

“ECOTERRORISM”? A CRITICAL ANALYSIS OF THE
VILIFICATION OF RADICAL ENVIRONMENTAL ACTIVISTS
AS TERRORISTS

BY
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Radical environmental activists have played a vocal and often controversial role in the environmental protection movement by taking direct action to slow the pace of environmental destruction, empowering others to resist the forces behind environmental destruction, and publicly exposing and ridiculing environmentally destructive industries and the government that supports them. The often illegal tactics employed by these activists have cost industries millions of dollars. The government and industries exposed by these activists are responding by publicly branding radical environmental activists as “ecoterrorists.” This Comment examines the economic and political framework behind the “ecoterrorist” brand, and suggests that the brand is inappropriate because it diminishes the true meaning of the word terrorism, stifles political dissent, and is being used as a pretext to ensure the protection of private economic gains at the expense of efforts to protect the environment.

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I. INTRODUCTION

We want to destroy environmentalists by taking their money and their members. . . . No one was aware that environmentalism was a problem until we came along.¹ Facts don't matter, in politics, perception is reality.

Ron Arnold, Father of the Wise Use Movement and Creator of the Term "Ecoterrorism"²

Terrorism is anything that stands in the face of what we want to do . . . people's movements of resistance against deprivation, against unemployment, against the loss of natural resources, all of that is termed 'terrorism.'

Edward Said, Columbia Professor of English & Comparative Literature³

In August of 2002, as I sat high in an old ponderosa pine to protest destructive logging on public lands in the Bitterroot Valley, federal agents began to cut the tree down from the top while I sat below their saw. After sawing off most of the branches, they tied one end of a rope to the trunk of the tree, and tied the other end of the rope to the bumper of a truck eighty feet below us. They would saw off a five foot section of the tree trunk, the truck would pull the rope, and the section of the tree trunk would crash to the ground. When they had cut the trunk of the tree down to where I was sitting, they lifted me into a cherry picker bucket and brought me to the ground.

Before they could take me to jail, they had to take me to the hospital. For the previous two weeks the federal agents had set up a twenty-four hour, four-person surveillance team—with four high powered spotlights—to enforce severe dehydration, starvation, and sleep deprivation upon me and my companion tree-sitter in a neighboring tree. When I arrived at the hospital to receive a three hour intravenous injection of fluids, the police officer handcuffed me to the hospital bed.

As I sat in the hospital bed, sediment from aggressive post-fire logging continued filling Rye Creek, the Bitterroot River tributary adjacent to the protest site. The bull trout, a species listed under the Endangered Species Act,⁴ used to live in Rye Creek.⁵ By the time the logging was completed that summer, the sedimentation it caused had obliterated the bull trout's habitat in Rye Creek. Bull trout can no longer be found in Rye Creek.⁶

¹ Timothy Egan, *Fund-Raisers Tap Anti-Environmentalism*, N.Y. TIMES, Dec. 19, 1991, at A18.

² Bill Berkowitz, *Terrorist Tree Huggers: Ron Arnold, Father of the 'Wise Use' Movement, Sets His Sights on 'Eco-Terrorists,'* WORKING ASSETS, July 7, 2004, <http://www.commondreams.org/views04/0707-12.htm> (last visited Apr. 13, 2008) (citation omitted).

³ David Barsamian, *They Call All Resistance "Terrorism,"* INT'L SOCIALIST REV., Aug.-Sept. 2001, available at http://www.isreview.org/issues/19/Said_part2.shtml.

⁴ Determination of Threatened Status for the Klamath River and Columbia River Distinct Population Segments of Bull Trout, 63 Fed. Reg. 31,647 (June 10, 1998).

⁵ NATIVE FOREST NETWORK, *Where is the Accountability? Fire Risk Increased, Restoration Work Not Getting Done*, in A HARD LOOK AT THE "RECOVERY" PLAN PRIMER 3, 3 (2004), available at http://nativeforest.org/pdf/Bitterroot_Primer.pdf.

⁶ *Id.*

My companion tree-sitter and I were convicted by a Western Montana jury whose members were all connected to the logging and wood products industry, the U.S. Forest Service, or law enforcement institutions. My sentence for engaging in a peaceful protest on public lands was thirty days locked in a halfway house in Butte, Montana, three years of supervised federal probation, and restitution for the cherry picker and my emergency room hospital bill. The conditions of my probation dictated that I could not enter any National Forest in the entire country unless it was an official wilderness area, and that I could not engage in any protest nor leave the state without permission from the federal government. My tree-sitting companion received a similar punishment. I believed that these were draconian sentences, but was not shocked by them. What I was shocked by was the Ninth Circuit Court of Appeals' decision on our criminal appeal, which implied that we were "ecoterrorists" for peacefully sitting in trees.⁷

Unfortunately, the branding of radical environmentalists as terrorists is not a new phenomenon. This Comment will specifically examine the law, policy, and procedure which have been enacted to paint radical environmentalists as terrorists. More generally, it will examine the origins of this legal phenomenon, and why the policy has been embraced and codified by lawmakers. Section II of this Comment will briefly examine how contemporary environmental problems have catalyzed the birth of the radical environmental movement in the United States. Part III of this Comment will examine the corresponding development and use of the term "ecoterrorism" by extractive industry advocates and government officials sympathetic to those types of special interests. Part IV of this Comment will examine how the acceptance and use of the term "ecoterrorism" by the mainstream media has affected activists, specifically post September 11, 2001. Part V will suggest why the term "ecoterrorism" should not be used to paint radical environmental activists as terrorists.

II. THE CATALYST FOR RADICAL ENVIRONMENTAL ACTIVISM

A. Ecological Problems

Over the past four decades, U.S. citizens have been forced to realize the detrimental effects of our collective lifestyle on the planet. The amount of environmental devastation faced by present generations of humans is overwhelming. Species are going extinct at a rate 100 to 1000 times the rate found in the fossil record⁸ and one-half of all of the planet's species are estimated to be extinct by the year 2100.⁹ The polar ice caps are melting and sea levels are rising,¹⁰ the effect of which is already eliminating the

⁷ United States v. Wyatt, 408 F.3d 1257, 1261 (9th Cir. 2005).

⁸ Jonathan Amos, *Earth Species Feel the Squeeze*, BBC NEWS, May 21, 2005, <http://news.bbc.co.uk/2/hi/science/nature/4563499.stm> (last visited Apr. 13, 2008).

⁹ Mitch Tobin, *Top Biologist: Half of All Species May be Gone by 2100*, ARIZ. DAILY STAR, Aug. 9, 2002, available at http://news.nationalgeographic.com/news/2002/08/0809_wireowilson.html.

¹⁰ *Antarctic's Ice Melting Faster*, BBC NEWS, Feb. 2, 2005, <http://news.bbc.co.uk/2/hi/>

homelands of island dwellers.¹¹ There is a massive hole in the ozone layer.¹² Acid rain is falling out of the sky.¹³ Toxic chemicals and substances are poisoning our drinking water, our food, our blood, and our lungs.¹⁴ These are only a few examples for illustration; the complete extent of the current crisis is probably impossible to fully document or even comprehend.¹⁵

B. Rise of Environmental Legal Tools

In response to awareness of these environmental problems, the U.S. Congress passed a series of environmental laws in the 1960s, 1970s, and 1980s. Congress passed the Wilderness Act in 1964¹⁶ and the National Environmental Policy Act (NEPA) in 1969.¹⁷ In 1970, an Executive Order established the Environmental Protection Agency (EPA)¹⁸ and Congress passed regulatory amendments to the Clean Air Act (CAA).¹⁹ In 1972, Congress passed the Clean Water Act (CWA),²⁰ followed by the Endangered Species Act (ESA) in 1973.²¹ In 1976, it passed the National Forest Management Act (NFMA)²² and in 1980 it passed the Comprehensive Environmental Response and Cleanup Liability Act (CERCLA).²³

Citizens took hold of these legal tools and as they utilized them to preserve our environment, the collateral impacts of enforcement on private industry began to surface. One example is the aftermath of the U.S. Supreme Court's decision in *Tennessee Valley Authority v. Hill*,²⁴ in which the Court refused to ignore the ESA's legal protections for species on the brink of

uk_news/4228411.stm (last visited Apr. 13, 2008).

¹¹ *All Things Considered: Climate Connections: Tiny Island Makes Climate a Priority* (National Public Radio broadcast June 4, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10712509>.

¹² *Ozone Hole Largest Yet*, BBC NEWS, Sept. 8, 2000, <http://news.bbc.co.uk/2/hi/science/nature/916037.stm> (last visited Apr. 13, 2008).

¹³ Colleen Diskin, *Dirtier Skies Ahead: Rush to Build Coal Plants Creates Fight over Air We Breathe*, N.J. RECORDER, Mar. 29, 2007, at A1.

¹⁴ Bridget Hunter, *Report Outlines Hazards to Children Posed By Toxic Exposures*, WASH. FILE, May 25, 2006, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=May&x=20060525134224liameruoy0.3171961> (last visited Apr. 13, 2008).

¹⁵ For an annual report on the state of the global environment, as well as access to an online library of reports of current events, newly released studies, and global trends, visit the website of the Worldwatch Institute: <http://www.worldwatch.org>.

¹⁶ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2000).

¹⁷ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370e (2000).

¹⁸ ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 93 (5th ed. 2006).

¹⁹ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000).

²⁰ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

²¹ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

²² National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-328, 88 Stat. 476).

²³ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2000).

²⁴ 437 U.S. 153 (1978).

extinction.²⁵ The Court recognized that the species in question was a small fish, and that enforcement of the law would permanently stop a dam project in which the Army Corps of Engineers had already invested more than \$100 million.²⁶ Nonetheless, the Court held that the dam could not close (and thereby destroy the river ecosystem) because the value of an endangered species is “incalculable.”²⁷ This decision and its repercussions on industries that exploit natural resources have led organizations like the conservative Pacific Legal Foundation to denounce the ESA as helping to “devastate entire industries.”²⁸ In the same vein, “free market” groups like Ron Arnold’s Center for the Defense of Free Enterprise have called NEPA a “procedural, bureaucratic, punitive, dangerous obstruction to the social and economic requirements of present generations of Americans.”²⁹

Another example is the case of Love Canal, New York where, after historic dumping of billions of tons of hazardous waste, the industrial owners of the dumping ground sold their land to the local school district for \$1.00.³⁰ In 1978, after a school and 100 homes were built on the dumping ground, a carcinogenic sludge began seeping into homes. Eventually, 1000 families were forced to abandon their homes.³¹ The publicly led outcry in response to this disaster led to the enactment of CERCLA by the U.S. Congress.³² CERCLA forces any agency that is involved in the creation, transport, or dumping of hazardous waste to be held strictly, and jointly and severally, liable.³³ This liability can end up costing industries tens of millions of dollars.³⁴

C. Rise of Environmental Organizations

As these laws were promulgated and initially utilized to combat environmental degradation, the 1970s and 1980s saw a public environmental movement take shape to organize against environmental destruction.³⁵ In 1976, the Internal Revenue Service recognized the importance of “efforts to

²⁵ *Id.* at 173–74.

²⁶ *Id.* at 172.

²⁷ *Id.* at 187–88.

²⁸ PAC. LEGAL FOUND., PLF MAKING HEADWAY IN EXPOSING ENDANGERED SPECIES ACT FOR WHAT IT REALLY IS: A BAD LAW 1 (2004), available at <http://www.idbsu.edu/biology/BIOL191/BIOL%20191%20Debates%20Spring%202007/Topic%204/Pacific%20Legal%20Foundation%20-%20PLF%20Making%20Headway%20In%20Exposing%20End.pdf>.

