the state of Ohio's definition of *purpose*, which corresponds to White's assertion of *motivation*. This equation is also consistent with the OECD report that identified two main elements when defining terrorism: *means and effect* and *intention*. A review of Golder & Williams (2004) reflects most other industrialized countries focus on the overt act and motivation (p. 277).

²⁴ Criminal actions are further defined as; committed within the United States or its territories without direction from a foreign power.

For the purpose of developing a legally defensible validation and designation process that would ultimately define a domestic terrorism individual or group, the United States should use the aforementioned equation in combination with Federal Statute Title 18 U.S.C. 2331 and 28 C.F.R. 0.85.

A common problem with investigating domestic terrorism actions are the types of criminal activities perpetrated by domestic terrorism offenders. The criminal actions committed by domestic terrorism adherents may be "...nothing more than a localized crime" (White 2006, p. 231). Usually these actions do not rise to the level of federal awareness or involvement. For example, the actions of Stop Huntingdon Animal Cruelty (SHAC) was known for employing tactics or "direct actions" such as vandalism, property destruction, equipment sabotage, theft of property, and business and home invasions (U.S. Department of Justice, 2004, p. 5). Often, before these criminal activities come to the attention of the FBI, the FBI relies on local jurisdictions to establish the motivations of the perpetrators (i.e., are they related to terrorism?). As such, the true motivations of some of these activities are not recognized as being associated with domestic terrorism.

The United States is one of the few countries that further complicates defining *terrorism* by differentiating between domestic and international terrorism. According to the Federal Bureau of Investigations report *Terrorism 2002–2005*, 23 out of the 24 recorded terrorist incidents reported during this period were attributed to domestic terrorists (U.S. Department of Justice, 2007b, p. 1). Title 18 U.S.C. 2331 part (5) clearly defines domestic terrorism as activities that:

- (A) Involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) Appear to be intended—
 - (i) To intimidate or coerce a civilian population;
 - (ii) To influence the policy of a government by intimidation or coercion;or

(iii) To affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) Occur primarily within the territorial jurisdiction of the United States.

As previously presented, 28 C.F.R. 0.85 defines terrorism as:

...the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. (28 Code of Federal Regulations Section 0.85)

Therefore the definitions as defined by Title 18 U.S.C. 2331 part (5) and 28 C.F.R. 0.85 can be directly applied to defining domestic terrorism by using the aforementioned equation:

Criminal Action²⁵ + Motivation = Domestic Terrorism

Criminal Action: Involves acts dangerous to human life or the unlawful use of force or violence against persons or property that are a violation of the criminal laws of the United States or of any state;

Motivation: Appears to be intended to intimidate or coerce a civilian population or any segment thereof; influence the policy of a government by intimidation or coercion; or

To affect the conduct of a government by mass destruction, assassination, or kidnapping. ***Domestic Terrorism:*** Occurs primarily within the territorial jurisdiction of the United States and not under the direction of a foreign power

The use of this equation further emphasizes the difference between a *terrorist* and a *criminal* whose motivations are purely outside the arena of political or social change. For example, an individual who creates and detonates an incendiary device for the purpose of receiving proceeds from an insurance claim is not a terrorist. But if that same

²⁵ Criminal actions are further defined as; committed within the United States or its territories without direction from a foreign power.

individual deploys the same incendiary device with the *motivation* to affect political or social change as outlined in Part (5) and the C.F.R., he or she would be defined as a *domestic terrorist*.

III. CIVIL LIBERTIES

A. LAWS AND POLICIES

The collection and retention of intelligence, specific to individuals or groups, by government organizations has come under constant scrutiny by public officials and civil liberty advocates. As stated in the report of the 9/11 Commission:

...while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right. This shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life. (9/11 Commission, 2004, p. 394)

Often, actions taken against individuals by governments are based on evidence obtained through various pre-established investigative techniques in accordance with specific statutory provisions and legal frameworks. In August of 2005, the American Civil Liberties Union (ACLU) brought attention to an FBI report that was meant to inform local, state and federal law enforcement agencies about various groups and individuals located in the state of Michigan who were believed to be involved in terrorist activities. The Executive Director of the Michigan ACLU, Kary Moss, went on to say through an ACLU press release:

This document confirms our fears that the federal and state counterterrorism officers have turned their attention to groups and individuals engaged in peaceful protest activities....Labeling political advocacy as 'terrorist activity' is a threat to legitimate dissent which has never been considered a crime in this country. (American Civil Liberties Union, 2005)

Based on the government's desire to preempt or prevent future terrorist attacks, the United States must strike a balance between the protection of civil liberties and the protection of the public. Alexander Hamilton wrote, "...to be more safe, they [the public] at length become willing to run the risk of being less free" (Crumpton, 2005, p

214). Unlike countries who govern by monarchy or dictatorship, it can be argued democracies survive due to the freedoms afforded to their individual citizens. Furthermore, it can also be argued that adherence to the rule of law will almost always bring legitimacy to a country's governance in the eyes of its populous, and the world.

The protection of civil liberties is always at the forefront when conducting criminal investigations against United States (U.S.) persons. The U. S. Constitution, Attorney General Guidelines (AGG), and other civil liberty protections, such as the Privacy Act of 1974 are some of the overarching boundaries followed while conducting criminal investigations by law enforcement and homeland security agencies. The AGG also provides guidance on how the FBI will collect, retain, and disseminate domestic terrorism investigative and intelligence information.

On the federal, state, and local levels several criminal validation processes have been established for the purpose of collecting intelligence on U.S. persons who may be involved in criminal activity.²⁶ On the federal level, the validation processes are specifically defined in legislation or agency policies, and must conform to the Privacy Act of 1974 and the U.S. Constitution. State and local agencies that collect and retain intelligence, within their information systems, must conform to the standards described in 28 CFR, Part 23, "Criminal Intelligence Systems Operating Policies" (28 CFR, Part 23). Failure to do so may result in the loss of federal funding from specified programs. Therefore, contributing agencies may retain intelligence under the following provisions:

(3) Criminal Intelligence Information means data which has been evaluated to determine that it: (i) is relevant to the identification of and the criminal activity engaged in by an individual who or organization which is reasonably suspected of involvement in criminal activity, and (ii) meets criminal intelligence system submission criteria. (28 CFR Part 23)

In March of 2005, a congressional report was issued by the Commission on the Intelligence Capabilities of the United States regarding Weapons of Mass Destruction (WMD) (United States Senate, 2005). The report focused on the pre-war judgments

²⁶ The research has established the use of lists by law enforcement to track sex offenders, criminal gang members and criminal gang groups.

made by the U.S. Intelligence Community concerning Iraq's weapons of mass destruction. The report also recognized and identified pitfalls of the U.S. Intelligence Community. One of these pitfalls centered on the legal issues surrounding the collection of intelligence against U.S. persons. The report states:

Throughout our work we came across Intelligence Community leaders, operators, and analysts who claimed that they couldn't do their jobs because of 'legal issues.' These 'legal issues' arose in a variety of contexts, ranging from the Intelligence Community's dealings with U.S. persons to the legality of certain covert actions...quite often the cited legal impediments ended up being either myths that overcautious lawyers had never debunked or policy choices swathed in pseudo-legal justifications. Needless to say, such confusion about what the law actually requires can seriously hinder the Intelligence Community's ability to be proactive and innovative. (United States Senate, 2005)

The report also recommended the Director of National Intelligence to establish an internal office within their office of General Counsel to take a "...forward-leaning look at legal issues that affect the Intelligence Community as a whole," (United States Senate, 2005, p. 335). The research conducted to date determined the issues surrounding collection of intelligence against U.S. persons is still highly debated within the Intelligence and legal communities.

B. DEFINING CIVIL LIBERTIES: A PERCEPTION ISSUE NOT NECESSARILY A LEGAL ONE

Based on the international community's desire to preempt or prevent future terrorist attacks, the U.S. and other democratic countries must strike a balance between the protection of civil liberties and protecting the public. Unlike countries that govern by monarchy or dictatorship, democracies survive due to the freedoms afforded to their individual citizens.

When it comes to the monitoring, collection of intelligence, and conducting of criminal investigations against U. S. persons, the protection of civil liberties is always at the forefront when developing new laws or enforcing old ones. The U.S. Constitution,

federal law, and other civil liberty legislative actions, such as the Privacy Act of 1974, afford fundamental protection of civil liberties to all U.S. persons.

A reaction that American citizens displayed after the September 11 terrorist attacks was the willingness to sacrifice some of their civil liberties (Mullen et al., 2004, p. 743). But, as time passed these same citizens attempted a return to normalcy, but their perception of the situation had changed, causing them to become more resilient and politically tolerant (Mullen et al., 2004). It can be argued as the diversity of the U.S. continues to expand, civil liberties may be defined through the eyes of the perceived victims, and not necessarily the current laws. When it comes to civil liberties, the balance a country strikes will be reflective of the country's core values and societal choices (Boyne, 2009, p. 5). Therefore, while developing a domestic terrorism validation and designation process, it will not only be important to adhere to the rule of law but also to take into account how the public will view this process. In a report issued in 2009 by the University of Maryland, researchers found that, "...criminal justice interventions in response to terrorism and political violence are often unsuccessful and can even be counterproductive" (2009, p. 16).

Further understanding of how a population defines civil liberties and terrorism may lend some insight as to how a domestic terrorism validation and designation process should be developed. How politically tolerant will the public be to a domestic terrorism validation and designation process regardless if developed within the boundaries of the constitution? As such, the following areas were explored for the purpose of this research: resilience, tolerance, laws, and diversity.

1. Resilience and Tolerance

Resilience may be a phenomena defined within the context of recovery from a traumatic event such as terrorism. As Butler, Morland, and Leskin noted, "resilience can connote features of an initial reaction to a traumatic event and characteristics of the recovery path associated with achieving a return to baseline functions" (Butler, Morland & Leskin, 2007, p. 403). It could be argued that these baseline functions may be what is

described as *symbolic immortality*. The research conducted by Mullen et al. (2004) examined political tolerance within the context of psychological closure after the September 11 attacks. The researchers posit *symbolic immortality* as a perceived end state. Victims may use a summation of value criteria and standards to cope with a terrorism event and lead the victims to the end state. These criteria and standards may include bolstering their cultural world view, derogating or aggressing against those who do not share it, increased levels of prejudice, and value affirmation (Mullen et al., 2004, p. 746).

As noted by Butler et al. (2007, p. 405), the individual begins to recover from the effects of a terrorism event and his or her resilience to the possibility of how he or she may handle another like event may evolve as well. Butler et al. argues that a resilient personality may rely on past stressful experiences and successful adaptation to be able to increase the ability to master future challenges (2007). Mullen et al. hypothesis is that “...closure [that] facilitates political tolerance is consistent with the observation that support for civil liberties does tend to recover over time (Huddy et al. [Khatib & Capelos], 2002) and provides one account for what leads to recovery” (Mullen et al., 2004, p. 746). Therefore, it could be argued the level of political tolerance displayed by a populous may be reflective of the overall recovery process post a terrorism event as the populous, in turn, becomes more resilient.

2. Civil Liberties and the Law

Civil liberties may be defined as inalienable human rights afforded to all regardless of race, religion, ethnicity, or political party. Within the U.S., most of these rights such as freedoms of association, speech, and religion, the rights to own property and due process are codified within the U.S. Constitution and Bill of Rights—either explicitly or implicitly. The laws and legislative actions born from these overarching documents have been established to protect the citizenry from potential government abuses as well as citizen-on-citizen abuses.