²⁹ RON ARNOLD, CTR. FOR THE DEF. OF FREE ENTERPRISE, SUBVERTING DEVELOPMENT: AMERICA’S INDUSTRIAL STRENGTH AT RISK 2 (2006), available at <http://www.cdfc.org/Subverting%20Development.pdf>.

³⁰ PERCIVAL ET AL., *supra* note 18, at 366.

³¹ *Id.*

³² *Id.*

³³ *See, e.g., id.* at 401–02.

³⁴ For example, in one case an industry which contributed to hazardous pollution was fined almost \$90 million for a clean-up. *United States v. Vertac Chem. Corp.*, 79 F. Supp. 2d 1034, 1038 (E.D. Ark. 1999).

³⁵ *See, e.g.,* CHRISTOPHER MANES, GREEN RAGE: RADICAL ENVIRONMENTALISM AND THE UNMAKING OF CIVILIZATION 45–65 (1990).

preserve and protect the natural environment for the benefit of the public” by officially sanctioning the granting of federal income tax-exempt status, and charitable contribution deduction status, for environmental organizations.³⁶ Over time, environmental groups and activists have developed their own distinct identities. Some environmental organizations, like the Sierra Club, are large corporations with headquarters, local offices, legal teams, and lobbying efforts.³⁷ Other organizations, like the Environmental Protection Information Center in Northern California, are grassroots groups that participate in local issues and use community organizing and strategic lawsuits as tools.³⁸ And yet other environmental activists, who do not believe that environmental change is occurring fast enough through the mainstream channels,³⁹ and who may identify with radical movements like Earth First! or the Earth Liberation Front, use civil disobedience as their tool, which includes breaking criminal laws from trespass to laws against property damage.⁴⁰

While tactics may be a constant source of debate, the collective purpose of all of these groups resonates with the American people. National polls indicate that the majority of Americans believe that environmental quality is getting worse (67%),⁴¹ that the United States should be enforcing environmental regulations more strongly (79%),⁴² and that businesses will “cut corners and damage the environment without strong government rules and regulations” (75%).⁴³ Moreover, a 2005 Harris Poll indicated 74% of Americans agree that “protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made regardless of cost.”⁴⁴

D. Radical Environmentalism

Despite the increase in legal tools, citizen organizing, and supportive public sentiment in the latter part of the century, some environmentalists were dissatisfied with the type and pace of environmental protection efforts. Critics

³⁶ Rev. Rul. 76-204, 1976-1 C.B. 152.

³⁷ See generally Sierra Club, Inside the Sierra Club, <http://www.sierraclub.org/inside/> (last visited Apr. 13, 2008).

³⁸ See Matthew Walton & Jessica Widay, *Shades of Green: Examining Cooperation Between Radical and Mainstream Environmentalists*, in IGNITING A REVOLUTION: VOICES IN DEFENSE OF THE EARTH 95–96 (Steven Best & Anthony J. Nocella II eds., 2006).

³⁹ See, e.g., MANES, *supra* note 35, at 55–65.

⁴⁰ See, e.g., *Direct Action Gets the Goods*, EARTH FIRST! J., available at <http://www.earthfirstjournal.org/subsection.php?id=1> [hereinafter *Direct Action Gets the Goods*]; *Monkeywrenching*, EARTH FIRST! J., available at <http://www.earthfirstjournal.org/subsection.php?id=2>.

⁴¹ Gallup Poll, Mar. 13–16, 2006, <http://www.pollingreport.com/enviro2.htm> (last visited Apr. 13, 2008).

⁴² *Id.*

⁴³ L.A. Times/Bloomberg Poll, Aug. 3, 2006, http://www.latimes.com/news/custom/timespoll/labloom-533environment-pdf,1,7911944.acrobat?coll=la-news-times_poll (last visited Apr. 13, 2008).

⁴⁴ Harris Poll, Aug. 9–16, 2005, <http://www.pollingreport.com/enviro2.htm> (last visited Apr. 13, 2008).

of the mainstream groups disdained the moderation and compromise exhibited by large environmental organizations whose leaders were ambitious environmental professionals eager to cross over into government offices.⁴⁵ The activists disagreed with the tendency of large professional environmental organizations to avoid critiques of the underlying social institutions supporting environmental destruction.⁴⁶ They believe that mainstream environmentalist victories have played a minor role in an overwhelming trend of escalating environmental losses, and they do not believe it is possible to achieve necessary change while primarily working within the same institutional system which has created, and is benefiting from, the causes of environmental destruction.⁴⁷ Norwegian philosopher Arne Naess described the situation as a distinction between the “shallow” ecological movement—composed of the large, bureaucratic, reform-oriented groups, and the “deep” ecological movement—composed of individuals who advocated a fundamental change in the way humans relate to the natural world.⁴⁸

The philosophy of Deep Ecology, also referred to as biocentrism, which argues that nature has intrinsic worth, and that all life processes should be valued,⁴⁹ was a rallying factor for early radical environmentalists.⁵⁰ United in their belief that nature was intrinsically valuable, these radical activists devised a different approach to environmental protection than their mainstream counterparts, an approach which included illegal tactics.⁵¹ Examples of these illegal tactics include trespassing, road-blockading, office sit-ins, tree-sitting, equipment damage, and arson of property.⁵² Although some radical environmentalists engage in acts of property damage or destruction, all specifically eschew violence, and provide guidelines to ensure that activists do not injure or harm human life in the process of their illegal actions. The Earth First! Journal, a publication which publishes news of radical environmental campaigns, states on its website that “[a]t no time should anyone physically or verbally assault anyone . . . at an Earth First! action.”⁵³ Similarly, the Earth Liberation Front, a radical environmental movement that advocates economic sabotage, published guidelines which state that actors shall “take all necessary precautions against harming any animal, human and nonhuman.”⁵⁴

⁴⁵ See, e.g., MANES, *supra* note 35, at 58–59.

⁴⁶ See *id.* at 50; see also Judi Bari, *The Sierra Club Surrender*, ANDERSON VALLEY ADVERTISER (Boonville, Cal.), Mar. 20, 1991, reprinted in JUDI BARI, *TIMBER WARS* 92–94 (1994).

⁴⁷ See, e.g., *Eco-terrorism and Lawlessness on the National Forests: Hearing Before the Subcomm. on Forests and Forest Health of the H. Resources Comm.*, 107th Cong. 107-83 (2002) (statement of Craig Rosebraugh, former Earth Liberation Front Press Officer), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:77615.wais [hereinafter *2002 House Hearing*].

⁴⁸ MANES, *supra* note 35, at 60–61.

⁴⁹ See *id.* at 139–50.

⁵⁰ *Id.* at 61.

⁵¹ *Id.*

⁵² See *generally No Compromise in Defense of Mother Earth*, EARTH FIRST! J., available at <http://www.earthfirstjournal.org/section.php?id=1> (last visited Apr. 13, 2008).

⁵³ *Direct Action Gets the Goods*, *supra* note 40.

⁵⁴ *Earth Liberation Front Guidelines*, in *IGNITING A REVOLUTION*, *supra* note 38, app. at 407.

III. DEVELOPMENT AND USE OF THE PHRASE “ECOTERRORISM”

A. *Property Rights Group Creates the Term “Ecoterrorism”*

The rise of a loud and diverse environmental movement in the United States has not gone unnoticed by private industry. In 1988, at a conference organized by the Center for the Defense of Free Enterprise (CDFE), the Center’s leader Ron Arnold introduced the phrase “wise use.”⁵⁵ The conference attracted groups affiliated with the mining and timber industries, off-road vehicle clubs, private property rights advocates, and conservative think tanks, among others.⁵⁶ Following the conference, Arnold’s group released the “Wise Use Agenda” which advocated opening seventy million acres of federal wilderness to commercial development and motor traffic, allowing mining in national parks, increasing logging and oil production in Alaska, and logging old growth forests.⁵⁷ Three years later, the representatives for the oil, cattle, logging, and motorized vehicle industries “who view big environmental groups as a threat to their livelihood and way of life” joined under the banner “Alliance for America.”⁵⁸

Arnold has stated that the wise use movement “created a sector of public opinion that didn’t use to exist” and that “[n]o one was aware that environmentalism was a problem until we came along.”⁵⁹ Arnold’s goal is “to destroy environmentalists by taking their money and their members.”⁶⁰

Arnold is attributed with first coining the phrase “ecoterrorism” in a 1983 article in Reason magazine.⁶¹ He later wrote a book entitled *Ecoterror: The Violent Agenda to Save Nature—The World of the Unabomber*.⁶² Arnold defines ecoterrorism as “a crime committed to save nature.”⁶³ The CDFE’s website maintains a page on “ecoterrorism”⁶⁴ and provides a link to an “Ecoterror Response Network,” which “gathers evidence, information and tips concerning crimes committed in the name of saving nature and relays them to the appropriate law enforcement agency.”⁶⁵ Links are provided on the website to records of environmentalists who have been arrested or

⁵⁵ Adam Pertman, *Wise Use Foot Soldiers on the March*, BOSTON GLOBE, Oct. 3, 1994.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Egan, *supra* note 1.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Ron Arnold, *Eco-terrorism*, REASON, Feb. 1983, at 31; Ctr. for the Def. of Free Enter., Ron Arnold Biography, <http://www.cdfc.org/staff.htm> (last visited Apr. 13, 2008).

⁶² RON ARNOLD, *ECOTERROR: THE VIOLENT AGENDA TO SAVE NATURE—THE WORLD OF THE UNABOMBER* (1997).

⁶³ *Acts of Ecoterrorism by Radical Environmental Organizations, Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 62 (June 9, 1998) [hereinafter *June 1998 Congressional Hearing*] (statement of Ron Arnold, Ctr. for the Def. of Free Enter.).

⁶⁴ Ctr. for the Def. of Free Enter., *EcoTerrorism*, <http://www.cdfc.org/ecoterror.htm> (last visited Apr. 13, 2008).

⁶⁵ Ctr. for the Def. of Free Enter., *EcoTerror Response Network*, <http://www.cdfc.org/ern.htm> (last visited Apr. 13, 2008).

convicted.⁶⁶ Arnold now presents himself as an expert on “ecoterrorism:” he has testified on the subject for a Senate Committee hearing⁶⁷ and received a \$340,000 grant for a University of Arkansas Terrorism Research Center study.⁶⁸

B. 1988 Congressional Testimony Calls Earth First! Activists “Ecoterrorists”

In 1988, five years after Arnold published the phrase “ecoterrorism,” it appeared in congressional testimony in relation to radical environmental activists. During testimony on the Anti-Drug Abuse Act of 1988, Senator James McClure addressed a provision of the Act which had nothing to do with drug-related offenses.⁶⁹ Part of the bill addressed drug cultivation on public lands, and criminalized dangerous booby traps set to protect crops by harming humans. McClure asserted these traps included everything from “trip wires connected to shotguns and hand grenades to the use of Claymore antipersonnel mines . . . traps . . . set with every intention to kill somebody.”⁷⁰

McClure then assured the Senate that “ecoterrorists” with a different agenda were using methods on the public lands “just as dangerous and deadly as the drug producers.”⁷¹ He asserted that Earth First! groups “get their kicks by hurting people and destroying property.”⁷² He then claimed Earth First! activists hide steel bars with sharpened nails attached underneath trails, which puts hikers, trail bikes, horse hoofs, men, women, children, and wildlife at risk.⁷³ He referred to one incident where a tree spike injured a logger and implied the spike was placed in the tree by a “radical environmentalist.”⁷⁴ Although he pointed to no other example of injury or economic loss, McClure asserted “terrorist thugs” were “driving citizens off the public lands.”⁷⁵ He then entered into the record an editorial from a Spokane, Washington newspaper which stated “[p]eople in the logging industry see [Earth First! activists], accurately, as terrorists.”⁷⁶

McClure also entered into the record an article written by a Spokesman-Review reporter which reported Earth First! activists, at what McClure called a “terrorist encampment,” were training each other to monkeywrench (i.e., place spikes in trees, disable machinery, and commit other acts of vandalism against property) as well as how to engage in tree-sitting (a type of protest

⁶⁶ *Id.*

⁶⁷ *June 1998 Congressional Hearing, supra* note 63.

⁶⁸ Berkowitz, *supra* note 2.

⁶⁹ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (codified as amended in scattered sections of 8, 15, 16, 18, 21, 22, 23, 26, 27, 29, 31, 41, and 42 U.S.C.); 134 CONG. REC. 30,810–12 (1988).

⁷⁰ 134 CONG. REC. 30,811 (1988) (emphasis added).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 30,811–12 (quoting Editorial, *They're Terrorists—Not Environmentalists*, SPOKESMAN-REV. (Spokane, Wash.), July 7, 1988).

where a person and his or her gear sits on a platform in a tree to prevent the tree from being cut down).⁷⁷ Ironically, the article made clear that Earth First! activists did not believe that the tree spike which injured a logger had been placed in the tree by a radical activist because no notice had been given to the timber industry and the activists do not intend to hurt people.⁷⁸ The article quoted a timber industry representative stating, “I don’t think they’re environmentalists, I think they’re terrorists.”⁷⁹

Following the congressional hearing, the Congress enacted 18 U.S.C. § 1864(a)(2), which criminalized the use of a hazardous or injurious device on federal land with the intent to obstruct or harass the harvesting of timber.⁸⁰ A hazardous or injurious device is defined as

[A] device, which when assembled or placed, is capable of causing bodily injury, or damage to property, by the action of any person making contact with such device subsequent to the assembly or placement. Such term includes guns attached to trip wires or other triggering mechanisms, ammunition attached to trip wires or other triggering mechanisms, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, lines or wires, lines or wires with hooks attached, nails placed so that the sharpened ends are positioned in an upright manner, or tree spiking devices including spikes, nails, or other objects hammered, driven, fastened, or otherwise placed into or on any timber, whether or not severed from the stump.⁸¹

The Ninth Circuit Court of Appeals has also held that unmodified, highly visible, plastic ropes tied between trees as part of a tree-sit protest qualify as hazardous or injurious devices.⁸²

Although McClure’s testimony in front of the Senate focused on human injury, the statute penalizes conduct even if there is no damage to any property or any individual, with fines and up to one year in prison.⁸³ Moreover, if a defendant has already been convicted once—even if there was no property damage or human injury in either incident—the second conviction may carry a twenty year prison term.⁸⁴ Additionally, if there is damage “to the property of any individual,” regardless of the level or type of damage,⁸⁵ or if any individual incurs a cut, bruise, or “any other injury to the body, no matter how temporary,”⁸⁶ the defendant may receive twenty years in prison.⁸⁷

⁷⁷ *Id.* (quoting Ann Japenga, *Earth First! Comes out of the Shadows—Environmental Commandos Teach Monkey-Wrenching*, SPOKESMAN-REV. (Spokane, Wash.), July 4, 1988).

⁷⁸ *Id.* at 30,812 (quoting Japenga, *supra* note 77); *see also infra* Part (D)(2) (referencing an interview with the injured logger).

⁷⁹ *Id.* (quoting Japenga, *supra* note 77).

⁸⁰ 18 U.S.C. § 1864(a)(2) (2000).

⁸¹ *Id.* § 1864(d)(3).

⁸² *United States v. Wyatt*, 408 F.3d 1257, 1260–62 (9th Cir. 2005).

⁸³ 18 U.S.C. § 1864(b)(5) (2000).

⁸⁴ *Id.* § 1864(e).

⁸⁵ *Id.* § 1864(b)(4).

⁸⁶ *Id.* § 1864(d)(2).

⁸⁷ *Id.* § 1864(b)(3).

C. Law Review Article Analogizes Radical Environmentalist Actions with Anti-Abortion Murders

In 1995, seven years after the Congress learned about “ecoterrorism” from Senator McClure, the Houston Law Review published an article advocating the use of organized crime laws against “environmental terrorists.”⁸⁸ In the article, the author claims that acts of vandalism committed by environmental “terrorists” are analogous to acts of murder committed by abortion “protestors”: “these organizations [Greenpeace, the Sea Shepard Society, and Earth First!] ha[ve] a history of terroristic and extortionate acts—acts with striking parallels to the recent abortion protest cases.”⁸⁹

D. June 1998 Congressional Hearing Convened on “Ecoterrorism by Radical Environmental Organizations”

Three years after that article was published, the House of Representatives’ Judiciary Committee Subcommittee on Crime held a hearing on “Acts of Ecoterrorism by Radical Environmental Organizations.”⁹⁰ In his opening remarks for the hearing, Chairman Representative Bill McCollum stated that “[i]n the name of protecting Mother Nature, radical environmentalists generate nothing but terror”⁹¹ and that “there have already been many victims of radical environmental attacks.”⁹² The witnesses called to testify at the hearing were Ron Arnold (the creator of the term “ecoterrorism”), Barry Clausen (a private investigator hired by timber, mining, and ranching interests to investigate acts of sabotage),⁹³ a former Forest Service employee, Representative Frank Riggs, one of Representative Riggs’ staff members, and Bruce Vincent, President of the wise use umbrella group Alliance for America.⁹⁴

1. Testimony of Congressman Frank Riggs

Riggs, who is an ex-police officer,⁹⁵ began his testimony by stating that “[m]any of our communities have been under outright siege” by radical environmentalists.⁹⁶ He relayed one incident where protestors entered his office with a large stump, dumped sawdust in the office, and staged a sit-in with their arms locked to each other around the stump to protest logging of

⁸⁸ William W. Cason, *Spiking the Spikers: The Use of Civil RICO Against Environmental Terrorists*, 32 HOUS. L. REV. 745 (1995).

⁸⁹ *Id.* at 752.

⁹⁰ *June 1998 Congressional Hearing*, *supra* note 63.

⁹¹ *Id.* at 7 (statement of Rep. Bill McCollum, Chairman).

⁹² *Id.* at 8.

⁹³ *Id.* at 56 (statement of Barry Clausen).

⁹⁴ *Id.* at 5.

⁹⁵ *Id.* at 83 (testimony of Honorable Frank Riggs).

⁹⁶ *Id.* at 10 (statement of Honorable Frank Riggs).

old growth forest in his congressional district.⁹⁷ Although he admitted that “no one was actually physically injured, and the damage or destruction of property wasn’t too extensive,”⁹⁸ Riggs referred to the Earth First! protest by saying “my office was quite literally assaulted by a group of environmental terrorists . . . in what was really an attack or a raid on my office.”⁹⁹ He further testified that his employees “thought a bomb had gone off,” that the protestors were dressed in “commando or paramilitary style,” and that they “proceeded to trash my office and traumatize my employees.”¹⁰⁰

Riggs stated that Earth First! activists are “members of a highly organized, nationwide movement bent on the destruction of the entire natural resource industry and the families and communities bound to that livelihood Their goal is to sap local resources by tying up law enforcement and clogging the judicial system.”¹⁰¹ He further asserted that the rise in “environmental zealots” has drained the treasury to the point where there are not enough resources for education and infrastructure maintenance, which “hurt[s] our children” and forces “sidewalks to crumble.”¹⁰² He stated that the “systematic, organized ecoterrorism of Earth First! and other militant organizations must stop. Lives have been lost.”¹⁰³ Echoing the 1995 Houston Law Review article, Riggs recommended expanding RICO, an organized crime statute, to apply to the actions of radical environmental activists.¹⁰⁴

2. Background Information and Context of Congressman Riggs’ Testimony

a. Police Reaction to Earth First! Protest

Notably, Riggs did not mention in his testimony that the local police response to the nonviolent Earth First! sit-in in his office was to hold the protestors’ eyelids open and swab pepper spray directly on their eyeballs, and/or to spray pepper spray directly into their open eyes.¹⁰⁵ This specific police conduct was found by a unanimous jury in 2005 to be an unconstitutional use of excessive force.¹⁰⁶

b. Details About the Cloverdale Tree-Spiking Incident

In the middle of his testimony about the Earth First! protest, Riggs stated that a group with ties to Earth First! spiked a tree, and that a logger was killed

⁹⁷ *Id.* at 10–12.

⁹⁸ *Id.* at 13.

⁹⁹ *Id.* at 10.

¹⁰⁰ *Id.* at 11.

¹⁰¹ *Id.* at 18.

¹⁰² *Id.*

¹⁰³ *Id.* at 20.

¹⁰⁴ *Id.* at 14, 20, 26–27.

¹⁰⁵ See Terri Compost, *Victory in Pepper Spray Torture Trial*, 25 EARTH FIRST! J. 3 (2005).

¹⁰⁶ *Id.*

by the spike at a mill in Cloverdale, California.¹⁰⁷ Referring to Earth First! again, Riggs asserted: “[t]hey are terrorists . . . [l]ives have been lost.”¹⁰⁸ Later in his testimony, in response to a question about whether or not anyone had been injured by “ecoterrorism,” Riggs again asserted that a mill worker in Cloverdale, California was killed by a spiked log.¹⁰⁹ In response to the same question later in the hearing, Riggs’ employee did not testify that the mill worker died, but instead she believed that “he lost an eye.”¹¹⁰

The mill worker to whom Riggs and his employee referred is George Alexander, a man who worked in the Louisiana-Pacific Cloverdale mill.¹¹¹ Earth First! activist Judi Bari interviewed Alexander and published the interview in a local newspaper in 1993. Her interview revealed that prior to the accident in 1987, Alexander had been complaining about dangerous working conditions in the mill. He had noticed that the band saw blade had cracks, and that the blade was wobbling.¹¹² He and other employees complained to Louisiana-Pacific management but they were ignored.¹¹³ Alexander stated that “[w]e’re not even people to [Louisiana-Pacific management] . . . All they care about is production.”¹¹⁴ Alexander’s wife echoed that statement: “I hate L-P.”¹¹⁵ On the day of the incident, Alexander had almost refused to come to work because of the dangerous working conditions.¹¹⁶ The day of his injury, Alexander had begun milling a twelve inch diameter tree, when it struck metal and the saw blade broke and hit him in the throat and face.¹¹⁷

Alexander was not killed, but was seriously injured.¹¹⁸ And while Alexander had to file a lawsuit against the timber company to get any money for his medical expenses, Louisiana Pacific offered a \$20,000 reward for information on who spiked the tree and exploited his accident for public relations purposes across the country.¹¹⁹ Alexander stated, “They used my name all over the country . . . Then they laid me off when the mill closed down . . . L-P is just sorry I didn’t die.”¹²⁰

Earth First! activists were immediately blamed by the company and denounced as terrorists in the media for the incident.¹²¹ But the logging company traced the spiked log to a logging project in an area where neighbors

¹⁰⁷ *June 1998 Congressional Hearing*, *supra* note 63, at 12, 17 (statement of Honorable Frank Riggs).

¹⁰⁸ *Id.* at 14–15.

¹⁰⁹ *Id.* at 27.

¹¹⁰ *Id.* at 75.

¹¹¹ Judi Bari, *The Secret History of Tree-Spiking—Part I*, ANDERSON VALLEY ADVERTISER (Boonville, Cal.), Feb. 17, 1993, *reprinted in* JUDI BARI, *TIMBER WARS* 264 (1994), *available at* <http://www.iww.org/unions/iu120/local-1/EF/JBari11.shtml#notes>.