In the wake of the September 11 attacks, law enforcement saw a significant increase in unsolicited cooperation from U.S. citizens. Although no laws were passed to undo the freedoms afforded all citizens under the U.S. Constitution, there was a significant decrease in political tolerance, as represented in Mullen et al.'s research. The research revealed further:

Huddy et al. (2002) analyzed a cross-section of national opinion polls and found that more people were willing to sacrifice civil liberties to fight terrorism in the aftermath of Oklahoma City bombing in 1995 (49%) and following the 2001 terrorist attacks (68%) than in 1997 (29%), when perceived threat of a terrorist attack was comparatively low. (2004, p. 743)

With a wide demographic sample of 550 respondents, Mullen et al. found that eight percent thought the Bush Administration had gone too far, 71 percent about right, and 21 percent felt the administration had not gone far enough in restricting civil liberties to fight terrorism (2004, p. 750). A primary example of the decrease in political tolerance was evidenced by the quick passage of the U.S.A. PATRIOT Act in October of 2001. Since that time, some civil liberty advocates have claimed the act removed too many civil liberties; however, at the time of passage, the act received widespread, bi-partisan support.

Reflective of this same time period, immediately after September 11 terrorist attacks, there was a considerable increase in prejudice and discrimination against groups perceived to be associated with the attacks such as Muslim and Arab Americans (Skitka, Saunders, Morgan & Wisneski, 2001). According to statistics compiled and illustrated in the book *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything*, hate crimes against Muslims far surpassed those of other minority groups such as Jews and Blacks (Morgan, 2009). This discrimination was not by the government but rather by other citizens; "Fear and perceived threat lead people to express higher degrees of ethnocentrism, to respond more punitively toward out groups, and become less politically tolerant" (Mullen et al., 2004, p. 744). A 2009 program report issued by the FBI's Public Corruption/Civil Rights Section stated that certain events trigger periods of

time of higher levels of hate crimes, "...the waves of backlash hate crimes directed against Arab-Americans following 9/11 and again after the initiation of the war in Iraq..." (Federal Bureau of Investigation, 2009b).

3. Diversity and Civil Liberties

As the face of America becomes more and more diverse, defining what a civil liberty is may become more diverse as well. As Mullen et al. (2004) discovered during their research, after a terrorism event the victims displayed a sense that a moral breach had been violated. Within this context, the value protection model, "... predicts that they will respond with aversive arousal (anger and fear), which in turn prompts moral outrage, reaffirmation of commitments to core moral values, or both" (Mullen et al., 2004, p. 745). Mullen et al. further identified this behavior may be focused on "out" groups, which are often individuals with the same nationality or religion as the perpetrators of the terrorism event and may be perceived as not having the same core moral standards and values as the victims. This phenomenon was evidenced previously by the increase in hate crimes reported against Arab and Muslim Americans following the September 11 terrorist attacks. Additionally, the Arab American Anti-Discrimination Committee (ADC) reported numerous cases of Muslim and Arab passengers being removed from airplanes due to concerns of perceived ethnicities. The ADC termed these actions as illegal (Skitka et al., 2009). During this time, the Arab and Muslim communities were viewed as out groups. Consequently, it could be argued the Arab and Muslim communities felt their civil liberties were being violated when the rest of America did not. There were no laws or legislative actions taken by the government to single out Arab or Muslim Americans. This was a clear dichotomy of Americans being challenged by one group's perception of events and actions.

4. Summary

A population that has been victimized by a terrorism event will display various levels of resiliency and tolerance in order to cope with the present and future. During these phenomena of psychological trauma, resilience and tolerance may fall somewhere

between ethnic and cultural norms and legal boundaries. Although no laws have been written to undo the fundamental rights held within the U.S. Constitution and Bill of Rights, victims of a terrorist event become resilient to the views of out groups and less politically tolerant. Individuals of the Arab and Muslim communities fell victim to these phenomena. This phenomenon was also identified during the 2008 Republican Convention when anarchists took to the streets of Minneapolis. Numerous people were arrested for criminal activities and some, but not all, were labeled as terrorists (MinnPost.com, 2009; Star Tribune 2008).

As future attacks loom in the minds of citizens and government officials, civil liberties may continue to be defined not just by legal terms, but by how resilient and tolerant the population has become. Therefore, the development of a domestic terrorism validation and designation process should focus on the rule of law and not current public perceptions or political tolerance.

C. THE U.S. PERSON DILEMMA: INTERCEPTING A TERRORIST'S COMMUNICATIONS, UNITED KINGDOM V.S. UNITED STATES

Today's U.S. Intelligence Community is facing new challenges imposed by the Information Age. To stay ahead of state and non-state actors who wish to "wreak havoc on U.S. interests" (Johnson & Wirtz, 2008, p. 1), law enforcement and intelligence agencies must identify the legal limits that may inhibit these agencies from staying ahead of the adherents of terrorism. One such limitation, as identified by this research, is the dichotomy that exists in the manner and method the U.S. uses to intercept oral and electronic communications of U.S. domestic terrorists as compared to international terrorists.

In a supporting chapter for the book *Intelligence and National Security*, Thomas Bruneau states, "Much of the good material on intelligence and democracy pertains to the established democracies, such as Great Britain, France, and the United States ..." (Johnson & Wirtz, 2008, p. 516). Additionally, Bruneau also states, "Intelligence is defined mainly by process," (p. 517) and "...democracies must establish a clear and

comprehensive legal framework” (p. 518). This research has established that within the United Kingdom (UK) and the U.S., a succession of legal and legislative frameworks and provisions have circumscribed certain investigative methods that may be used by police and intelligence agencies to collect evidence against suspected terrorists. Types of evidence may include the interception of private electronic and oral communications.

With the understanding that like the U.S., the UK also seeks to protect civil liberties and protect its citizenry from terrorism, this case study will examine two specific legal and statutory frameworks within the following areas: defining terrorism and interception of communications. More specifically, this research demonstrates that U.S. law enforcement and intelligence agencies cannot always use the same tools to investigate suspected terrorists and often succumb to legal barriers when the suspected terrorist is a U.S. person.

1. Legal Frameworks

During the twentieth century, the UK has faced the threats and effects of terrorism. From the violence related to the political status of Northern Ireland to its response to the attacks of September 11, the UK has enacted counterterrorism legislation to address the adherents of terrorism (Donohue, 2007). Its ability to balance the safety and security of its citizens while preserving civil liberties is under constant scrutiny. As noted by Lord Falconer of Thoroton QC during a House of Lords debate in March 2003, “Our society is based on the liberty of the individual...It should not be limited unless a proper case for limitation is established” (Donohue, 2007, p .39).

Efforts by the UK to impose the rule of law over its populous in response to the threats and actions of terrorists can be traced back to the early years of the 1900s. The *Defense of Realm Act* and the *Restoration of Orders in Ireland Act* of 1920 provided legislative guidance to civil authorities to close premises, roads, transportation routes, and detain and intern individuals in an effort to protect its citizenry from the threats and actions of paramilitary violence (Donohue, 2007, p. 19). Since that time, the UK has recognized threats from the militant Irish Republican Army, domestic animal extremists,

and modern day Islamic fundamentalists. United Kingdom police and intelligence agencies have successfully used intercepted communications to prevent and deter terrorism both within and outside their borders (P. Smith, personal communication, February 25, 2009).

The UK does not stand alone in the fight against terrorism. Throughout its history, the U.S. has endured numerous acts of terrorism inside and outside its borders. The perpetrators of these attacks have included both U.S. citizens, such as Timothy McVeigh, and foreign nationals, such as Ramsey Yosef; the acts themselves aimed at both domestic targets and U.S. foreign interests. During recent testimony before the Senate Judiciary Committee, the Director of the Federal Bureau of Investigation, Robert Mueller, stated:

Today, we still face threats from al Qaeda. But we must also focus on less well-known terrorist groups, as well as homegrown terrorists. We must also focus on extremists who may be living here in the United States, in the very communities they intend to attack. (2009)

It is axiomatic that terrorists have no geographical boundaries.

Although the UK does not have a Constitution, or Bill of Rights, it currently adheres to the European Convention on Human Rights (ECHR) (Donohue, 2007). As noted by Lord Falconer of Thoroton QC, during a House of Lords debate in March 2003:

Any limitations on individual freedom must be proportionate to the threat; they must be sanctioned by law and cannot take place on an ad hoc basis; and they must be implemented in a way which ensures that there are safeguards and that the activities of the executive are subject to monitoring, scrutiny and accountability. (Donohue, 2007, p 39)

An examination of both the ECHR and the U.S. Constitution reveals that both define fundamental human rights and expectations of freedoms. Both documents recognize and bestow certain inalienable rights to its citizenry, such as the freedoms of religion and speech, and the right to due process. However, the ECHR and the Constitution differ on the legal limits placed on the government to contravene these rights while attempting to maintain order or protect its citizenry from danger. The U.S. Constitution prohibits *unreasonable searches and seizures* by the government and

requires *probable cause* be shown before a warrant can be issued. These standards, as realized by U.S. law enforcement and intelligence agencies' pose significant challenges when trying to apply oral and electronic information gathering techniques such as utilized by our UK counterparts.

2. Defining Terrorism: The UK

As previously noted, there is no internationally accepted definition of terrorism. Not unlike the U.S., the UK defined terrorism through a legislative process with the passage of the *Terrorism Act 2000*. The UK legislation defined terrorism in Section I of *the Terrorism Act 2000* as, in summary form; *the use of threat designed to influence the government or intimidate the public and used for the purpose of advancing a political, religious or ideological cause*. The act further states, acts of terrorism involve serious violence against a person or serious damage to property, endangering of a person's life, and creation of a serious risk to health or safety to the public. According to the act, the effects of an action of terrorism include: action outside the UK, reference to any person or property wherever situated, and against the government of the UK or of a country other than the UK (Terrorism Act 2000).

Multiple subsequent U.K. legislative acts further defined terrorism offenses and the investigative and intelligence gathering techniques that may be used to thwart terrorist activities both within and outside the UK. These acts include the *Prevention of Terrorism Act 2005* and *Terrorism Act 2006*, but substantively, the definition of *terrorism* was unchanged.

3. Defining Terrorism: The U.S.

The U.S. has defined terrorism in the *Code of Federal Regulations* as: "...the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives" (28 C.F.R. Section 0.85). This definition is used solely in the context of assigning and designating the Federal Bureau of Investigation as the lead agency

responsible for investigating terrorist activity not for the purposes of legal proceedings against terrorists. In the wake of September 11, the U.S.A. PATRIOT Act of 2001 became law (9/11 Commission, 2004). The PATRIOT Act further defined terrorism and provided two distinct categories: international and domestic terrorism (9/11 Commission, 2004). These definitions were codified in Title 18 United States Code 2331. The Code defines *international terrorism* as, in summary:

...activity that involves violent acts or acts dangerous to human life and that are a violation of criminal laws of the U.S. or of any State; are intended to intimidate or coerce a civilian population, influence the policy of a government, and that occur primarily outside the territorial jurisdiction of the U.S. or transcend national boundaries in terms by which they are accomplished.²⁷

The Code defines *domestic terrorism* with essentially all of the same overt and intended actions, except that these actions or activities “occur primarily within the territorial jurisdiction of the United States” (Title 18 United States Code 2331).

Although both the UK and U.S. definitions contain fundamentally the same understanding of what constitutes terrorist activity, noticeably absent from the UK’s definition is a distinction between international and domestic terrorism. Additionally, provisions in U.S. law further emphasize the difference between domestic and international terrorism particularly when it comes to the electronic interception of terrorist communications, which will be discussed later. The UK’s definition of terrorism looks at the actions and targets involved rather than concentrating on the location of the perpetrators.