¹¹² *Id.* at 266.

¹¹³ *Id.*

¹¹⁴ *Id.* at 265.

¹¹⁵ *Id.* at 267.

¹¹⁶ *Id.* at 266.

¹¹⁷ *Id.* at 266–67.

¹¹⁸ *Id.* at 267.

¹¹⁹ *Id.* at 270.

¹²⁰ *Id.*

¹²¹ *Id.* at 267.

had been complaining about the logging and the threats the logging posed to their water supply.¹²² When Judi Bari received her FBI files, they included the Sheriff's reports about the tree-spiking incident, and she learned that the actual suspect for the spiking was a man named Bill Ervin.¹²³ Ervin was a local who openly admitted to spiking trees on his own property in an attempt to dissuade Louisiana-Pacific from "accidentally" logging trees which were not on their property.¹²⁴

c. Death of David Chain

While no mill worker has ever been killed by radical environmentalists, unfortunately a radical environmentalist was killed by a logger only months after the 1998 Senate hearing on ecoterrorism. On September 17, 1998 Earth First! activist David Chain was protesting the logging of thousand year old trees near Eureka, California.¹²⁵ A video of the event revealed that at one point during the protest, the logger had shouted: "Get outta here! Otherwise I'll (expletive) make sure I got a tree coming this way."¹²⁶ Chain was then crushed to death when the logger felled a tree onto him.¹²⁷ The local district attorney refused to press any criminal charges against the logger,¹²⁸ although he considered pressing manslaughter charges against the other protestors at the scene.¹²⁹ Chain's parents then filed a civil lawsuit against the logging company and the case settled days before trial.¹³⁰

3. Testimony of Other Witnesses

After Congressman Riggs' testimony, the Committee heard testimony from Bruce Vincent, President of Alliance for America,¹³¹ the wise use umbrella group mentioned above that represents the oil, cattle, logging, and motorized vehicle industries.¹³² Vincent claimed that people had threatened "sexual and physical torture of [his] children before they were killed if [he] did not shut up."¹³³ Vincent stated that although no one was ever hurt,¹³⁴ the FBI and Montana Senator Conrad Burns worked with him and told him and

¹²² *Id.* at 268–69.

¹²³ Bari, *supra* note 111.

¹²⁴ *Id.*

¹²⁵ Yvonne Daley, *In California, Cause of Saving Redwoods Gaining*, BOSTON GLOBE, Nov. 8, 1998, at A10.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Bill Dawson, *No Charges in Forest Protest Fatality*, HOUS. CHRON., Dec. 18, 1998, at A13.

¹²⁹ Bill Dawson, *Mother Says Activists May be Charged in Son's Death at Logging Site*, HOUS. CHRON., Oct. 23, 1998, at A37.

¹³⁰ *David Chain v. Goliath Maxxam: Wrongful Death Settlement Reached*, 22 EARTH FIRST! J., 19, 19 (Dec.–Jan. 2001).

¹³¹ *June 1998 Congressional Hearing*, *supra* note 63, at 29–35.

¹³² Egan, *supra* note 1.

¹³³ *June 1998 Congressional Hearing*, *supra* note 63, at 33.

¹³⁴ *Id.* at 31.

his wife to carry concealed weapons and teach their children—as young as six years old—how to shoot guns.¹³⁵ He states that his phone was tapped to capture the threatening calls, but he was not ever able to “trap” any of the calls.¹³⁶

Although Vincent admitted he did not know who made the calls, he stated that Earth First! should be held accountable for the threats because it “print[ed] the material that causes the atmosphere for this to happen.”¹³⁷ Vincent ended his testimony by asking the Committee to amend the Animal Enterprise Protection Act of 1993 (AEPA) to include natural resource workers in logging, fishing, mining, energy, and ranching.¹³⁸

At that time, AEPA prohibited the intentional physical disruption of an animal enterprise “by intentionally stealing, damaging, or causing the loss of any property (including animals or records) used by the animal enterprise, [which] thereby causes economic damage exceeding \$10,000 to that enterprise, or conspires to do so.”¹³⁹ A conviction at that time would be a maximum one year prison sentence and fines.¹⁴⁰ In 2002, the penalty was increased to a maximum three year prison sentence for damage over \$10,000, and a maximum six month sentence for damage less than \$10,000.¹⁴¹

Vincent’s testimony was followed by testimony from a former Forest Service employee who called Earth First! an “ecoterrorist group.”¹⁴² This testimony was followed by testimony from one of Congressman Riggs’ employees. She asserted that mills close, families are “torn apart,” high incidents of “domestic violence and child abuse” are occurring in her district, and that those problems are “exacerbated in large part” from protests of the radical environmental groups.¹⁴³ The next witness was private investigator and self-proclaimed Earth First! “infiltrator” Barry Clausen. He asserted that from his monitoring of Earth First! publications, supporters, ideologies, and connections to other groups¹⁴⁴ he knew of an “unknown number of death threats” and “actual incidents of attempted murder and murder itself.”¹⁴⁵ He did not provide any examples. He asserted that Earth First! “advocates . . . terrorism to the youth of our country”¹⁴⁶ and that the excessive use of force lawsuits filed by Earth First! activists against police were intended “to intimidate law enforcement officers into reluctance to make arrests for fear of reprisals.”¹⁴⁷

¹³⁵ *Id.* at 33–34.

¹³⁶ *Id.* at 33.

¹³⁷ *Id.* at 72.

¹³⁸ *Id.* at 35.

¹³⁹ 18 U.S.C. § 43(a)(2) (2000) (amended June 12, 2002, and amended and renamed Nov. 16, 2006 as Animal Enterprise Terrorism Act).

¹⁴⁰ *Id.* § 43(a).

¹⁴¹ 18 U.S.C. § 43 (b)(1)–(2) (Supp. II 2002).

¹⁴² *June 1998 Congressional Hearing, supra* note 63, at 41.

¹⁴³ *Id.* at 50.

¹⁴⁴ *Id.* at 56.

¹⁴⁵ *Id.* at 57.

¹⁴⁶ *Id.* at 56.

¹⁴⁷ *Id.* at 57.

The final witness at the June 1998 hearing was Ron Arnold. Arnold defined ecoterrorism for the Committee as “a crime committed to save nature” which includes every crime from trespass to murder.¹⁴⁸ Like Vincent, Arnold recommended amending the Animal Enterprise Protection Act to include natural resource workers and enterprises.¹⁴⁹

E. February 2002 Congressional Hearing on “Eco-terrorism and Lawlessness on National Forests”

In 2002, James F. Jarboe, Domestic Terrorism Section Chief of the FBI Counterterrorism Division, testified before the House Resources Committee, Subcommittee on Forests and Forest Health.¹⁵⁰ While recognizing that the Animal Liberation Front (a radical animal rights movement he linked to the Earth Liberation Front) “discourages acts that harm any animal, human and nonhuman,” he asserted that the Animal Liberation Front (ALF) and the Earth Liberation Front (ELF) had emerged as a “serious terrorist threat” because of criminal action in the United States since 1996 that had resulted in excess of \$43 million in property damage.¹⁵¹ Jarboe further pronounced that ELF/ALF was the top priority in domestic terrorism.¹⁵² He defined “ecoterrorism” as “the use or threatened use of violence of a criminal nature against innocent victims or property by an environmentally-oriented subnational group for environmental-political reasons, or aimed at an audience beyond the target often of a symbolic nature.”¹⁵³ Thus, Jarboe made clear that the FBI considers a threat to use violence against an inanimate object to be a terrorist act if it is environmentally motivated, regardless if property damage ever materializes. He did not define for the Committee exactly what the FBI considers to be “violence.”

Jarboe informed the Committee that between 1993 and 2003, the number of FBI agents assigned to counterterrorism programs increased by 224% to 1669 agents—nearly 16% of all FBI agents.¹⁵⁴ Jarboe further indicated that counterterrorism programs have “strengthened” in recent years. He stated that by the end of 2003, the FBI planned to have Joint Terrorism Task Forces established in each of the FBI’s fifty-six field offices.¹⁵⁵ He also stated that the FBI currently had twenty-six field offices with pending investigations associated with ALF/ELF activities.¹⁵⁶ In his testimony he did not cite to any incident where a human was injured or killed by “ecoterrorism.”

¹⁴⁸ *Id.* at 62.

¹⁴⁹ *Id.* at 67–68.

¹⁵⁰ 2002 House Hearing, *supra* note 47 (statement and testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, FBI).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

Jarboe's testimony at the hearing largely mirrored the sentiments of most of the other twenty individuals who participated with testimony or prepared statements. Throughout the hearing—held only five months after the September 11, 2001 attacks—the participants repeatedly affirmed the concept that acts of property damage committed by the ELF or ALF were acts of terrorism.¹⁵⁷ Several witnesses did however emphasize that the physical assaults on government employees by adherents to the “wise use” philosophy,¹⁵⁸ as well as the tens of millions of dollars of timber stolen annually from public lands,¹⁵⁹ were both crimes surpassing the acts of “ecoterrorism” emphasized by the hearing.

F. Industry Group Publishes Model Act: Animal and Ecological Terrorism Act

In 2003, a group called the American Legislative Exchange Council published model legislation entitled the “Animal & Ecological Terrorism Act” (Model Act).¹⁶⁰

1. The American Legislative Exchange Council

The American Legislative Exchange Council (ALEC) is incorporated as a 501(c)(3) nonprofit educational organization¹⁶¹ and was originally started in 1973 by conservative activist Paul Weyrich along with a small number of state legislators.¹⁶² In the 1980s, ALEC shifted its emphasis and is now a mix of state and federal legislators who are funded by corporate donors to draft and introduce industry-friendly legislation.¹⁶³ In 2002, ALEC included over 2400 state lawmakers and members, as well as alumni of at least nine state governors and 80 members of Congress, including Dennis Hastert and Tom Delay.¹⁶⁴ The group is funded primarily by large corporations, industry groups, and conservative foundations who pay up to \$50,000 a year (in a tax-deductible donation) in membership dues; members have included corporations like Philip Morris, Amoco, Chevron, and Enron.¹⁶⁵ In 2000 alone, ALEC members introduced and convinced legislatures to pass 450 ALEC-drafted laws.¹⁶⁶

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (statement and testimony of Gloria Flora, former National Forest Supervisor).

¹⁵⁹ *Id.* (statement of Dr. Michael Pendleton, Government Accountability Project).

¹⁶⁰ AM. LEGISLATIVE EXCH. COUNCIL, MODEL ANIMAL & ECOLOGICAL TERRORISM ACT, *in* ANIMAL & ECOLOGICAL TERRORISM IN AMERICA 21, 21–23 (2003), available at <http://www.alec.org/meSWFiles/pdf/AnimalandEcologicalTerrorisminAmerica.pdf> [hereinafter MODEL ACT].

¹⁶¹ See Am. Legislative Exch. Council, Contributions, <http://www.alec.org/contributions> (last visited Apr. 13, 2008).