These overarching definitions of terrorism establish the legal framework utilized by the courts, the police, and intelligence agencies within the UK and U.S. In addressing and investigating suspected terrorists, as stated by Lord Carlile of Berriew QC, in March 2007, while conducting an independent review of UK terrorism legislation, “The definition is of real practical importance. It triggers many powers, as well as contributing

²⁷ The phrase “transcend national boundaries in terms by which they are accomplished” has also been interpreted to mean; an act of International Terrorism may be at the direction of a *Foreign Power* even though the event was on U.S. soil or against U.S. interests.

to the description of offences” (2007, p. 6). In addition to examining the root definition of terrorism, Lord Carlile examined the legislative provisions that provide the investigative techniques and oversight utilized to combat terrorism. He concluded the provisions were proportional and necessary:

The ordinary criminal law does not offer the range of options necessary to deal with the need for prophylaxis and pre-emption...I conclude that a definition of terrorism is required to describe and circumscribe the circumstances in which the special provisions may be used. (Carlile, 2007, p. 28)

Lord Carlile further noted his believes that terrorism is a type of crime, not unlike drug dealing or bank robbery, and that unique investigative and intelligence gathering techniques should be utilized to address the threat and commission of terrorist acts.

The U.S. also identifies terrorism as a crime. A report published by the FBI through the Department of Justice, *Terrorism 2002–2005* stated, “In accordance with U.S. counterterrorism policy, the FBI considers terrorists to be criminals. ...there is no single federal law specifically making terrorism a crime. Terrorists are arrested and convicted under existing criminal statutes” (2007b, p. iv).

Thus, the question becomes, if both the UK and the U.S. fundamentally agree on the definition of terrorism and both countries deem the adherents of terrorism as criminals, why should the U.S. draw a distinction between domestic and international terrorism? This researcher argues the difference with the UK may lie in the laws and techniques employed within the U.S. to investigate and gather intelligence against U.S. citizens in contrast to non-U.S. citizens perpetrating or supporting terrorism. In light of Director Mueller’s identification of the transnational nature of terrorism and the continuous threat of home-grown terrorism, does the distinction between a domestic and international terrorist place the U.S. at a disadvantage? In a contributing article to the *MIPT Terrorism Annual 2002*, Dr. Brannan [consistency with source intro] argued, “...to the utility of the terms “domestic” and “international,” one must wonder whether the terms and mind-set they foster are impeding the government’s efforts to protect citizens against terrorist violence” (2004, p. 5). Having worked in the area of homeland security,

this researcher argues that the U.S. law enforcement and intelligence communities do not have the necessary legal tools to surreptitiously intercept the private communications of domestic terrorists. In support of this argument, an examination of the legal authorities employed by the UK and U.S. to intercept communications of terrorists will assist in determining if vulnerabilities exist in the U.S. legal, law enforcement and intelligence frameworks.

4. Interception of Communications: UK

The UK police and intelligence agencies derive their authority to intercept private telecommunications between individuals from Section 5 of the *Regulation of Investigatory Powers Act 2000*. In summary, the Secretary of State may issue a warrant to intercept the (subjects) transmissions by means of postal or telecommunications, if the Secretary of State believes it is in the interest of national security, preventing or detecting serious crime, or for safeguarding the economic well-being of the UK (*Regulation of Investigative Powers Act 2000*).

An examination of this provision reveals no distinction made between UK citizens and non-UK citizens for the purpose of collecting evidence or intelligence, nor is there a distinction made as to whether the crime is one of domestic or international terrorism. The evidentiary standard required by the UK Secretary of State prior to issuing an interception warrant is not clearly defined. Information provided on the UK Security Service (MI5) Web site defined the warrant process and standard as follows, “A warrant can be issued only if the Secretary of State is satisfied that it meets the tests of necessity and proportionality” (Security Service (MI5), 2009, p. 1). Additionally, a former practitioner of a UK intelligence service opined the standard of “reasonable suspicion that someone could be a terrorist...is sufficient predication to open a Security Service File on a suspect and begin an investigation. Once the file is open it is easier in the UK than the U.S.A. to get FISA coverage on suspicion...Does not have to prove the target is a terrorist to justify the wire tap” (P. Smith, personal communication, February 25, 2009).

Unlike the UK, U.S. police and intelligence agencies derive their interception authority from two legislative measures, the *Foreign Intelligence Surveillance Act* (FISA) (Title 50 Chapter 36) and Title III of the *Omnibus Crime Control and Safe Streets Act* of 1968, (Title 18 U.S.C. 2510-2522).²⁸

5. Interception of Communications: United States

The Office of Legal Education Executive Office for United States Attorneys published the findings of a U.S. court, comparing the differences between Title III authorities and FISA (Department of Justice, 2004). A summary of the comparisons find:

Under Title III, the court must find ‘on the basis of the facts submitted by the applicant ...there is probable cause for the belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516²⁹ of this chapter.’ In contrast, FISA requires the court to find, ‘on the basis of the facts ... there is probable cause to believe that ***the target of the electronic surveillance is a foreign power or an agent of a foreign power: Provided, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States. (50 U.S.C. 1805 (a)(3)) The terms ‘foreign power’ and ‘agent of foreign power’ are defined by FISA in ways that sometimes, but not always, require a showing of criminal conduct. (Department of Justice, 2003, p. 5)

Additionally, under FISA the term “foreign power” may be defined by meeting one of six criteria (Department of Justice, 2003, p. 5). All six criteria require a demonstration of a nexus to command or control by a foreign nation or government or a group engaged in *international terrorism*. The term “agent of a foreign power” is defined as, “any person other than a United States person...” (Department of Justice, 2003, p. 7). “A U. S. person can be an “agent of a foreign power” only if he engages in some level of

²⁸ Due to the length of these statutes a summary excerpt from a Department of Justice publication is provided.

²⁹ Title 18 U.S.C. 2516: Authorization of wire, oral or electronic communications; establishes the process by which the government may be permitted to intercept wire and oral communications when the interception may provide evidence of a myriad of crimes to include terrorism.

criminal activity... [this] includes persons engaged in espionage and clandestine intelligence activities... sabotage international terrorism” (Department of Justice, 2003, p. 9).

To be an “agent of a foreign power” under the rubric of sabotage/international terrorism, a U.S. person must “knowingly engage” in “sabotage or international terrorism, or activities that are in preparation therefore, for or on behalf of a foreign power....These are criminal law standards...this standard requires the Government to establish probable cause...” (Department of Justice, 2003, p. 11).

Under FISA:

A U.S. person who is engaged in ‘clandestine intelligence gathering activities’ or ‘other clandestine intelligence activities’ for or on behalf of a foreign power may be an agent of that foreign power only if those activities either ‘involve,’ ‘may involve,’ or ‘are about to involve’ a ‘violation of the criminal statutes of the United States. By setting a ‘may involve’ standard, Congress intended to require less than the showing of probable cause applicable in ordinary criminal cases. (Department of Justice, 2003, p. 10)

The report goes on to make a final comparison by stating, “... groups engaged in terrorism of a purely domestic nature...should be subject to surveillance under Title III, not FISA. Thus, in its probable cause provisions, FISA is more demanding than Title III when applied to U.S. person terrorists” (Department of Justice, 2003, p. 17).

By examining the U.S. legal authorities to intercept terrorist communications, it becomes evident there are limitations and additional burdens of proof placed on police and intelligence agencies when the target is a U.S. citizen. The criminal and intelligence collection criteria under Title III and FISA are not consistent tools to be used when trying to identify, disrupt, or prevent actions of a domestic terrorist. In summary, if a domestic terrorist is a U.S. person and is in the *clandestine intelligence* gathering stage, has not committed or is about to commit a specific crime as outlined in 18 U.S.C. 2516, neither Title III nor FISA may be used. Director Mueller, of the Federal Bureau of Investigation, recently stated:

Our objective is to defeat national security and criminal threats by operating as a single intelligence-led operation, with no dividing line between our criminal and counterterrorism programs. We want to make sure nothing falls through the cracks. (Mueller, 2009)

This statement coincides with comments made by Lord Carlile when he identified the differences between terrorism related crime and ordinary serious crime. He stated:

Fanatics and others moved by fervent ideology or similar purpose are less predictable than professional criminals. They are patient so long as they have a confident sense of security. They are intent upon and have the means to cause terror among a wide and unpredictable section of the community. They are driven by a common purpose though not always a common goal. They are difficult to find... (Carlile, 2007, p. 24).

6. Summary

Both FBI Director Mueller and Lord Carlile have identified the unique and clandestine nature of terrorist activities and the need of government to preempt terrorist actions in order to protect their citizenry. The U.S. has created a legal and investigative dichotomy by creating two distinct types of terrorists: U.S. citizen versus non-U.S. citizen; operating on behalf of a foreign power, or not an agent of a foreign power; clandestine intelligence gathering, or just a criminal. Consequently, the legal authorities used to intercept the communications of these distinct types of terrorists may be Director Muller's proverbial "crack." The history of the U.S. demonstrates that a domestic terrorist may engage in acts do not rise to the necessary level of "probable cause to commit a crime" prior to the actual onset of the terrorist attack. Recent examples include Eric Rudolph, the Olympic Park Bomber; Theodore Kaczynski, the Unabomber; and the infamous Oklahoma City bomber, Timothy McVeigh. None of the preparatory actions of these individuals would have risen to the level required by the interception standards as outlined within T III (18 U.S.C. 2516) or FISA, prior to their initial acts of violence. Although these individuals are accredited with some of the worst terrorist acts in U.S. history, the ability for U.S. police and intelligence agencies to intercept the

communications of domestic terrorists has not changed as it relates to U.S. citizens. The threshold of “probable cause” may be too high to effectively accommodate U.S. counterterrorism efforts.

Conversely, the UK’s understanding of terrorism is not defined by geographical borders or the individuals committing the terrorist acts. Therefore, its legal framework and statutory provisions are not constrained by the location or the citizenship of the perpetrator. United States police and intelligence agencies should be provided the same investigative latitude and granted the ability to intercept the communications of any terrorist regardless of their location or citizenship. If terrorism is a unique type of crime, as Lord Carlile and the FBI have previously noted, and the precursors to committing a terrorist act are distinctive, the U.S. must establish new laws or authorities to effectively combat terrorism.

This research has established that the U.S. has developed an equitable way for law enforcement and homeland security agencies to easily identify a foreign power by leveraging the Foreign Terrorist Organization (FTO) list or the State Sponsors of Terrorist list. For the purpose of using an investigative technique such as FISA, one must simply show one of the adherents on the lists are conducting clandestine intelligence operations against the U.S. or its interests. Conversely, it can be argued if a U.S. person who is a member of a “domestic terrorism organization,” which at this time is undefined within the greater homeland security community, is conducting clandestine intelligence operations that one may not use a Title III interception of wire communications until a potential crime has been committed.

The development of a legally defensible process to designate a terrorist as a domestic terrorist or domestic terrorist group may arguably be a significant step toward assisting law enforcement and homeland security agencies in convincing policy makers to recognize the significance of intercepting communications of these adherents. It is anticipated that the introduction of legislation to the U.S. Congress centered on intrusion of the government into U.S. citizens’ constitutional rights would immediately be met with opposition; however, the intrusion of the government into terrorists’ activities is expected

in order to ensure public safety and security. It can be further argued if it can be shown that predicted domestic terrorists were conducting clandestine intelligence activities, as evidenced by the UK after years of combating threats and acts of terrorism, the time for enacting similar measures in the U.S. may be close at hand.

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IV. CURRENT VALIDATION AND DESIGNATION PROCESSES

The research has brought to the forefront some salient points to consider when it comes to terrorism and the adherents of the same. These points are: terrorism is bad (Bogner, 2007), terrorism is a crime (German, 2007), terrorists are criminals (Federal Bureau of Investigation, 2005), and terrorism has a political meaning beyond the crime (White, 2006). The research also suggests that in order to combat terrorism unique investigative and intelligence gathering techniques should be employed against terrorists (Carlile, 2007).

Additionally, the research has also identified that the U.S. has used a “brand” process to identify other criminals such as gang members and child sex offenders. However, when it comes to adherents of domestic terrorism the processes and “branding” of a domestic terrorist becomes less defined and largely non-existent. The following sections will examine the various governmental processes that are currently used when addressing terrorists (international and domestic), gangs, and sex offenders. Specific focus will be placed on process initiation (i.e., legislative or administrative), designation criteria, redress, dissemination, and use limitations.

A. TERRORISM LISTS

Current policies and procedures defining and designating foreign terrorist organizations (FTO) are well documented and were promulgated by a legislative process. The legal criteria for designating FTOs and the process by which to follow are defined within section 219 of the *Immigration and Nationality Act* (INA), (Title 8 U.S.C. 1101). The Secretary of State maintains the responsibility of designating and publishing FTOs on behalf of the U. S. There are currently 45 FTOs designated by the State Department (State Department, 2009). The State Department is not alone in this process. It is directed to consult with the Department of Treasury and the Attorney General prior to completing the designation process (State Department, 2009). The INA establishes three conditions for the purpose of designating an FTO: the organization is foreign, the organization

engages in terrorist activity, and the terrorist activity threatens the security of U.S. persons or the national security of the U.S. (State Department, 2009).

The FTO list is a readily available to the public via the internet. Additionally, other lists have been established to identify international terrorists and terrorist organizations. These include the State-Sponsors of Terrorism (SST) list, Terrorist Exclusion List (TEL),³⁰ and the Specially Designated Nationals and Blocked Persons (SDN) list. Each one of these lists has specific validation and designation processes. Every two to five years the Secretary follows certain review and revocation procedures, examining the FTO list to determine relevancy of designation (State Department, 2009). Additionally, a FTO may file a petition for revocation two years after designation (State Department, 2009). The effects of being included on one of the aforementioned lists provide for various legal processes and administrative sanctions imposed by U.S. law enforcement, immigration, Treasury and Executive Branch agencies (State Department, 2009). According to the U.S. State Department, there are benefits associated with placing a group or an individual on one of these lists, such as:

...supports our efforts to curb terrorism financing and...encourage[s] other nations to do the same, [it also] stigmatizes and isolates designated terrorist organizations internationally, deters donations or contributions to and economic transactions with named organizations, heightens public awareness and knowledge of terrorist organizations, and signals to other governments our concern about named organizations. (U.S. State Department, 2009)

A review of these lists reflect that none of these lists include domestic terrorists or groups, or U.S. citizens who have been identified as supporting international terrorism, such as Adam Yahye Gadahn.³¹

³⁰ Section 411 of the U.S.A PATRIOT Act of 2001 authorizes the Secretary of State, in consultation with the Attorney General, to designate terrorist organizations for immigration purposes.

³¹ The lists reviewed were located at the State Department Web site located at <http://www.state.gov/s/ct/list/#> and the Department of Treasury, Foreign Asset Control Web site located at <http://www.ustreas.gov/offices/enforcement/ofac/sdn/>.

Unlike the FTO list that addresses international terrorism (U.S. Department of State, 2009), this researcher has identified only one validation and designation process that uses established protocols and is in use by a federal government agency for identifying *individuals* engaged in domestic terrorism for inclusion on a government list. That list is the *Consolidated Terrorist Watch List* housed within the Terrorist Screening Center (TSC) (Terrorist Screening Center, 2009).

In September 2003, *Homeland Security Presidential Directive (HSPD) 6* was signed by President Bush (U.S. Department of Justice, 2009a). *Homeland Security Presidential Directive 6* directed the Attorney General to establish a process to consolidate the government's approach to terrorism screening and provide for the appropriate and lawful use of terrorist information in a screening process (U.S. Department of Justice, 2009a). The Watch List that was born out of HSPD 6 does not provide for any of the benefits realized by the FTO list. Specifically, it does not curb terrorism financing, encourage other nations to do the same, stigmatize and isolate designated terrorist organizations, deter donations, contributions and economic transactions with named organizations, heighten public awareness and knowledge of terrorist organizations, or signal to other governments our concern about named organizations. This watch list is primarily used for affecting and tracking domestic and international travel of suspected terrorists. A second administrative list, primarily used by the FBI, known as the *Violent Gang/Terrorist Organization File (VGTOF)* has been used to further track and identify terrorists (U.S. Department of Justice, 2009a). In June 2009, the VGTOF was separated into two separate files *the Gang File* and *the Known or Appropriately Suspected Terrorist (KST) File* (Federal Bureau of Investigation 2009c); both of which are accessible to law enforcement agencies through the National Crime Information Center (NCIC).³²

³² NCIC is a nationwide information system run by the FBI. The system supports criminal justice agencies throughout the nation and Canada. Approved users may research records and in some cases nominate individuals in the areas of probation/parole, criminal histories, wants/warrants, gang file, and Convicted Sex Offender Registry, to name a few.

According to the NCIC 2000 *Operators Manual*, which establishes the policies and procedures to be followed by all NCIC users, the TSC alone has the authority to enter an individual who has been nominated as a suspected terrorist to the KST file (Federal Bureau of Investigation, 2009c).

In March 2004, the government created a Consolidated Terrorist Watchlist (U.S. Department of Justice, 2009a). The Consolidated Terrorist Watchlist merged separate watch lists, such as the VGTOF, which had been maintained by other federal agencies (U.S. Department of Justice, 2009a). The consolidated list is managed by the FBI by way of its oversight of the TSC (U.S. Department of Justice, 2009a).

The FBI as well as other federal agencies may nominate suspected International Terrorists to the National Counterterrorism Center (NCTC), which subsequently moves the information to the TSC for inclusion into the Consolidated Terrorist Watchlist (U.S. Department of Justice, 2009a).

The NCTC also enters the nominee into the *Terrorist Identities Data Mart Environment* (TIDE) (U.S. Department of Justice, 2009a). But when the nomination involves a suspected domestic terrorist, the FBI is the sole nominator. In fact, the FBI bypasses NCTC and brings the domestic terrorist nominee directly to the TSC (U.S. Department of Justice, 2009a). Additionally, the "...TIDE database is prohibited from containing purely domestic terrorism information" (U.S. Department of Justice, 2009a, p. viii).

Terrorist nomination protocols for all contributing agencies for inclusion into the TSC terrorist databases are outlined in a document that is classified *Sensitive Security Information* and is not available for review by the general public. This researcher was not able to find any validation and designation processes or protocols for domestic terrorist groups in support of nomination to any government list. The TSC has published limited criteria for nominating individuals suspected of being domestic terrorists as part of the *Watch Listing* process (Terrorist Screening Center, 2009). Research has identified criteria used by the FBI to establish what is considered a terrorist, for nomination purposes, as partially reflected in a U.S. Department of Justice, Office of Inspector

General Audit of the FBI's terrorist watch list nomination practices (U.S. Department of Justice, 2009a). According to the audit, the FBI begins the watch list nomination process, "Whenever an FBI field office opens a preliminary or full international terrorism investigation or a full domestic terrorism investigation" (U.S. Department of Justice, 2009a, p. 4). In order to further identify specific criteria to define what constitutes the terms preliminary and full investigations, the FBI must rely on the U.S. Attorney General's Guidelines for Domestic FBI Operations (Mukasey, 2008). According to the guidelines, a "Preliminary investigation may be initiated on the basis of any allegation or information indicative of possible criminal or national security-threatening activity, but more substantial factual predication is required for full investigations" (Mukasey, 2008, p. 18). The guidelines also define terrorism and terrorist actions with reference to Title 18 U.S.C. 2331, 2332b (g)(5)(B), and 43.³³

In summary, in order for the FBI to nominate a suspected terrorist to the NCTC or TSC, which would eventually be placed into the VGTOF/KST, it must first initiate a preliminary or full terrorism investigation following the legal definitions reflected in the aforementioned statutes. This would be the totality of the nomination standards/criteria for the FBI when it comes to domestic terrorists. With reference to redress procedures, per FBI policy at the close of the investigation the individual must be removed from the Consolidated Terrorist Watchlist (U.S. Department of Justice, 2009a). There are some limited circumstances to permit an individual to remain on the list such as when the individual is known to have left the U.S. (U.S. Department of Justice, 2009). If an individual becomes aware of their name being associated with terrorism, there are no redress procedures for the nominated individual to personally challenge the FBI's nomination process.

To date VGTOF/KST and the Consolidated Watchlist are the only repositories for the FBI to publish or identify a domestic terrorism subject, who has not been formally charged, to the greater homeland security community. This research has established the individuals placed into VGTOF/KST or the Consolidated Watchlist only become

³³ Title 18 United States Code 43 is known as the Animal Enterprise Terrorism statute.

available if the adherents name and/or identifiers are searched by an authorized user of these disparate databases. The research has also established there is no validation or nomination process established by any federal government agency for the nomination of a domestic terrorism group to any homeland security information sharing system. Additionally, there are no processes for the FBI to nominate a domestic or international terrorist group for inclusion into VGTOF/KST or the Consolidated Terrorist Watchlist.

Unlike the previously identified lists concerning international terrorists, individuals identified in VGTOF/KST or the Consolidated Terrorist Watchlist are subject to limited administrative sanctions and no legal sanctions. One of most significant legal actions that may be enforced against individuals assisting an FTO involves “Providing Material Support to Terrorists” (Title 18 U.S.C. 2339A). According to this statute, any monetary or tangible service provided by an individual in support of terrorism may be subject to the legal ramifications as stated within the material support statute (Title 18 U.S.C. 2339A). This statute can be directly applied to an individual who is identified as supporting a designated FTO. For example, according to the State Department, Al-Qaida is a designated FTO (2009). If an individual is found to be providing money or any tangible assets in support of Al-Qaida then they may be charged with *material support*. The research has not uncovered the use of material support being successfully charged against a domestic terrorism group or its supporters. It can be argued, that because there are no government designation processes for designating a domestic terrorism group the statute may not be as easily applied.

Two additional lists of note are the publically available FBI’s Most Wanted Terrorist (Federal Bureau of Investigation, n.d.b.) and Domestic Terrorism lists (Federal Bureau of Investigation, n.d.a.). These lists are the only repositories for the FBI to externally publish or identify a domestic terror subject (post-indictment) to law enforcement, selected communities of interest, or the public. Both lists provide information concerning fugitives who have been criminally charged and are associated with terrorism or domestic terrorism, respectively. For instance, FBI fugitive and animal rights extremist Daniel Andreas San Diego was recently added to the FBI’s Most Wanted

Terrorist list (Federal Bureau of Investigation, n.d.b.). However, these lists do not identify known or suspected domestic terror subjects or groups, regardless of their criminal history or current threat, unless or until they have been charged with a federal crime, unlike the criteria used to be placed on the FTO list.

B. CRIMINAL LISTS

One of the most recognizable public criminal designation processes is, *The Sex Offender Registration and Notification Act* (SORNA), which stems from the *Adam Walsh Protection and Safety Act* of 2006 (U.S. Department of Justice, 2008b). The stated purpose of the *Adam Walsh Act* is:

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders. (United States Congress, 2006, Section 102)

SORNA establishes a set of comprehensive standards for sex offender registration within the United States (U.S. Department of Justice, 2008b). The national sex offender registry is broken down into two different registries. The first is the National Sex Offender Registry (NSOR), which is the responsibility of the FBI to maintain through the use of the NCIC, and the second is the Office of Justice Programs' Dru Sjodin National Sex Offender Public Registry, which may be viewed on a public Web site (U.S. Department of Justice, 2008c). The NSOR registry houses the names of, "individuals convicted of criminal offenses against minors, convicted of sexually violent offenses, and individuals who are designated as sexually violent predators" (U.S. Department of Justice, 2008c, p. i).

The *Public Law* specifically defines the term *sex offender* as an individual who was convicted of a sex offense (United States Congress, 2006). According to this legislation, the registry requirements are imposed on the offender and are to be enforced by each state and in coordination with the Attorney General of the United States (United States Congress, 2006). Although the FBI is responsible for maintaining the national

registry, the U.S. Marshal Service has been designated as the lead federal agency for investigating non-compliant sex offenders and to assist states in enforcing registration requirements (U.S. Department of Justice, 2008c, p. ii).