¹⁶² Karen Olsson, *Ghostwriting the Law: A Little-Known Corporate Lobby is Drafting Business-Friendly Bills for State Legislators Across the Country*, 27 MOTHER JONES 17 (Sept. 2002).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

2. The Model Act

In 2003, ALEC published the Model Act to criminalize any act that “obstructs” or “impedes” use of an animal facility or natural resource.¹⁶⁷ Also criminalized by the Model Act is any lodging, publicity, and financial or other support given to an activist deemed to be “obstructing” or “impeding” the use of an animal or natural resource.¹⁶⁸ ALEC stated that the Model Act was necessary in part because the AEPA was “overly narrow” and because the USA PATRIOT ACT “can rarely be used [within the realm of ecoterrorism] because the federal definition of terrorism requires the death of or harm to people, an element not characteristic of eco-terrorists.”¹⁶⁹

The penalty for a violation of the act which causes between \$0 and \$500.00 damage would be a high degree misdemeanor with fines or imprisonment.¹⁷⁰ The penalty for a violation of the act which causes more than \$500.00 of damage would be a felony with fines or imprisonment.¹⁷¹ A conviction under this Model Act would be deemed a conviction of a terrorist act, and the offender would be required to register with the Attorney General in a terrorist registry.¹⁷² The registry would keep a website with the convict’s photograph, name, address, and signature for at least three years, after which the convict could petition to be removed from the registry.¹⁷³

In 2003, ALEC reported that current or former members had introduced versions of the Model Act in Missouri, New York, Ohio, Oklahoma, Oregon, and Texas.¹⁷⁴

G. Senate Environment Committee Hearings on “Ecoterrorism”

1. May 2005 Hearing

On May 18, 2005, the U.S. Senate Committee on Environment and Public Works held a hearing entitled “Eco-terrorism Specifically Examining the Earth Liberation Front and the Animal Liberation Front.”¹⁷⁵ The Committee accepted statements from Senator James Inhofe; Senator David Vitter; Senator James Jeffords; Senator Frank Lautenberg; Senator Barack Obama; FBI Deputy Assistant Director John Lewis; Bureau of Alcohol,

¹⁶⁷ MODEL ACT, *supra* note 160, § 3(A)(1), (2).

¹⁶⁸ *Id.* § 3 (A)(3).

¹⁶⁹ AM. LEGISLATIVE EXCH. COUNCIL, RESPONSE IN THE FEDERAL JURISDICTION, *in* ANIMAL & ECOLOGICAL TERRORISM IN AMERICA, *supra* note 160, at 15.

¹⁷⁰ MODEL ACT, *supra* note 160, § 4(A).

¹⁷¹ *Id.* § 4(B).

¹⁷² *See id.* § 5.

¹⁷³ *See id.* § 5.

¹⁷⁴ *See* AM. LEGISLATIVE EXCH. COUNCIL, A COMPARISON OF STATE INTRODUCTIONS OF AETA, *in* ANIMAL & ECOLOGICAL TERRORISM IN AMERICA, *supra* note 160, at 13–14.

¹⁷⁵ *Eco-terrorism Specifically Examining the Earth Liberation Front and the Animal Liberation Front: Hearing Before the S. Comm. on Environment and Public Works*, 109th Cong. (2005), available at http://epw.senate.gov/hearing_statements.cfm?id=237836 [hereinafter *May 2005 Senate Hearing*].

Tobacco, Firearms, and Explosives Deputy Assistant Director Carson Carroll; New Jersey Department of Environmental Protection Commissioner Bradley Campbell; University of Iowa President David Skorton; and Center for Consumer Freedom Director of Research David Martosko.¹⁷⁶

a. Testimony of Senator James Inhofe

The first testimony at the hearing came from Senator James Inhofe, a Republican from Oklahoma. Although Inhofe is the Chairman of the Senate Committee on the Environment and Public Works,¹⁷⁷ he has repeatedly expressed disdain for environmentalists and environmental protection efforts. Inhofe called the federal Environmental Protection Agency a “Gestapo bureaucracy.”¹⁷⁸ He was the only Senator to oppose the restoration of the Florida Everglades.¹⁷⁹ He has called the threat of catastrophic global warming the “greatest hoax ever perpetuated on the American people.”¹⁸⁰ Inhofe refers to mainstream environmentalists as “environmental extremists,” “elitist organizations,” “alarmists,” and “fear-monger[ers].”¹⁸¹ He has stated that nonprofit environmental organizations “demonstrate more interest in hyping apocalyptic environmental scenarios to raise money for raw political purposes” than in conserving the environment.¹⁸² The highest private sector contributor to Senator Inhofe has been the oil and gas industry, which has donated at least \$999,023 to him since 1989.¹⁸³

At the hearing, Senator Inhofe asserted that ELF and ALF are the number one domestic terror threat in the United States “over the likes of white supremacists, militias, and anti-abortion groups.”¹⁸⁴ Although he compares ELF and ALF to Al Qaeda, Senator Inhofe admits that not a single person has died as a result of direct action taken by ELF and ALF activists.¹⁸⁵

b. Testimony from Other Senators

After Senator Inhofe’s statement, Senator James M. Jeffords stated that he believed the police were already successfully countering the

¹⁷⁶ See *id.* at III.

¹⁷⁷ United States Senator James Inhofe: About Senator Inhofe—Biography, <http://inhofe.senate.gov/public/index.cfm?FuseAction=AboutSenatorInhofe.Biography> (last visited Apr. 13, 2008).

¹⁷⁸ Bob Dart, *Oklahoma Senator Stands Firm against Tougher Air Standards*, ATLANTA J. & CONST., July 25, 1997, at A.

¹⁷⁹ Larry Lipman, *Everglades Project Foe To Get Key Post*, PALM BEACH POST, Dec. 7, 2002, at 10A.

¹⁸⁰ 151 CONG. REC. S18 (daily ed. Jan. 4, 2005) (statement of Sen. James M. Inhofe).

¹⁸¹ *Id.* at S18–19.

¹⁸² 150 CONG. REC. S10,347 (daily ed. Oct. 4, 2004) (statement of Sen. James M. Inhofe).

¹⁸³ The Center for Responsive Politics, James M. Inhofe: Campaign Finance/Money, <http://www.opensecrets.org/politicians/allindus.asp?CID=N00005582> (last visited Apr. 13, 2008).

¹⁸⁴ *May 2005 Senate Hearing*, *supra* note 175, at 2.

¹⁸⁵ *Id.* at 2–3.

threats from radical groups and was puzzled by the fact that the Senate Environment Committee was addressing the issue of domestic terrorism since it has no jurisdiction over criminal matters.¹⁸⁶ He noted, however, that the Committee did have jurisdiction to make sure that industrial facilities, nuclear power plants, nuclear waste storage facilities, and wastewater treatment facilities are much safer because those types of facilities have the potential to threaten the lives of millions of people.¹⁸⁷ Senator Jeffords further noted that Congressman Bennie Thompson, the ranking member of the House of Representatives Homeland Security Committee—who was denied the right to testify at the hearing—had prepared a report which highlighted the failure of the Department of Homeland Security to assess the threat posed by right-wing domestic terrorist groups, and urged that the Department not focus on ecoterrorism at the expense of domestic terrorist groups such as the KKK, right wing militias, abortion clinic bombers, and skinheads.¹⁸⁸

Senator Frank Lautenberg then testified and asked that the Committee “keep things in perspective” by recognizing that the Oklahoma City bombing killed 168 people, and the September 11 attacks killed 3000 people.¹⁸⁹ Additionally, he noted that since 1993 there have been at least five fatal attacks on doctors performing legal abortions.¹⁹⁰ Senator Lautenberg stated that “[a]ll of these cases involved the loss of human life. To date, not a single incident of so-called environmental terrorism has killed anyone.”¹⁹¹ He told the Committee that it is wrong to destroy property and the perpetrators should be brought to justice, but he also warned that the Committee should be careful about who it calls terrorists.¹⁹²

Senator Barack Obama submitted a statement echoing the sentiments of Senator Lautenberg, stating that he did not want “people to think that the threat from these organizations is equivalent to other crimes faced by Americans every day.”¹⁹³ He further noted that in 2003 there were 7400 hate crimes committed in the United States and that the FBI has 450 pending investigations of environmental crimes involving threats to public health or worker safety.¹⁹⁴ Senator Obama urged the Committee to instead focus its attention on larger environmental threats, such as the high levels of lead found in thousands of children’s blood.¹⁹⁵

¹⁸⁶ *Id.* at 4 (statement of Sen. James M. Jeffords).

¹⁸⁷ *Id.* at 4–5.

¹⁸⁸ *Id.* at 4.

¹⁸⁹ *Id.* at 6–7 (statement of Sen. Frank Lautenberg).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 7.

¹⁹² *Id.* at 5–6.

¹⁹³ *Id.* at 37 (statement of Sen. Barack Obama).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

c. Testimony from the FBI

Following the Senators' testimony, John Lewis, Deputy Assistant Director of the FBI, testified before the Committee. Mr. Lewis stated that the ELF posed "[o]ne of today's most serious domestic terrorism threats."¹⁹⁶ He did not mention any example of a human injured or killed by an ELF action. Mr. Lewis then asserted that the FBI lacked federal criminal statutes to address "multi-state campaigns of intimidation, threats, and damage designed to shut down legitimate businesses,"¹⁹⁷ and proposed that the Congress expand the actions criminalized by the Animal Enterprise Protection Act and expand the Act's scope to "address criminal activity related to eco-terrorism."¹⁹⁸

2. October 2005 Hearing

On October 26, 2005 the Senate Committee on Environment and Public Works again held a hearing on "Eco-terrorism."¹⁹⁹ The issues addressed were similar to the May 2005 hearing, but the focus was primarily on the Stop Huntingdon Animal Cruelty (SHAC) campaign. The SHAC campaign is international in scope and has brought Huntingdon Life Sciences—a contract animal testing lab which kills 500 animals a day and routinely abuses animals—to the brink of financial ruin through public ridicule, investigative reporting, property damage, and harassment.²⁰⁰ At the hearing, Barry M. Sabin, Chief of the Counterterrorism Section of the Department of Justice, asked that Congress amend the Animal Enterprise Protection Act to include "economic disruption to animal enterprises and threats of death and serious bodily injury to associated persons."²⁰¹ He told the Committee that he supported Senator Inhofe's proposal to amend the Animal Enterprise Protection Act to replace "economic damage" (physical property damage) with "economic disruption" (business losses), and to allow electronic surveillance authority for investigation of violations of the Act.²⁰² Again, other Senators expressed doubt as to spending time on "ecoterrorism" when there are higher priorities.²⁰³ For example, Senator Jeffords noted that "[i]n our current state of fear, it is easy to get headlines by using the term 'terrorism.' But sometimes, a criminal is just a criminal."²⁰⁴

¹⁹⁶ *Id.* at 38 (statement of FBI Deputy Assistant Director John Lewis).

¹⁹⁷ *Id.* at 13.

¹⁹⁸ *Id.* at 40.

¹⁹⁹ *Eco-terrorism: Hearing Before the S. Comm. on Environment and Public Works*, 109th Cong. (2005), available at http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=093930CB-F66E-420D-8C37-1780ED2C7F3C [hereinafter *October 2005 Senate Hearing*].

²⁰⁰ *Id.* (testimony of Dr. Jerry Vlasak).

²⁰¹ *Id.* (testimony of Barry M. Sabin, Chief of the Counterterrorism Section of the Department of Justice).

²⁰² *Id.*

²⁰³ *Id.* (testimony of Sen. James M. Jeffords).