As part of the national registration process, the sex offender is required to keep their registration current in each jurisdiction where they reside. Failure of the sex offender to register may subject them to legal action and possible imprisonment by federal and state government law enforcement agencies (United States Congress, 2006). Participating states have enacted their own sex offender laws and corresponding registry requirements (U.S. Department of Justice, 2008c). Although the states must meet the minimum federal registration requirements, individual states may establish more stringent ones as well (U.S. Department of Justice, 2008c).

Each jurisdiction is mandated to make the registration available to the public through the use of the Internet (United States Congress, 2006). Additionally, the U.S. Attorney General is tasked with maintaining a National Sex Offender Public Website (U.S. Department of Justice, 2008c). This site is known as the Dru Sjodin Web site, which is available through the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) Web site (U.S. Department of Justice, 2008c). The Web site is a portal to all participating local jurisdictions. The Dru Sjodin Website is a one-stop-shop for nationwide inquiries. The duration of registration for the sex offender may vary from 15 years to life depending on the degree of the offense (United States Congress, 2006).

Based on the procedures outlined in the aforementioned legislation, sex offenders are broken down into three *tiers* depending on the level of criminal activity. For example, a Tier III sex offender is an offender whose offense was punishable by imprisonment for more than one year (United States Congress, 2006).

Not unlike terrorism, there is no federal crime for being a member of a gang. Perpetrators are prosecuted for violations of various criminal laws. Often, some of the same violations a terrorist may be prosecuted for such as homicide, arson, or money laundering. Federal statute Title 18 U.S.C 521(a) defines a criminal street gang as:

...an ongoing group, club, organization, or association of five or more persons—

(A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);

(B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and

(C) the activities of which affect interstate or foreign commerce.

“State” means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States” (Title 18 U.S.C. 521).

The national effort to combat criminal gang violence has led various law enforcement agencies to establish gang and gang member validation, designation, and intelligence collection processes. According to the NCIC 2000 *Operators Manual*, a contributing agency may enter a gang into the NCIC *Gang File* if the following criteria are met:

1. The group must be an ongoing organization, association, or group of three or more persons; and,
2. The group must have a common interest and/or activity characterized by the commission of or involvement in a pattern of criminal activity or delinquent conduct. (Federal Bureau of Investigation 2009c, p. 5)

The manual further defines criminal conduct as “...narcotics distribution, firearms or explosives violations, murder, extortion, obstruction of justice, and other violent offenses such as assault, threat and burglary...” (Federal Bureau of Investigation 2009c, p. 5).

The retention periods for these records within NCIC are indefinite or as determined by the originating agency (Federal Bureau of Investigation 2009c, p. 5). Access to the records is available by all NCIC justice system users upon inquiry.

The Department of Justice, Office of Justice Programs, has an established National Gang Center Web site that provides access to the latest research about gangs and links to tools and databases (U.S. Department of Justice, 2009c). The site makes note that the definitions of gang and gang membership varies widely throughout the country. Therefore, validation and designation processes vary as well. The site does provide widely accepted criteria to define a gang as:

- The group has three or more members, generally aged 12–24.
- Members share an identity, typically linked to a name, and often other symbols.
- Members view themselves as a gang, and they are recognized by others as a gang.
- The group has some permanence and a degree of organization.
- The group is involved in an elevated level of criminal activity. (U.S. Department of Justice, 2009c)

The FBI recognizes these criteria as it applies to a nationally recognized gang known as the 18th Street Gang (M. Escorza, personal communication, September 16, 2008). According to an FBI program manager, the FBI does not have established validation requirements (M. Escorza, personal communication, September 16, 2008). The FBI looks to local law enforcement agencies for validation purposes (M. Escorza, personal communication, September 16, 2008).

According to the FBI program manager, examples of some of the criteria used by various local law enforcement agencies in California include: self admission, tattoos depicting gang affiliation, style of dress, use of hand signals, reliable informant identification, associates with known gang members, prior arrest with known gang members, and attendance at gang functions (M. Escorza, personal communication, September 16, 2008).

The 18th Street Gang is also publicly identified on the Los Angeles Police Department's *Gang Injunctions* list (Los Angeles Police Department, 2009). There are currently 37 active injunctions in the city of Los Angeles involving 57 gangs.³⁴ A gang injunction is a *restraining order against a group* (Los Angeles Police Department, 2009). The purpose of the injunction is a civil process to declare a gang's public behavior a nuisance (Los Angeles Police Department, 2009). Once declared, special rules may be directed toward the gang's activity. The identity/name of the gang is subsequently posted on a public Web site. The purpose of the injunction is also to "...address the neighborhood's gang problem before it reaches the level of felony crime activity" (Los Angeles Police Department, 2009). Because there is a civil process for the designation of a group to the injunction list a designated group may use the same civil process for redress as well. Although the city of Los Angeles publically identifies validated gangs, they do not publically identify gang members. According to Detective Tracey Angeles of the Los Angeles Police Department, once a gang member has been validated, criminal investigations and collection of intelligence in support of the same may be initiated against the validated subject (personal communication, March 5, 2010). Additionally, a validated gang member is also entered into a database known as CalGang (T. Angeles, personal communication, March 5, 2010). CalGang is a state-funded database operated and maintained by the Los Angeles County Sheriff's Office (T. Angeles, personal communication, March 5, 2010). CalGang's mission is to provide participating law enforcement agencies with accurate and timely statewide gang related intelligence information (California Office of the Attorney General, 2010). The CalGang system operates as a criminal intelligence system and operates pursuant to United States Code 28 CFR part 23 (California Office of the Attorney General, 2010).

³⁴ The Los Angeles Police Department's Gang Injunction Web site is continually being updated and may be viewed at http://lapdonline.org/gang_injunctions/content_basic_view/33163.

Addressing gang violence is not limited to the federal government or major metropolitan law enforcement agencies. For example, the Anchorage (Alaska) Police Department has an established gang validation process. According to Criminal Intelligence Officer D. Scott Lofthouse, the Anchorage Police Department (APD) has a regulations and procedures manual for identification, classification, validation, intelligence storage, and purge criteria for gangs and gang members (personal communication, April 13, 2010). The APD procedures rely heavily on compliance with 28 CFR Part 23. According to the APD regulations, the criteria for an individual who meets a standard of *reasonable suspicion* for involvement in a gang related crime, self admits to being a gang member, or has been documented as being an active participant in a gang and validated by a Gang Specialist Officer may be designated as a gang member (D. Lofthouse, personal communication, April 13, 2010). Once designated, the gang or gang member is placed into a database for intelligence and information sharing purposes. The gang database file is reviewed for purging based on a five-year retention period per entry (D. Lofthouse, personal communication, April 13, 2010). If no gang or related criminal activity has been recorded for the entry, for the previous five years, the record would be purged from the system (D. Lofthouse, personal communication, April 13, 2010). The APD gang files are not specific to U.S. or non-U.S. persons and are not available to the public (D. Lofthouse, personal communication, April 13, 2010).

Both CalGang and the APD follow the guidelines of 28 CFR Part 23. As the research has previously established, if a criminal intelligence system fails to comply with the operating policies of 28 CFR Part 23 federal funding may be forfeit. The U.S. Department of Justice, Office of Justice Programs has significant oversight of the compliance and funding processes as they relate to 28 CFR Part 23. A closer review of the policy reveals that 28 CFR Part 23 also establishes and standardizes how and why these criminal intelligence systems should operate. For example, the policy recognizes that individuals involved in various criminal activities such as drug trafficking, smuggling, and corruption employ some degree of regular coordination and involve participants over a broad geographical area and the pooling of that information may be useful to combat these illegal activities (28 CFR Part 23). The policy also recognizes the

need to protect the privacy and civil liberties of individuals. According to the policy, the standard of *reasonable suspicion* is used as the overriding predication for collection of criminal intelligence:

...when information exists which establishes sufficient facts to give a trained law enforcement officer or criminal investigative agency officer, investigator, or employee a basis to believe that there is a reasonable possibility that and individual or organization is involved in a definable criminal activity or enterprise. (28 CFR Part 23, p. 3)

Consequently, this would be a consistent predication standard for all intelligence databases that are 28 CFR Part 23 compliant such as CalGang. The policy also defines Criminal Intelligence in the following manner:

(3) Criminal Intelligence Information means data which has been evaluated to determine that it: (i) is relevant to the identification of and the criminal activity engaged in by an individual who or organization which is reasonably suspected of involvement in criminal activity, and (ii) meets criminal intelligence system submission criteria. (28 CFR Part 23)

C. SUMMARY

The research has established that organizations and individuals involved in criminal and terrorist activities have been “branded” by local, state, and federal government agencies through the use of legislative and administrative policies. There is also a distinction of when and how a group or individual is “branded” (e.g., initiation of an investigation, civil or criminal action, etc...). The degree of to whom the information is disseminated varies widely as well (e.g., public or limited, need-to-know, etc...). From the review of all of the aforementioned processes this researcher has compiled the following findings (see Appendix B):

1. If a terrorist group is non-U.S. based their identities will be widely distributed publically in accordance with an established U.S. legislative process (FTO). Likewise the name of a criminal gang may be publically identified (Gang Injunction). In both cases special civil/criminal actions may be imposed on these groups. There are no such processes or repercussions for domestic terrorist groups.

2. If a terrorist is a non-U.S. citizen and in support of a non-U.S. based terrorist group their names will be distributed publically such as the Specially Designated Nationals and Blocked Persons List. The terrorists name may also be published through the TSC which feeds the aforementioned list.
3. If a terrorist is a U.S. person (not yet indicted on criminal charges) and is in support of an FTO their name is only published to lists that are not available to the public but are widely distributed to a select group with need-to-know accesses to the Consolidated Terrorist Watchlist.
4. If a terrorist is purely domestic in nature only the FBI may nominate them for inclusion into the Consolidated Terrorist Watchlist. There are limited criteria for the FBI to follow when nominating a domestic terrorist. There are some terrorist lists which purely domestic terrorists will be excluded for example, the TIDE database. The dissemination of the domestic terrorist's name is limited to need-to-know and is not distributed to the public.
5. If you are charged with criminal activity in furtherance of terrorism and are considered a fugitive, domestic or foreign, the FBI may publish the name publically.
6. If a terrorist is convicted of a crime in support of terrorism, domestic or foreign, or an investigation is completed the FBI must remove their name from the Consolidated Terrorist Watchlist.
7. There is no process for a state or other federal agencies, outside the FBI, for nominating a domestic terrorist to the TSC.
8. An individual may be identified as a gang member (citizen or Non-U.S. citizen) following specific validation requirements. Once validated the members identity is published with a limited need-to-know distribution (i.e. - CalGang and VGTOF/Gang).
9. If an individual is convicted of a sex offense (citizen or non-U.S. citizen) their name is published publically post-conviction.
10. A convicted sex offender may also suffer criminal sanctions for non-compliance. Post-conviction, a process has been established to monitor a convicted sex offender's movements.
11. In examples where individuals or groups were published to the public, a process was established by legislation or the result of a judicial process.

Conversely, lists that were published based on a need-to-know were established by administrative actions such as Presidential Directives or internal agency policies.

12. There is no list or government process to publish and track the names of individuals convicted of crimes in support of terrorism.

When it comes to addressing domestic terrorism adherents, this researcher was unable to find any process for designating a domestic terrorist group. Additionally, there are no legislative or administrative actions that may be imposed on individuals who support a purely domestic terrorist group. Therefore, if terrorism is just a crime then a domestic terrorist or domestic terrorist group should be treated with like processes, as used against international terrorists, sex offenders, and gangs.

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V. STOP HUNTINGDON ANIMAL CRUELTY (SHAC) CASE STUDY: A FOCUS ON THE VULNERABILITIES

As the book *The Starfish and the Spider* points out, the Animal Liberation Front (ALF) is one of the “biggest decentralized organizations in Europe and America” (Brafman & Beckstrom, 2007, p. 137). Brafman and Beckstrom further claim that ALF is more akin to an ideological based following such as al Qaeda (2007, p. 140). Because ALF is so decentralized, it is more of a movement than an identifiable organizational structure (Brafman & Beckstrom, 2007). The FBI considers ALF to be a serious domestic terrorist threat (Federal Bureau of Investigation, 2002). It can be argued that with these types of decentralized organizations it is the ideology that identifies a common cause that aids in recruitment and justifies the use of violence (University of Maryland, 2009). Therefore, homeland security agencies are continually trying to identify a moving target.

This is not to say the followers of ALF are the only domestic terrorism adherents that follow an ideology; environmentalist, anti-abortionists and white-supremacists all believe they are acting in support of a special cause or calling. Research conducted by the University of Maryland affirmed that “ideology is a core component of terrorism” (2009, p. 7). Because domestic terrorism causes and adherents are often ideology-based there may not be a single leader. If so, the leader does not necessarily give specific orders for criminal actions to take place. A common problem with investigating domestic terrorism adherents is the type of criminal activity they conduct. The criminal actions or direct actions are historically violations of local and state laws and go unnoticed (White, 2006). Therefore, the FBI may be unaware of potential domestic terrorism adherents. As the research has indicated, the FBI has lead responsibility for investigating domestic terrorism on behalf of the federal government. Conversely, state and local law enforcement may not know if significant FBI domestic terrorism subjects are living in their area of responsibility unless they are told or get lucky and run across the subject in

connection with a local criminal investigation and make inquiries through NCIC. One such domestic terrorism group who historically has operated within the U.S. is Stop Huntingdon Animal Cruelty (SHAC).

Although SHAC is known to have originated in the United Kingdom (U.S. Department of Justice, 2004), SHAC-UK, it is important to examine SHAC's activities within the United States, SHAC-US. The following case study will provide a brief history of the group, its structure, objectives, motivations, and different stages of evolution. Consequently, it can be argued throughout the case study, because this was a U.S.-based group composed of U.S. persons, significant opportunities to deter and prevent domestic terrorism actions may have been missed because there is no validation and designation process for domestic terrorism adherents.

SHAC was established in the UK in 1999 following campaigns of economic sabotage against farms that bred animals for scientific research (U.S. Department of Justice, 2004). SHAC's single objective was the complete closure of Huntingdon Life Sciences (HLS), a UK-based animal research laboratory headquartered in Cambridge, England with facilities in Suffolk, England (U.S. Department of Justice, 2004). In 2000, HLS opened a facility in East Millstone, New Jersey. Shortly thereafter SHAC-US was founded and their voice was Kevin Kjonaas (Anti-Defamation League, 2009). From the inception of SHAC-US, Kjonaas and the corporate officers operated above ground, unlike the leaderless society affiliates within the ALF, which the FBI has identified as a domestic terrorism movement (Federal Bureau of Investigation, 2005). Due to various SHAC-US objectives and motivations, coupled with law enforcement activities, SHAC-US was forced to undergo several organizational changes. The most recent was a more risk-based operational structure due to the successful prosecution of the SHAC-7 in March 2006 (U.S. Department of Justice, 2006).

It is important to note that although SHAC-US developed as a hierarchical organization, there was no evidence to show SHAC-US was subordinate to SHAC-UK. It was also clear both organizations had the same published primary objective—shutting down HLS (Anti-Defamation League, 2009). Both groups employed some of the same

tactics and techniques such as various levels of lawful and unlawful activity, including: harassing HLS employees and clients using threats, telephone blockages, black faxes, false mail-orders, and home visits (United States District Court District of New Jersey, 2005). Extremists also engaged in “direct actions” against HLS and its business partners within the U.S. (Federal Bureau of Investigation, 2005). These direct actions included vandalism, property destruction, bomb and death threats, office invasions, cyber-attacks, and theft (U.S. Department of Justice, 2006).

This phenomenon of best practices was described by Horacio R. Trujillo (2005), in the book *Aptitude for Destruction Volume 2: Case Studies of Organizational Learning in Five Terrorist Groups*. As a contributing author, Trujillo devoted a chapter examining this phenomenon. In the chapter titled “The Radical Environmentalist Movement,” Trujillo indicates the assessment of organizational learning in radical environmentalist organizations requires an appreciation of how such learning can be transmitted through informal social processes, as well as formal ones (Trujillo, 2005). Trujillo further mentioned that the two groups, which he was examining, were part of a social movement as much as, if not more than, a formal organization (Trujillo, 2005). It should also be noted that SHAC-US was not designated as a domestic terrorism organization or openly identified on any list published to the law enforcement community, or other communities of interest. At this time a domestic terrorism validation and designation process could have been applied to the individuals committing the direct actions against HLS. Not unlike a criminal gang member committing a criminal act in furtherance of the gang’s agenda or an FTO targeting U.S. interests.

Kjonaas, who was purported to have already been involved in support of the ALF movement, would have been familiar with the clandestine world of Animal Rights extremists that had no formal membership (Anti-Defamation League, 2009). This was largely due to Kjonaas leveraging the appeal of shared risk and underlying shared purpose to expand the SHAC agenda. This is not unlike what is seen today with the Al’ Qai’da inspired home-grown threats. Therefore, it can be argued that Kjonaas may have believed SHAC-US, as a corporation, could remain aboveground all the while relying on

the more clandestine ALF extremists to follow through independent of any organizational direction. Kjonaas would have understood what was meant by the phrase “direct action” in the world of extremists, due to his prior involvement with ALF but would have also understood the meaning of “First Amendment Protected Activities,” presenting law enforcement with an uphill battle to hold him accountable.

Because there was no accepted definition of domestic terrorism, or a designation process, local law enforcement was continually challenged. The SHAC mindset was further identified in an article published by the *SHAC Support Fund*, after the SHAC-7 were charged, which stated in part; “While the charges themselves sound alarming, the defendants are not actually accused of having personally engaged in terrorist or threatening acts. Instead, the government’s case centers around the idea that aboveground organizers of a campaign are responsible for any and all acts that anyone engages in while furthering the goals of the organizers” (SHAC-7, 2010). Initially, from 2000–2001, SHAC-US affiliated groups and chapters were identified throughout the U.S. primarily internal to the FBI, disparate law enforcement agencies, and independently by a few animal rights extremist watch-dog groups. There was no formalized list identifying the groups or their members that was published to all the communities of interest.

The SHAC-US organization started to take on a different appearance from 2002–2004. These activities led to the arrest of Kjonaas in 2004 for his involvement with different activities with SHAC (Anti-Defamation League, 2009). Additional aboveground members became public, and there was a landmark Supreme Court decision that created an environment for AR Extremists to feel they may have found a loophole in the federal law that they could exploit. In the past, some of the aforementioned criminal conduct was prosecuted as a violation of the Hobbs Act, Title 18 United States Code 951, but in *Scheidler v. National Organization for Women*, where the Supreme Court held, “...in order to commit the extortion that is the gravamen of a Hobbs Act violation, a defendant must actually ‘obtain’ property” (Supreme Court of the United States, 2003). So, theoretically furnishing names, addresses, and identifying information of HLS employees and business affiliates should be of no consequence if; in fact, the direct

actions taken against them were not for the benefit of the perpetrators, under federal law. Clearly at this time, it could be argued that SHAC-US was conducting clandestine intelligence activity for the purpose of furthering terrorist activity. But, as previously argued, law enforcement could not use FISA or Title III investigative measures for the purpose of intercepting this type of clandestine domestic intelligence gathering by a purely domestic group. Among federal law enforcement agencies such as the FBI, it was common knowledge that most of the criminal actions were low level crimes that could have been charged as local crimes (Federal Bureau of Investigation, 2005).

As stated in the indictment of SHAC and its founders, “It was further part of the conspiracy that the defendants espoused and encouraged others to engage in ‘direct action,’ which was directed as described by SHAC involved activities that ‘operate outside the confines of the legal system’...” (United States District Court District of New Jersey, 2005). These types of actions included physical assault, vandalism, smashing windows, flooding homes, bomb hoaxes, and damaging property (United States District Court District of New Jersey, 2005). The SHAC-US Web site expanded with in-depth information on possible targets, and the results of direct actions were also published (Anti-Defamation League, 2009). In large part, SHAC-US was engaging in institutionalized knowledge management as described by Trujillo (2005, p. 143). At this point in time, if a domestic terrorism validation and designation process would have been in place, it could be argued individuals committing low level criminal actions and SHAC-US could have been validated and designated as domestic terrorism individuals and/or domestic terrorist group. This would have provided law enforcement with a clear understanding of the national threat posed by SHAC.

Up until this time, Kjonaas and SHAC-US were successful in developing an organizational structure that leveraged the advantages of an aboveground hierarchy. While operating under what they perceived as minimal risk as a clandestine resistance operated with little exposure as they conducted unlawful activities. This was evidenced several times when self proclaimed members of ALF issued claims of “responsibility” for

crimes committed against SHAC's publicly named targets. Applying the elements as defined in 18 U.S.C. 2339, arguably the self-proclaimed ALF members should be seen as providing Material Support to SHAC.

One such incident occurred in Salt Lake City in June of 2001. Vandals smashed display windows at Bed Bath & Beyond. The ALF claimed credit for this direct action (SHAC, 2010). After examination it was found the stores' corporate office had unspecified financial dealings with a New Jersey investment company suspected of holding shares of HLS stock. These direct actions were having a noticeable toll on HLS as well as its financial and business partners. According to the indictment:

After the May 30, 2001 attack on the home of DD, the SHAC Website posted names and home addresses of HLS employees and stated with respect to DD that his home "was visited several times, had car windows broke, tires slashed, [and his] house spray painted with slogans. His wife is reportedly on the brink of a nervous breakdown and divorce." (United States District Court District of New Jersey, 2005).

Along with this success came the moniker of being labeled a domestic terrorism threat during Congressional testimony by the FBI (Federal Bureau of Investigation, 2005), but there was no official validation or designation of SHAC-US as a domestic terrorism group by the FBI. Individuals could continue to contribute financially and offer material support to SHAC-US without the threat of government action as would befall the same actions if they were offering the same support to a designated international terrorist or group such as an FTO. Clearly the actions taken by SHAC-US and its supporters fit the definition of domestic terrorism as defined through the use of the equation presented previously:

Criminal Action³⁵ + Motivation = Domestic Terrorism

Due to this type of organizational structure, the membership of SHAC-US has never been fully identified, which could be considered a success up to this point of the case study. But as described by Della Porta (1995, pp. 113-135), who examined political

³⁵ Criminal actions are further defined as; committed within the United States or its territories without direction from a foreign power.

violence and social movements in Europe, groups that try to operate in more open organizational models decrease their life expectancy (Porta, 1995). Unfortunately, for Kjonaas, in a 2005 superseding indictment, he and his corporate members, along with the SHAC-US Corporation, were indicted on charges of animal enterprise terrorism under the Animal Enterprise Protection Act, Title 18 U.S.C. 43 (United States District Court District of New Jersey, 2005). This would be the first time this charge was successfully prosecuted in federal court against an organization. This promulgated another organizational change.

Prior to the indictment, in August 2004, Pamela Ferdin, AKA Pamela Vlasak became the legal president of SHAC-US (Animal Scam.com, 2010). The SHAC Website became more media oriented, and campaign coordination activities became even more decentralized as regional animal rights leaders assumed these new responsibilities. There was no longer any recognizable organizational structure other than Ferdin, since there was no evidence the regional leaders reported to Ferdin. As the case against Kjonaas and his co-conspirators was being advanced, the U.S. was moving a legislative change to the Animal Enterprise Terrorism Act through Congress. This change would expose AR extremists to a broader scope of activities to be investigated by law enforcement.