²⁰⁴ *Id.*

H. Statement of U.S. Attorney General Alberto Gonzales

In January of 2006 multiple individuals were indicted by a federal grand jury, and pleaded guilty, to various incidents of arson and one incident of cutting down an electric tower, claimed by the ELF and/or ALF.²⁰⁵ Although no human was injured or killed by these acts of economic sabotage, and although most of the defendants were either held at the local county jail (instead of somewhere like Guantanamo Bay) or released on bail until sentencing, U.S. Attorney General Alberto Gonzales held a press conference in Washington D.C. and he and the director of the FBI pronounced that these individuals were among the highest domestic terrorism priorities in the nation.²⁰⁶

I. Congress Passes the Animal Enterprise Terrorism Act

On November 27, 2006, the Animal Enterprise Protection Act was amended and renamed and passed as the Animal Enterprise Terrorism Act (AETA).²⁰⁷ AETA criminalizes damaging or interfering with an animal enterprise if any property is lost or damaged, any person is placed in reasonable fear of death or serious bodily injury, or if an actor conspires or attempts to do either thing.²⁰⁸ The definition of “economic damage” includes “loss of profits” and “increased costs resulting from . . . trespass . . . or [resulting from] intimidation taken against a person or entity”²⁰⁹ If there is no property loss or damage, and no fear instilled in any person, the statutory penalty is a fine and/or a maximum of one year in prison.²¹⁰ If there is no injury or fear by any person but there is over \$10,000 damage, the statutory penalty is a fine and a maximum of five years in prison.²¹¹ If there is no injury or fear by any person but there is over \$100,000 damage, the statutory penalty is a fine and a maximum of ten years in prison.²¹² If there is no injury or fear by any person but there is over \$1 million in damage, the statutory penalty is a fine and a maximum of twenty years in prison.²¹³ In addition, the FBI has authority to conduct wiretapping of any individual if the wiretapping “may provide” evidence of a violation of AETA.²¹⁴

The AETA does not yet prohibit interference with the natural resource industry, but such an amendment would not be a surprise considering that it

²⁰⁵ Press Release, United States Department of Justice, Eleven Defendants Indicted on Domestic Terrorism Charges (Jan. 20, 2006), available at http://www.usdoj.gov/opa/pr/2006/January/06_crm_030.html.

²⁰⁶ *Id.*

²⁰⁷ 18 U.S.C. § 43 (2000) (effective Nov. 27, 2006).

²⁰⁸ *Id.* § 43(a).

²⁰⁹ *Id.* § 43(d)(3).

²¹⁰ *Id.* § 43(b)(1)(A).

²¹¹ *Id.* § 43(b)(2)(A).

²¹² *Id.* § 43(b)(3)(A).

²¹³ *Id.* § 43(b)(4)(B).

²¹⁴ 18 U.S.C.A. § 2516(1)(c) (West 2006).

has already been proposed by the wise use group Alliance for America,²¹⁵ the FBI,²¹⁶ and ALEC.²¹⁷

IV. EFFECTS ON ACTIVISM FROM THE USE OF THE TERM "ECOTERRORISM"

A. Mass Media's Frame of Reference

In a concurring opinion in *New York Times v. United States*, Justice Stewart noted that "without an informed and free press there cannot be an enlightened people."²¹⁸ The mass media is an important factor to consider when evaluating current political phenomena because it provides a filter through which the ordinary American receives news of what is happening in the world. As one newspaper columnist reported: "[I]n today's world, individuals cannot personally observe events and reach decisions in a forum. . . . They necessarily depend on the press to be informed."²¹⁹ The mass media thus has a powerful role in determining what people think by creating their frame of reference.

As Dr. Edward Feulner of the Heritage Foundation—a conservative think tank "whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense"²²⁰—has stated: by intentionally disseminating ideas through thousands of newspapers, debate is kept "within its proper perspective."²²¹ Advertising plays a fundamental role in dictating this "proper perspective." As Grant Tinker, former head of the National Broadcasting Company (NBC) stated: "[television] is an advertising-supported medium, and to the extent that support falls out, programming will change."²²²

One illustration of the role advertising plays in dictating news coverage is the case of a public television station which lost its funding from Gulf and Western in 1987 because it showed a documentary which was critical of corporate development activities.²²³ The chief executive of Gulf and Western complained that the documentary was "virulently anti-business if not anti-American."²²⁴ For further illustration of the role of advertising on media coverage, the manager of corporate communications for General Electric (which now owns NBC) has stated: "We insist on a program environment

²¹⁵ *June 1998 Congressional Hearing, supra* note 63, at 35.

²¹⁶ *May 2005 Senate Hearing, supra* note 175, at 38 (testimony of FBI Deputy Assistant Director John Lewis).

²¹⁷ MODEL ACT, *supra* note 160, § 3(A)(1)–(2).

²¹⁸ *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J. concurring).

²¹⁹ HERBERT J. GANS, *DEMOCRACY AND THE NEWS 1* (2003) (quoting Brandeis, J.).

²²⁰ The Heritage Foundation, Mission Statement, <http://www.heritage.org/about> (last visited Apr. 13, 2008).

²²¹ EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* 24 (1988) (citation omitted).

²²² *Id.* at 16 (citation omitted).

²²³ *Id.* at 17.

²²⁴ *Id.* (citation omitted).

that reinforces our corporate messages.”²²⁵ Moreover, Proctor & Gamble instructs its advertising agency that “[t]here will be no material on any of our programs which could in any way further the concept of business as cold, ruthless, and lacking in all sentiment or spiritual motivation.”²²⁶

Government also plays a role in influencing the “proper perspective” provided by the mass media. During World War I, the federal government’s Committee on Public Information discovered that one of the best ways of controlling the news was to flood the news channels with official information on the “facts.”²²⁷ Accordingly, the federal government has joined private industry in developing extensive public relations networks which prepare official news that is easy to process and reproduce—including advance copies of reports and speeches, scheduled photo opportunity sessions, well-timed press conferences, etc.²²⁸ While exact statistics on the number of government personnel creating and disseminating official information is not easily available, in a moment of transparency decades ago following the Watergate scandal, the Pentagon revealed that at that time its public information services involved thousands of employees and hundreds of millions of dollars each year.²²⁹ In 1979 and 1980, it revealed specifically that the Air Force alone published 690,000 copies per week of 140 newspapers, published a magazine with a monthly circulation of 125,000, operated thirty-four radio and seventeen TV stations, disseminated 615,000 hometown news releases, conducted 6600 interviews with news media, conducted 3200 news conferences, presented 11,000 speeches, and more.²³⁰

B. Ownership of the Mass Media

In addition to the issues of advertising and “official information,” there is the issue of who owns and manages the major mass media outlets in the United States. In the United States, there are ten major corporations which control most of our media sources: the New York Times Company, the Washington Post Company, AOL Time Warner (which owns CNN), Gannett, Viacom (which owns CBS), General Electric (which owns NBC), News Corp (which owns Fox), Tribune (which owns the Chicago Tribune and the Los Angeles Times), Knight-Ridder, and Disney (which owns ABC).²³¹ The boards of directors of these media corporations comprise only 118 individuals, who in turn sit on the boards of 288 national and international corporations.²³²

Members on the board of the New York Times Company also sit on the boards of the Aluminum Company of America, Ford Motor Company,

²²⁵ *Id.* at 340 n.55 (citation omitted).

²²⁶ *Id.*

²²⁷ *Id.* at 23 (citation omitted).

²²⁸ *Id.* at 21–22.

²²⁹ *Id.* at 19–20.

²³⁰ *Id.* at 20 (citation omitted).

²³¹ Bridget Thornton, Brit Walters & Lori Rouse, *Corporate Media is Corporate America: Big Media Interlocks with Corporate America and Broadcast News Media Ownership Empires*, in PROJECT CENSORED 253, 253–56 (Peter Phillips ed., 2005).

²³² *Id.* at 253.

Johnson & Johnson, W.R. Grace & Co., Staples, Inc., and others.²³³ Members on the board of the Washington Post Company also sit on the boards of the RAND Corporation, General Electric Investments, Coca-Cola, J.P. Morgan, and others.²³⁴ Members on the board of Knight-Ridder also sit on the board of H&R Block, Inc., Kimberly-Clark Corporation, and others.²³⁵ Members on the board of Tribune (which owns the Chicago Tribune and the Los Angeles Times) also sit on the boards of 3M Company, Kraft, Conoco-Phillips, McDonalds, and others.²³⁶ Members on the boards of News Corp. (which owns Fox) also sit on the boards of British Airways, Rothschild Investment Trust, C.P., and others.²³⁷

Members on the board of General Electric (which owns NBC) also sit on the boards of Bechtel Group, Inc., Anheuser-Busch Companies, Inc., ChevronTexaco Corporation, Proctor & Gamble, General Motors Corporation, Microsoft Corporation, Home Depot, Inc., and others.²³⁸ Members on the board of Walt Disney (which owns ABC) also sit on the boards of Halliburton Co., Boeing Company, Clorox, Staples, Inc., and others.²³⁹ Members on the board of Viacom (which owns CBS) also sit on the boards of American Express Co., Consolidated Edison, Inc., and others.²⁴⁰ Members on the board at Gannett are also on the boards of Lockheed Martin Corporation, Continental Airlines, Inc., PepsiCo, Inc., Prudential Mutual Funds, Target Corporation, and others.²⁴¹ Members on the board of AOL Time Warner (CNN) are also on the boards of Citigroup, Estee Lauder, Colgate-Palmolive Company, Hilton Hotels Corporation, and others.²⁴²

C. Media Acceptance of the Term "Ecoterrorism"

Internal corporate interests have likely influenced the mass media to vilify radical environmentalists because the activists often cause those interests to lose profits through obstruction of extractive activities, bad publicity, and physical property damage. Moreover, the impact of government rhetoric on the necessity of fighting a "war on terror" since September 11, 2001 has likely influenced the mass media to not only vilify radical environmentalists, but to further accept their designation as "domestic terrorists." The mass media's acceptance of government designations of "who the terrorists are" follows Orwellian admonitions by the Bush Administration like "either you are with us, or you are with the terrorists,"²⁴³ and "to those

²³³ *Id.* at 256–57.

²³⁴ *Id.* at 257–58.

²³⁵ *Id.* at 258.

²³⁶ *Id.* at 258–59.

²³⁷ *Id.* at 259.

²³⁸ *Id.* at 259–60.

²³⁹ *Id.* at 260.

²⁴⁰ *Id.* at 261.

²⁴¹ *Id.* at 256.

²⁴² *Id.* at 259.

²⁴³ Press Release, White House, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920>

who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists . . .”²⁴⁴ As Hermann Goring, second in command to Adolf Hitler, stated: “[T]he people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same way in any country.”²⁴⁵

The examples of mass media portrayals of radical environmentalists as terrorists are too numerous to mention in full, but following are some examples. In 1999, the Portland, Oregon-based newspaper *The Oregonian* published a four-part series, beginning with an article entitled “Eco-terrorism Sweeps the West.”²⁴⁶ The first article stated that crimes of property damage were “acts of domestic terrorism.”²⁴⁷ Although the article listed only property damage and stated “no one has been killed” it nonetheless concluded that the threat to humans and property was “on the rise.”²⁴⁸

In 2002, The New York Times published an article entitled “From Tree-Hugger to Terrorist.”²⁴⁹ While admitting that “protection of all life remains one of the E.L.F.’s major tenets,” the article nonetheless called the ELF “one of the nation’s most active and destructive domestic terrorist organizations” and drew analogies to the Irish Republican Army and Basque separatists.²⁵⁰ It also quoted a Portland State University criminologist who stated that he has tracked ELF “assassins.”²⁵¹ Interestingly, the article also made a reference to the Weather Underground, a group responsible for over a dozen politically-motivated bombings of government and financial targets in the 1960s and 1970s, including bombings of the U.S. Capitol and State Department.²⁵² Like the ELF, the Weather Underground targeted inanimate objects and never killed or seriously injured a human,²⁵³ but the article nonetheless described the Weather Underground members as “radical activists” while ELF members were described as “terrorists.”²⁵⁴ Moreover, the article then mentioned the assassinations of abortion doctors, but called the perpetrators of those murders anti-abortion “advocates” not “terrorists.”²⁵⁵

8.html.