In March of 2006, the SHAC-7 (six defendants and the corporation) were found guilty, and in November of 2006 Congress passed an updated version of the *Animal Enterprise Terrorism Act* that expanded the coverage to secondary and tertiary targets. A new Web site was created after a court mandated the termination of the former SHAC-US site. The new site offered the names and home addresses of more than 2,000 pharmaceutical companies associated with HLS. Interestingly, even with this huge setback, other splinter groups such as “Win Animal Rights” have continued to encourage supporters to participate in the campaign to shut down HLS (W.A.R., 2010).

Per FBI policy, individuals who had been entered into VGTOF during a terrorism investigation must be removed after the cases had been closed (U.S. Department of Justice, 2009, p. iv). Therefore, it should be noted none of the convicted SHAC-6 nor the Corporation are currently identified on any government list as domestic terrorists.

Since the events of September 11, there has not been a successful attack by any international terrorism group in the U.S., unlike the success of the AR Extremists who have shown great success. According to current FBI reporting, from 2003–2008 AR Extremists committed 597 criminal acts. Of those, 199 incidents involved violence or threats of violence (33 percent) (Federal Bureau of Investigation, 2009d). The violent activities include bombing, arson, attempted arson, physical altercations, and BB/pellet gun use in property destruction. Additionally, other types of criminal activity including animal theft, cyber attacks, harassment, theft, and threats can also instill fear as well as financial loss. Although there was no evidence of loss of human life, most of the aforementioned criminal activity was considered by law enforcement to result in the same effect as an act of violence. Clearly, the threat and use of criminal activity by AR Extremism is noticeably becoming more prevalent within the U.S., but consequently, has not garnered national attention as have the activities by well-known international terrorist groups. As argued by Brannan, the United States has made the distinction between domestic and international terrorism because policy makers do not see the domestic threat to be as dangerous as the international threat (2002).

During the analysis, it became obvious SHAC-US was not successful in meeting its objective of shutting down HLS; however, SHAC-US was successful in evolving and motivating a following of individuals willing to advance their campaign. From the outset, SHAC's stated objective had no timetable associated with it, and there is no evidence SHAC-US has been dismantled. For these reasons, it is believed by various AR outlets and law enforcement intelligence services that the campaign against HLS will continue but perhaps in a more clandestine fashion. Perhaps the more clandestine groups may also increase their level of violence if they feel a lack of success and become more of a recognized threat to mainstream America.

VI. RECOMMENDATIONS

While much of the national attention is focused on the substantial threat posed by international terrorists to the homeland, the United States must also contend with an ongoing threat posed by domestic terrorists based and operating strictly within the United States. Domestic terrorists, motivated by a number of political or social issues, continue to use violence and criminal activity to further their agendas. (Mueller, 2010)

This research focused on the domestic terrorist threat to the homeland and vulnerabilities associated with the absence of a validation and designation process for domestic terrorism individuals and groups. The protection of the citizenry from a terrorist action is paramount but must be equally balanced with the protection of privacy and civil liberties (9/11 Commission, 2004).

As represented by the strategy canvas in Figure 1, the *value innovation* of this research was to establish a domestic terrorism validation and designation process to provide a national effort in standardizing domestic terrorism awareness, investigations, and intelligence collection throughout the country. Issues such as inadvertent impingement of First Amendment protected activities should be diminished. Both law enforcement as well as the public will have a clearly defined understanding of *who is a domestic terrorist*. The research has also brought to light that the branding of U.S. persons who commit or are attempting to commit crimes within the U.S. is not unique. The U. S. has employed acceptable processes for designating and tracking sex offenders (e.g., NSOR, and violent street gangs (e.g., CalGang) and Gang Injunctions). These efforts have focused law enforcement and community efforts to take preemptive action without violating a person's constitutional rights. The ability to subject domestic terrorism adherents to administrative and legal sanctions like those imposed on designated members of FTOs, sex offenders, and gangs would be of significant benefit to U.S counterterrorism efforts.

But what is a terrorist? When researching the answer to this question, neither the literature nor the interview subjects were able to agree holistically. Therefore, this thesis

establishes a straight forward equation in which to satisfy the most critical part of a domestic terrorism validation and designation process, which is, what *is a domestic terrorist?* This researcher proposes the following equation to answer this pointed question: **Criminal Action**³⁶ + **Motivation** = **Domestic Terrorism**³⁷

The use of this equation further emphasizes the difference between a *terrorist* and a criminal whose motivations are purely outside the political or social change arena.

A. DEVELOPING A DESIGNATION PROCESS

The Foreign Terrorist Organizations (FTOs) list has a well documented process. The research has established that through the legislative process the U.S. felt it necessary to publically identify foreign terrorist organizations with hopes to bring legal clarity to efforts to identify and prosecute members of terrorist organizations and those who support them (Cronin, 2003, p. 7). As such, the designation criteria for identifying a domestic terrorism organization (DTO) should be the same as an FTO with three distinct changes:

1. The organization is **Domestic**.
2. The organization engages in terrorist activity.
3. The terrorist activity threatens the security of the United States citizens or the national security of the United States.

The benefits of having a DTO list will be the same as Cronin (2003, p. 7) identified when evaluating the benefits of an FTO:

The advantage of using the formal FTO designation is the list provides legal clarity for law enforcement purposes. The list further assists decision makers with a focal point for counterterrorism efforts. In effect, all agencies have an understanding; if you are on the list you are subject to further scrutiny: Having a focal point for agency coordination enhances the effectiveness of government implementation and may also serve as a deterrent to organizations that consider engaging in illegal behavior. (Cronin, 2003, p. 7)

³⁶ Criminal actions are further defined as; committed within the United States or its territories without direction from a foreign power.

³⁷ See page 41 for complete explanation of the equation.

But what about the individual who seeks to espouse their views in the exercise of free speech? The research has established that there is a paradigm that develops when that individual is a U.S. person or a foreign national. “U.S. citizen’s constitutional rights are very important and not to be taken lightly. This is especially true when labeling someone as a “terrorist,” since the word has been used to paint political opponents negatively rather to simply identify some reality” (D. Brannan, personal communication, April 28, 2010). But as realized by the branding of a sex offender the public looks to a judicial process to balance these civil liberties. Fortunately, when it comes to *terrorism*, the courts have already recognized how to define a *terrorist*. The United States’ Sentencing Guidelines have a specified terrorist enhancement, 3A1.4, which clearly defines a terrorist action (United States Sentencing Commission, 2008). This research supports the perspective that if an individual is subjected to this enhancement the individual is *branded* a *terrorist* and subsequent sanctions may be imposed, much like the registration requirements of a sex offender and this is a positive move in defending against domestic terrorism.

B. THE WAY FORWARD

The FBI should lead law enforcement in developing a strategic process that will include specific communities of interest to target the domestic terrorism. The research has established that the FBI’s roles and responsibilities in addressing domestic terrorism are inculcated throughout its culture, policies, and legislative responsibilities. The FBI has a pre-established domestic terrorism program within its Counterterrorism Division, which is responsible for direct program management oversight of all FBI domestic terrorism investigations and intelligence collection. But where the FBI, and for that matter the federal government, is lacking is how to engage the greater homeland security community and the public in defining and identifying the domestic threat. Utilizing the established infrastructure, the FBI should develop a validation process that defines and leads to the designation of a domestic terrorist. The FBI should identify specific validation requirements much like those used in validating a gang member. Once defined, the Department of Justice, through the Attorney General, may present these

validation requirements to the greater homeland security community and the 800,000 law enforcement officers throughout the nation (U.S. Department of Justice, 2009b). In turn, law enforcement may incorporate the validation and designation process into its day-to-day investigative and intelligence collection activities. These legally defensible standards would ultimately encourage information sharing between all agencies thereby fostering an environment for the United States to understand the domestic terrorism threat. Additionally, by leveraging the current watch listing process, the FBI would not be the only agency working to identify the next Timothy McVeigh.

A strategic plan built around the concept of common purpose would help facilitate worth and mutual empowerment for all communities of interests "...within and beyond their organization" (Byson, 2004, p. 309). By properly defining and implementing a process for designating a domestic terrorism individual or group law enforcement will be able to defend the nation against another Oklahoma City style attack.

C. RECOMMENDATIONS FOR FUTURE RESEARCH

A domestic terrorism validation and designation process is not a process that can be easily developed and implemented on a national level. Social norms and political tolerance should be taken into account during the process. The state of Arizona's attempt to develop such a process promulgated legislative actions and public cries of impingement of constitutional freedoms. Future researchers should take into account the events of the day (i.e., demands of the citizenry in the wake of a domestic terrorist attack.) Tied to what was found in this research was the absence of information associated with the recidivism of terrorists. Therefore, additional research should be conducted and data compiled in support of a domestic terrorism validation and designation process.

APPENDIX A. INTERVIEW MATERIALS

#	Biomedical Research	Intel Community	DOJ-Legal	Civil Liberty Advocate	DOJ-LE	DOJ-Legal	DOJ-LE	DOJ-LE	UK-LE	STATE-LE	STATE-LE
1.	Organized effort to do significant harm or personal safety to civilian population opposed to a group conducting legal activity. "Stop what you are doing or we know where your children go to school!"	People who use violence for political ends typically against a civilian target.	2332 bg (5) Acts listed 2331 if Act of force or violence merit using violence to change a government or a group looking at Action and intent Acting - Criminal Act of violence Intent government or a group	A crime - lack the motivation.	1984 Benjamin Netanyahu International murder, maiming and menacing of the innocent for social and political gain.	Advance political, social or religious goals through force or violence.	Use of force or violence for political or social change.	Act of violence & coercion. Violations of criminal laws. intent Social change.		Any individual or organization uses criminal act "violent" to further political or social views. It is the violent act that may determine or discover them as a terrorist.	Professional Part-Look at the legal definition as defined by federal definition of terrorism. The other part is not just legal but popular definition of how its effects our way of life, psychologically as a culture and how it disciplines business of daily life, fear and concur actions and presence of a group. Intimidation of the group operating in the area. Fear.
2	Organize, carries out, material support. Yes, intent makes you a terrorist due to philosophical or individual differences to advance that agenda.	The terrorist is the same people who also support them.	Someone who takes a role in these actions.	It's a criminal.	Provides material support in furtherance of the above activities.	An individual who is willing to use force or violence to do this. You need the overt act to designate	Individual that utilizes force or violence to coerce a portion of a population in furtherance of their ideology.	Individual or individuals and facilitators of #1.	The act of terrorism is defined by section 1 (UK) Terrorism Act 2000. Terrorists are therefore persons who engage in such acts, or who are otherwise categorized as members of "proscribed organizations." The Terrorism Act 2006 provides further amendments to the main legislation. Of note, the Secretary of State has a	The terrorist is the person who commits the criminal "violent" act. People who support terrorists are criminals but not necessarily terrorists themselves.	A person whose intent is to cause destruction of government, business or way of life through the use of any means, force, threat of force to disrupt daily lives.

										mandatory requirement to review the legislation regularly, at least on an annual basis.		
#	Biomedical Research	Intel Community	DOJ-Legal	Civil Liberty Advocate	DOJ-LE	DOJ-Legal	DOJ-LE	DOJ-LE	UK-LE	STATE-LE	STATE-LE	
3.	Yes.	If we validated a person as a terrorist yes they can be will help	Intelligence community yes. Criminal community not that much (no utility) because they already have the tools.	Double edge sword we can mislead as well. - Complex response. Mere membership may not be a Stated mission of group to commit acts of violence.	Only if policies and statutes would be changed to support.	Yes.	No-LE side. We still have laws and collecting requirement policy to preclude it. Yes - Intel side. It would help.	Yes. Help identify a scope.	Possibly in as much as the profile and therefore priority would be raised within the intelligence and law enforcement community. However, the National Intelligence Model should be capable of prioritizing threat and risk across all aspects of CT, DE and Serious & Organized Crime.	Yes. Adjust behaviors and more vigilant in documenting their activities. That would seem benign.	Yes. Makes identification, and takes away any concern about targeting. Should be some basis that you are unfairly targeting a group. Dilution of First Amendment Activities.	
4.	Yes.	Yes	Intelligence community yes. Groups yes, could share Intel without infringing on First Amendment rights.	Yes it would assist in the identification.	Only if you have authorities to reinforce the designation.	No, you can't differentiate.	Yes	Yes.		Yes. We would know who they were.	Yes.	
5.	Two classes Of animal rights. Ones who orchestrate the plan. Ones who execute the plan. Yes.	Yes should it	No.	Against the idea of designating. Does not believe it would prevent the FBI using "reasonable suspicion."	Yes. All considered as part of the validation process.	No. If done, yes.	Yes. As a group no. As a person yes. The AETA removed the "force or violence" prong so we have already done this.	Some may be part.	The risk of validation is that you then possibly have two thresholds to meet. 1) Does the named individual/organization fit the "definition" and then 2) is there sufficient evidence of crime to justify follow on enforcement activity?	Yes. Savings of time.	Yes.	