²⁴⁴ *Department of Justice Oversight: Hearing Before the S. Judiciary Comm.*, 107th Cong. (2001) (testimony of John Ashcroft, Att’y Gen. of the United States), available at <http://www.usdoj.gov/archive/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm>.

²⁴⁵ G.M. GILBERT, *NUREMBERG DIARY* 278–79 (Da Capo Press 1995) (1947).

²⁴⁶ Bryan Denson & James Long, *Eco-terrorism Sweeps the West Part I*, OREGONIAN, Sept. 26, 1999, at A1.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Bruce Barcott, *From Tree-Hugger to Terrorist*, N.Y. TIMES, Apr. 7, 2002, at E56.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at E59; *THE WEATHER UNDERGROUND: THE EXPLOSIVE STORY OF AMERICA’S MOST NOTORIOUS REVOLUTIONARIES* (The Free History Project 2003) 55:43 to 57:29, 1:11:38 to 1:13:56 (a documentary film about the Weather Underground).

²⁵³ *Id.* at 49:59 to 50:23.

²⁵⁴ Barcott, *supra* note 249, at E56, E59.

²⁵⁵ *Id.* at E59.

A final example is a Seattle Post-Intelligencer article entitled “Eco-, animal-rights terrorism called threat.”²⁵⁶ The article essentially reported the testimony of Senator Inhofe, the FBI, and the BATF from the May 18, 2005 Senate Hearing on “ecoterrorism” which was discussed above. The article repeated the FBI’s statement that “[t]here is nothing else going on in this country over the last several years that is racking up the high number of violent crimes and terrorist actions.”²⁵⁷ Nowhere in the article is there mention of the skepticism which was expressed by all of the other Senators, besides Senator Inhofe, who made statements at the hearing. Instead the article quoted Inhofe comparing ELF and ALF to Al Qaeda and quoted Inhofe stating that he wanted to “examine more closely” how ELF, ALF, and SHAC “might be getting assistance in fund raising and communications from tax-exempt organizations’ ‘mainstream activists’”²⁵⁸

D. Impacts from the Acceptance of the Term “Ecoterrorism”

Because of repeated official pronouncements from the government, the complicity of the mass media, and the campaigning of industry groups like the Alliance for America, the American Legislative Exchange Council, and the Center for the Defense of Free Enterprise, the term ecoterrorism has been widely accepted. The acceptance of the term has also created acceptance more generally of the idea that radical environmentalists are terrorists. The impacts of this acceptance include more investigation, infiltration, and disruption of radical environmental groups regardless of whether any law is actually violated, longer terms of incarceration for convicted activists, and the harassment of mainstream environmental groups.

1. Increased Government Surveillance of Radical Groups

By categorizing an activist as someone who might commit an act of terrorism, the federal government is given broader power over that activist or activist group. One way in which its power is expanded is through authority to listen to personal phone conversations, read private emails, and record private conversations. On March 9, 2006, as part of the Reauthorization of the USA PATRIOT Act,²⁵⁹ the federal wiretapping statute was amended to authorize the “interception of wire, oral, or electronic communications” when the interception “may provide” evidence of “animal enterprise terrorism” as set forth in 18 U.S.C. § 43.²⁶⁰ Thus, an activist who has never been arrested for any crime or any type of protest may have her

²⁵⁶ *Eco-, Animal-Rights Terrorism Called Threat*, SEATTLE POST-INTELLIGENCER, May 19, 2005, available at http://seattlepi.nwsourc.com/national/224826_ecoterrorist19.html.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 113(b)(1), 120 Stat. 192, 209 (2006).

²⁶⁰ 18 U.S.C.A. § 2516(1)(c) (West 2006).

phones tapped, her emails read, and her private conversations recorded if a federal government agent believes that it might find some evidence of a plan to interfere with an animal enterprise. If AETA is amended to include natural resource industries, the FBI will have legal authority to spy on all radical environmental activists. A “terrorism” tag also gives federal magistrate judges the authority to issue warrants outside of the judges’ districts.²⁶¹

Another surveillance implication of branding radical environmental activists as terrorists is found in the National Crime Information Center’s (NCIC) Violent Gang and Terrorist Organization File (VGTOF).²⁶² The NCIC is a national electronic database of criminal records and other identifying information for U.S. citizens,²⁶³ which is available to prosecutors, law enforcement agents, and law enforcement institutions twenty-four hours a day.²⁶⁴ Until 2002, the NCIC only recorded actual convictions. But in 2002, the federal government decided to use the NCIC as an “investigative” tool with the goal of creating a “centralized terrorist watch list.”²⁶⁵

There is no judicial process for the entry of an individual into the potential terrorist database²⁶⁶ and no notice is provided to the “potential terrorist.”²⁶⁷ Thus, when an individual is pulled over in a routine traffic stop, the officer can instantly determine whether the individual has been designated—unbeknownst to him or her—as a potential terrorist through an online database. If there is a match, the officer is advised that the individual in the car may be a terrorist, and the officer is instructed to call the FBI’s Terrorist Screening Center (TSC) for further direction.²⁶⁸

In 2002, an FBI memo indicated that potential terrorist groups included “anarchists,” “animal rights extremist[s],” and “environmental extremist[s].”²⁶⁹ The FBI indicated in 2003 that the terrorist listings on the terrorist watch list included over 7000 names.²⁷⁰ In this context, it is reasonable to presume that radical environmental activists could be entered as potential terrorists in the NCIC database, which will in turn alter the way the activists are treated in their communities by local law enforcement.

²⁶¹ FED. R. CRIM. P. 41(b)(3).

²⁶² Fed. Bureau of Investigation, National Crime Information Center, http://www.fbi.gov/hq/cjisd/ncic_brochure.htm (last visited Apr. 13, 2008).

²⁶³ Fed. Bureau of Investigation, CJIS Division Homepage, <http://www.fbi.gov/hq/cjisd/ncic.htm> (last visited Apr. 13, 2008).

²⁶⁴ Fed. Bureau of Investigation, Congressional Testimony, <http://www.fbi.gov/congress/congress03/ncic111303.htm> (last visited Apr. 13, 2008).

²⁶⁵ *Id.*

²⁶⁶ *See id.*

²⁶⁷ Press Release, Fed. Bureau of Investigation, Terrorist Screening Center Statement Regarding October 8, 2006 *60 Minutes* Segment (Oct. 8, 2006), *available at* <http://www.fbi.gov/pressrel/pressrel06/terrorisscreeningcenter100806.htm>.

²⁶⁸ Press Release, White House, President Bush Discusses Progress in the Global War on Terror (Sept. 7, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/09/20060907-2.html>.

²⁶⁹ Ann Davis, *Data Collection Is Up Sharply Following 9/11*, WALL ST. J., May 22, 2003, at B1.

²⁷⁰ *Id.*

2. Increased Penalties/Convictions for Acts of Protest

Another consequence of the widespread branding of radical environmental activists as terrorists is the more severe convictions and sentences they will receive for engaging in protest activities. For example, in my own criminal case I was charged with, and convicted of, a federal tree-spiking statute even though my “crime” was sitting in a tree with three visible plastic ropes tied to other trees.²⁷¹ In its opinion, the court refers to Senator McClure’s 1988 testimony, discussed above, about “dangerous and deadly” ecoterrorists, implying that somehow McClure’s testimony provided evidence that I should be convicted under the tree-spiking statute.²⁷² And in fact, upon review of McClure’s testimony—which calls Earth First! activists “terrorists” and specifically mentions tree-sitting as an Earth First! tactic²⁷³—the court’s conclusion that I was guilty by association is not so far-fetched.

In addition to convictions that do not match conduct, the “ecoterrorist” branding also leads to sentences that do not match conduct. In December of 2005, as mentioned above, numerous indictments were issued for over a dozen acts of sabotage committed between 1996 and 2001.²⁷⁴ All of the crimes listed were either thought crimes or property damage crimes: “arson, conspiracy, use of a destructive device, and destruction of an energy facility.”²⁷⁵ No human was injured or killed by any of the crimes.²⁷⁶ Nonetheless, prosecuting attorneys requested terrorism “sentencing enhancements” under the federal sentencing guidelines.²⁷⁷

More specifically, the federal government’s sentencing memorandum asserted that “all ten defendants engaged in terroristic conduct”²⁷⁸ and its opening remarks in the first actual sentencing called the acts of property damage a “classic case of terrorism.”²⁷⁹ Although the district court judge stated that the defendants were not terrorists in the traditional sense of the word, the court nonetheless held that their actions included elements of

²⁷¹ United States v. Wyatt, 408 F.3d 1257, 1257 (9th Cir. 2005).

²⁷² *Id.* at 1261.

²⁷³ 134 CONG. REC., 30,811 (1988) (statement of Sen. McClure).

²⁷⁴ Angela Valdez, *Terror-fying the Greens: Did Investigators Use Post-9/11 Warrantless Wiretaps to Bust Accused Eco-Saboteurs?*, WILLAMETTE WK. (Aug. 30, 2006), available at <http://www.week.com/story.php?story=7938>.

²⁷⁵ *Id.*

²⁷⁶ See United States v. Thurston, Nos. CR 06-60069-01-AA, CR 06-60070-01-AA, CR 06-60071-01-AA, CR 06-60078-01-AA, CR 06-60079-01-AA, CR 06-60080-01-AA, CR 06-60120-01-AA, CR 06-60122-01-AA, CR 06-60122-02-AA, CR 06-60123-01-AA, CR 06-60124-01-AA, CR 06-60125-01-AA, CR 06-60126-01-AA, 2007 WL 1500176, at *11 (D. Or. May 21, 2007) (offering that defendants argued against terrorism enhancement because none of the offenses caused injury or death).

²⁷⁷ Valdez, *supra* note 274.

²⁷⁸ Government’s Sentencing Memorandum at 73, United States v. Dibee, Nos. CR 06-60069-01-AA; CR 06-60070-01-AA; CR 06-60071-01-AA; CR 06-60078-01-AA; CR 06-60079-01-AA; CR 06-60080-01-AA; CR 06-60120-01-AA; CR 06-60122-01-AA; CR 06-60122-02-AA; CR 06-60123-01-AA; CR 06-60124-01-AA; CR 06-60125-01-AA; CR 06-60126-01-AA (D. Or. May 4, 2007), available at http://www.cldc.org/pdf/government_sentencing_memo.pdf.

²⁷⁹ Sentencing Hearing, United States v. Meyerhoff, Nos. CR-06-60078-01-AA; CR-06-60122-02AA (D. Or. May 22, 2007).

terrorism²⁸⁰ and that the terrorism enhancement could be applied to their sentences.²⁸¹

The terrorism sentence enhancement can substantially add time to a defendant's term of incarceration. For example, the federal sentencing guidelines provide that a first offense act of arson alone should have a sentence of 33 to 41 months (2 to 4 years).²⁸² But with a terrorism sentence enhancement that sentence (for the same crime) becomes 168 to 210 months (14 to 15 years).²⁸³ In addition, receiving the terrorist label at sentencing directly affects the type of incarceration a defendant will face; the federal Bureau of Prisons considers the terrorist designation seriously and assigns such defendants to maximum security prisons or super-maximum security prisons.²⁸⁴ These facilities are designed to house the most violent criminal offenders in the nation and may require twenty-three hours of lockdown in a cell each day, as well as limit conversation with family to one hour per month.²⁸⁵

The current federal sentencing guidelines allow for a terrorism enhancement if the crime is a "federal crime of terrorism" as defined by 18 U.S.C. § 2332b(g)(5)(B), and is intended to influence or affect government conduct by intimidation or coercion, or is intended to retaliate against government conduct.²⁸⁶ The sentencing guidelines also note that an upward departure from the guidelines range is permissible even if the defendant's conduct is not listed as a "federal crime of terrorism" so long as it was calculated to influence or affect government conduct by intimidation or coercion, or is intended to retaliate against government conduct.²⁸⁷ Similarly, an upward departure is allowed if the defendant's conduct was a "federal crime of terrorism" that was intended "to intimidate or coerce a civilian population."²⁸⁸ "Federal Crime of Terrorism" is defined as following:

- (i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet,

²⁸⁰ Sentencing Hearing, *United States v. Meyerhoff*, Nos. CR-06-60078-01-AA, CR-06-60122-02AA (D. Or. May 23, 2007).