#	Biomedical Research	Intel Community	DOJ-Legal	Civil Liberty Advocate	DOJ-LE	DOJ-Legal	DOJ-LE	DOJ-LE	UK-LE	STATE-LE	STATE-LE
6.	Yes. Today people do not know who are subjects and who are not.	It could help, yes.	Yes.	Not sure.	Yes.	No. If done, yes.	Yes.	Yes.	Possibly, but there is the potential for unintended consequences. If a Domestic Extremism cause (say environmentalism-saving the planet) results in a minority of criminal being "proscribed", what happened if a bulk of sympathetic public "join" the group because they share the basic ideology. How do you separate?	Yes. If you are at zero now, I would suggest you would get some reporting of suspicious criminal activities.	Yes, the public would have more confidence that people are not being unfairly targeted.
7.	It should.	If you or part of you an organization, yes.	Yes, I do not think it will.	Yes.	Yes, by design.	Yes.	Yes.	Depends. Not sure.	There is a real risk here of eroding not only first amendment rights, but also associated basic human rights such as freedom of assembly, speech and movement. In a democracy there is a very fine balance between the right to protest and domestic legislation and policy that upholds the law and protects against crime and disorder.	Yes. It may have to fight a couple of court cases until this becomes an accepted practice.	Yes.
8.	Yes.	Probably would.	Yes.	Probably not with any reliability.	Yes.	Yes.	Yes.	Yes.		Yes. He does not know what he doesn't know.	Yes. He has known visibility.
9.	Yes. All local law enforcement is stress thin.	Long term, yes. Especially if we go to threat based planning.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.		Yes. Not sure if currently the state has statutes to address DT.	Yes, gives him something to point to.

#	Biomedical Research	Intel Community	DOJ-Legal	Civil Liberty Advocate	DOJ-LE	DOJ-Legal	DOJ-LE	DOJ-LE	UK-LE	STATE-LE	STATE-LE
10.	Usually.	It is almost inevitable.	Do not think so, still looking at actual acts and not the group community theory.	Yes it would. May be part of a problem.	Yes.	Yes.	Yes.	Yes.		Yes.	Yes. Legislators like to see formal processes so they can make justifications.
11.	Yes.	I do not think so.	Yes.	Dependant on the criteria. Yes, it would hold individual accountable instead of the organization.	Not sure if it elevates though concurs it may exacerbate.	Yes.	Yes.	Depends on the validation process.		Yes, definitely. We saw this right after 9/11	Yes.
12.	Executive Order.	This is a political issue.	Proper place somewhere in the AG guideline huge amount of input through the FBI and state attorney general throughout the country.	Constitutional amendment.	Heavy hand from the AG PDD or Executive Order Directing the attorney general to establish	Statutorily based.	Executive Order.	Legislative/executive order.	Existing models for identifying criminal Organized Crime Groups (OCG's) and Network Analysis and Criminal Business Profiles could arguably provide the same product.	Mixture of public & LES. Organizations/Individuals. The most dangerous organizations should be public. In the earlier stages it should not be public.	Organization - should be posted and publicly available. Charged (public review) it should be publicly available. If only validated but not changed it should be LES.
13.	Probably there will be some risk.	Bring attention yes and no.	No.	Yes.	No.	Yes.	Yes.	Could.		It would bring additional attention but not undue. It may cause them to publicly denounce organizations or activities they do not want to be lumped in with.	By explaining that the organization Has been validated.

14.	Yes, because it is interested. DOJ.	It is one of the DOJ and legislature as well.	Yes, FBI assisted by DOJ main.	No	Not FBI DOJ. FBI is an executive organization not a policy organization.	Yes they would be.	Yes. But implementation should be DOJ.	FBI would contribute but DOJ would be lead (collaborative)		Yes. FBI holds more information on groups and activities. Organizationally FBI is more used to dealing with intelligence gathering and how to handle the information.	Yes. With mandates, Intel, etc. and they are still controlled by civil authority, open for public review and scrutiny.
15.	No, the opposite.	It may not change the nature of the target.	No.	No.	No.	No.	Yes.	No.		It may cause the targets to take steps to mitigate the consequences (threat). High public expectation to do so.	No. This could happen to any victim. Just like any random victim of crime. We would allow that organization to make a difference.

#	Biomedical Research	Intel Community	DOJ-Legal	Civil Liberty Advocate	DOJ-LE	DOJ-Legal	DOJ-LE	DOJ-LE	UK-LE	STATE-LE	STATE-LE
16.	No.	No.	If you have a proper designation process LE could use additional tools to ferret them out.	Yes.	Sure, of course it would.	Yes, they may bifurcate.	Not at first but as it moves forward it may.	Yes.		No. In order for them to achieve their views they have to be public.	Yes. That would be a failing attempt to do that, they need to still publicize itself. If they have nothing to hide, why are they hiding?
17.	No comment.	Probably.	Properly designate - no Improperly designate - Yes.	Yes.	Potential will always exist.	Yes.	Yes.	No change.		No. We are not going to have the resources to look at everyone.	No, it would depend on what the group done something and looking for suspects. It would be precipitated by them and immediately previous actions (i.e. crime committed). "We do not collect info on citizens, we collect info on criminals."

18.	Yes, probably.	No, see #3.	Do not know.	May not have any influence.	No more than they should already.	No.	Yes.	No.		No.	Yes it could.
19.	Yes.	Unclear.	Would help to assist.	Yes.	No, it will make it easier.	Yes.	Yes.	No.		It may make it easier to identify members of DT groups. Probably not make it any more difficult than it is today.	Yes, if they take on that brand they are considered to be part of that criminal group. "The member makes the proclamation" This is one of the benefits.
20.	No.	No.	No.	Yes.	No.	No.	Yes.	Yes.		Yes. This is a benefit. It may educate people on who they are supporting.	No, it should help to demonstrate "we are not one of those"
21.	Would not be permanent.	We deal with that now.	No it is ideology coupled with the action.	Yes.	Clearly delineate the differences.	Yes.	Yes.	Validate process should alleviate that issue.		This would make it more clear for law enforcement.	It depends on how each group wants to bring about the change. One is persecution and one is threat of force.

#	Biomedical Research	Intel Community	DOJ-Legal	Civil Liberty Advocate	DOJ-LE	DOJ-Legal	DOJ-LE	DOJ-LE	UK-LE	STATE-LE	STATE-LE
22.	No. May help define the groups	This is a guidelines issue. No, they would remain disparate.	Proper designation process would elevate this.	Yes.	Re-designate.	Yes.	No.	Yes.		Based on the individuals who compare the organization.	No-if that organization changed yes (those are individual actions).
23.	Yes. Not sure	Yes.	Yes.	Yes.	By design you don't.	No.	No.	Depend.		You would force the legitimate wing to detach from the criminal wing.	You would have to show direction and control by group leadership - this takes away the First Amendment rights. You have decided to stay with a group that has been publicly validated as a DT group.

INTERVIEW QUESTIONS:

1. How do you define terrorism?
2. How do you define a terrorist?
3. Would identifying a group as a terrorist organization assist law enforcement and the Intelligence Community in collection of information on individuals or groups?
4. Will developing a validation process assist in the identification of individuals associated with known terrorist individuals and groups?
5. Will this process assist in alleviating the need for the three prongs to make a DT case? a. Force or violence; b. Political or social agenda; c. Violation of federal law
6. Will an established validation process result in increased reporting by the public?
7. Will a process enable infringement on the First Amendment without civil liability to investigators?
8. Will a process assist in identifying how many DT groups or individuals are present within the United States?
9. Will this process result in assisting in LE budget enhancements if groups/individuals are identified in their area of responsibility (national and local)?
10. Will a validation process assist in developing new legislation in targeting the modus operandi of DT groups (e.g., Animal Enterprise Terrorism Act)?
11. Would a validation process clearly define DT groups and individuals thereby alleviate the fear of legitimate groups having their constitutionally protected rights infringed upon?
12. If a DT designation process was developed how should it be implemented?
13. Would the identification of a group as a DT organization bring undo attention to those of like mind but are demonstrating legally?
14. Is the FBI the appropriate agency to develop a validation and designation process? (If not who would you suggest?)

15. Would designation cause significant economic hardship (stigma associated with being a target) to those companies and universities targeted by a terrorist?
16. Will a process force groups to go underground making it even harder to identify criminal membership?
17. Will a process result in over collection by LE purely because they are associated with being a group?
18. Will companies targeted have difficulty in obtaining loans, insurance, etc.? Will those that do have to pay a premium for these services?
19. Will it further make it difficult to differentiate between those that are legitimate and those that aren't within a group?
20. Would the process put a chilling effect on those who lawfully and legally support a cause?
21. Would a process develop unforeseen issues by designating one group with a particular ideology and the government does not designate another group with the same ideology?
22. Will a process be able to assist with groups whose names change but membership stays the same? For example, if you have a group name Suspect #1 and you have them identified as a DT group, then they go out two months later and commit acts in the name of Suspect #2.
23. Would the process assist in recognizing groups that are founded on a legitimate and lawful foundation, but has a rogue wing? How do you name a one-third of a group a terrorist group and two-thirds a legitimate group?

APPENDIX B. DESIGNATION LISTS

DESIGNATION LISTS	PROCESS		USE LIMITATION	DESIGNATION CRITERIA	DISSEMINATION		REDRESS	TERRORIST		CITIZENSHIP	
	Administrative	Legislative			Public	Need-To-Know		International	Domestic	U.S.	Non U.S.
FTO		X	NO	YES	X		YES	X			X
SST		X	NO	YES	X		YES	X			X
TEL		X	NO	YES	X		YES	X			X
SDN		X	NO	YES	X		YES	X			X
CTWL (2)	X		YES	YES (Classified)		X	YES	X	X	X	X
VGTOF/KST	X		YES	YES (Classified)		X	YES	X	X (FBI Only)	X	X
VGTOF/Gang	X		YES	YES		X	YES (1)	N/A	N/A	X	X
TIDE		X	YES	YES		X	YES	X		X	X
DTO (3)											
Sex Offender		X	NO	YES	X		YES	N/A	N/A	X	X
Gang Injunction	X		YES	YES	X		YES		X	X	X
CalGang	X		YES	YES		X	YES (1)	N/A	N/A	X	X

*(1) 28 CFR Part 23 Compliant

*(2) Consolidated Terrorist Watch List

*(3) Domestic Terrorist Organization

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