²⁸¹ *Thurston*, 2007 WL 1500176, at *20.

²⁸² U.S. SENTENCING GUIDELINES MANUAL § 2K1.4(a)(2), ch. 5, pt. A (2006). This is offered only for the illustrative purpose of comparing the length of a prison sentence before and after the terrorism sentencing enhancement. Many other factors can affect the sentence a defendant receives under the guidelines and Congress has imposed a mandatory minimum sentence for arson of 60 months. *See, e.g.*, Anti-Arson Act of 1982, 18 U.S.C. § 844(i) (2000).

²⁸³ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2006); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2006).

²⁸⁴ Sentencing Hearing, *United States v. Meyerhoff*, Nos. CR-06-60078-01-AA; CR-06-60122-02AA (D. Or. May 23, 2007) (testimony of Harvey Cox, former Bureau of Prisons warden).

²⁸⁵ *Id.*

²⁸⁶ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. nn.1 & 4.

²⁸⁷ *Id.* § 3A1.4 cmt. n.4.

²⁸⁸ *Id.*

and Supreme Court assassination and kidnaping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States) 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), 1992 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), 2155 (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to national defense material, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization), or 2340A (relating to torture) of this title;

(ii) sections 92 (relating to prohibitions governing atomic weapons) or 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. § 2122 or 2284);

(iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49; or

(iv) section 1010A of the Controlled Substances Import and Export Act (relating to narco-terrorism).²⁸⁹

²⁸⁹ 18 U.S.C.A. § 2332b(g)(5)(B) (West 2006).

Although the statute where this definition is found requires, in a preceding subsection, that terrorist acts include the element of a substantial risk of serious bodily injury,²⁹⁰ the guidelines did not import that contextual element. These guidelines are not promulgated by Congress, but instead by an independent agency composed of seven voting members appointed by the President and known as the Sentencing Commission.²⁹¹

3. Investigation of Mainstream Environmental Groups

Finally, and perhaps most interesting to the majority of those reading this Comment, are the effects of the ecoterrorist branding on mainstream environmental organizations. Senator Inhofe has testified before Congress, and has been quoted in the mass media, stating that “ecoterrorists” have links to mainstream environmental groups who fund and support them.²⁹² Along these same lines an article in a journal for prosecuting attorneys argued that “[a]n effective way to begin tracking potential ELF members is to track active members of other environmental organizations with similar ideologies”²⁹³ It recommends that Earth First! is one group which might be tracked, in part because it “support[s] an environmental preservation philosophy.”²⁹⁴ A hint as to what other ideologies—besides “environmental preservation”—might provide grounds for terrorist investigations surfaced in a report published by the Heritage Foundation.²⁹⁵ The report suggests that it is likely that people will be killed by environmentalists if the philosophy of Deep Ecology “is not challenged at the philosophical level.”²⁹⁶

V. WHY RADICAL ENVIRONMENTALISTS SHOULD NOT BE BRANDED AS TERRORISTS

The propagandist naturally cannot reveal the true intentions of the principal for whom he acts. . . . That would be to submit the projects to public discussion, to the scrutiny of public opinion, and thus to prevent their success. . . . Propaganda must serve instead as a veil for such projects, masking true intention.²⁹⁷

²⁹⁰ 18 U.S.C. § 2332b(a)(1)(A) (2000).

²⁹¹ U.S. SENTENCING COMM’N, AN OVERVIEW OF THE U.S. SENTENCING COMMISSION 3 (2007), available at http://www.ussc.gov/general/USSC_Overview_Dec07.pdf. Although Congress did require that the Sentencing Commission use the definition of “federal crime of terrorism” found at 18 U.S.C. § 2332b(g)(5)(B) (2000) for the terrorism sentence enhancement, Congress did not require that the Sentencing Commission use that definition out of context. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303 (1996).

²⁹² *May 2005 Senate Hearing*, *supra* note 175 (statement of Sen. James M. Inhofe); *Eco-, Animal-Rights Terrorism Called Threat*, *supra* note 256.

²⁹³ Joshua K Marquis & Danielle M. Weiss, *Eco-Terror: Special Interest Terrorism*, PROSECUTOR, Jan.–Feb. 2005, at 30.

²⁹⁴ *Id.* at 44 n.13.

²⁹⁵ DOUG BANDOW, HERITAGE FOUND. REPORTS, ECOTERRORISM: THE DANGEROUS FRINGE OF THE ENVIRONMENTAL MOVEMENT 3–4 (1990), available at http://www.heritage.org/Research/EnergyandEnvironment/upload/87972_1.pdf.

²⁹⁶ *Id.* at 10.

²⁹⁷ HERMAN & CHOMSKY, *supra* note 221, at xiii (quoting JACQUES ELLUL, PROPAGANDA 58–59).

For several reasons, the term terrorism should not be used to describe acts of trespass, vandalism, or other interferences with profits which result in no human injury or death. Most importantly, use of the term terrorism to describe these acts diminishes the true meaning of the word. Additionally, branding such acts as terrorism is likely stifling political dissent. Finally, the branding was created by industry groups and is now being used as a pretext to ensure the protection of their economic gains at the expense of efforts to protect the environment.

A. Terrorism Means Murder, Not Property Damage

Historians have noted that the term terrorism has been used by governments “to keep the population afraid and insecure”²⁹⁸ and create a kind of lynch mob hysteria²⁹⁹ in order to achieve political goals.³⁰⁰ Threats to the governments’ interests are often labeled as terrorism, while the enormous military, environmental, and economic damage—including human deaths—caused by the same governments are obscured.³⁰¹ Although the mass media has largely accepted the notion that radical activists who cause profit loss to industry are terrorists, other definitions of terrorism indicate the word should apply only to crimes intended to inflict mass civilian casualties directly through murder, or more indirectly through actions like the destruction of a drinking water purification infrastructure.

For example, the USA PATRIOT Act defines “domestic terrorism” as involving “acts dangerous to human life.”³⁰² Likewise, the Homeland Security Act defines “terrorism” as acts that are “dangerous to human life or potentially destructive of critical infrastructure or key resources.”³⁰³ Additionally, the State Department mandate for an annual report on terrorist activity defines “terrorism” as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”³⁰⁴ Even President George W. Bush stated that terrorism relates to murder. In his speech to the nation introducing the “War on Terror,” President Bush stated that terrorists “sacrific[e] human life,” “kill not merely to end lives, but to disrupt and end a way of life,” have a directive “to kill all Americans,” and “[aid and abet murder by] heirs of all the murderous ideologies of the 20th century.”³⁰⁵

(1965)).

²⁹⁸ Barsamian, *supra* note 3.

²⁹⁹ HOWARD ZINN, *TERRORISM AND WAR* 57 (2002).

³⁰⁰ Andrew Hartman, *The Politicization of Terror: September 11 and American Historical Selectivity*, *Z MAG.*, Dec. 2001, at 25.

³⁰¹ Barsamian, *supra* note 3.

³⁰² 18 U.S.C. § 2331(5) (2000 & Supp. V 2006).

³⁰³ 6 U.S.C. § 101(15) (2000 & Supp. V 2006).

³⁰⁴ 22 U.S.C. § 2656f(d)(2) (2000 & Supp. V 2006).

³⁰⁵ Press Release, *supra* note 243.

B. Government's Conduct Echoes a History of Stifling Political Dissent

But while the U.S. Congress and the President of the United States may agree that the term terrorism implies acts involving civilian casualties, the FBI has defined terrorism to include “the unlawful use, or threatened use, of violence . . . against . . . property.”³⁰⁶ This definition has allowed the FBI to call ELF activists one of the top domestic terrorist threats. This designation cuts the FBI political slack, because while the federal government has failed to catch terrorists like Osama bin Laden, it can now claim it is catching and prosecuting terrorists when it prosecutes vandals. Additionally, this definition gives the FBI greater surveillance and data gathering power, as discussed above. While some may argue that the FBI has only categorized radical environmental activists as terrorists in order to protect the American people from possible harm, the history of the FBI's attempts to silence political dissenters suggests an ulterior motive for this new branding.

1. COINTELPRO

In 1971, a group of radical activists called the Citizens' Commission to Investigate the FBI broke into a small FBI field office and stole the files inside.³⁰⁷ Their lootings uncovered over 1000 documents revealing a systematic FBI effort—known as COINTELPRO—to suppress political dissent through wiretapping, infiltration, and media manipulation intended to discredit, destabilize, and demoralize dissenters.³⁰⁸ As the COINTELPRO papers indicated, the FBI intended to “enhance the paranoia endemic in these circles” and “get the point across that there is an FBI agent behind every mailbox.”³⁰⁹ Targets of the COINTELPRO program included Martin Luther King, Jr. and the Southern Christian Leadership Conference, the Student Non-violent Organizing Committee, the Black Panther Party, Women's Strike for Peace, the Communist Party of the U.S.A.,³¹⁰ the Nation of Islam,³¹¹ the Socialist Workers Party, Puerto Rican Independence activists, leftist student activists, and radical professors.³¹² Subsequent civil rights litigation and Freedom of Information Act requests revealed even more documentation of the suppression campaign, though many of the subsequently received documents were censored.³¹³

³⁰⁶ 2002 House Hearing, *supra* note 47 (statement and testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, FBI).

³⁰⁷ Allan M. Jalon, *A Break-In To End All Break-Ins*, L.A. TIMES, Mar. 8, 2006, available at http://uniset.ca/terr/news/lat_fbibreakin.html.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ See Memorandum from Airtel to SAC, Albany, Counterintelligence Program, Black Nationalist-Hate Groups, reprinted in WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSIDENTS IN THE UNITED STATES 111 (2d ed. 2002).

³¹² Noam Chomsky, *Introduction to NELSON BLACKSTOCK, COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM 6-7* (1975).

³¹³ *Id.* at ix-xi.

Some of the activities conducted by the FBI as part of the COINTELPRO program included having FBI agents infiltrate organizations by posing as members,³¹⁴ catalyzing the termination of a socialist professor,³¹⁵ leafletting with misinformation “to cause disruption in the peace movement,”³¹⁶ publishing and disseminating a fraudulent underground newspaper,³¹⁷ sending an anonymous letter to the spouse of a political preacher stating that he was having an affair,³¹⁸ sending anonymous letters soliciting funds for assassination of political leaders,³¹⁹ convincing property owners not to sell land to radical groups,³²⁰ framing an activist as a CIA agent to get him kicked out of his organization,³²¹ and using cooperative press contacts to make political dissenters appear “stupid,” “coward[ly],” “violent,” and generally unfavorable.³²² Thus, the FBI’s stated goal for the black movement—to “expose, disrupt, misdirect, discredit, or otherwise neutralize [their] activities”³²³—carried over to all of its targeted groups and political ideologies.

In addition to its campaigns of provocation and deliberate misinformation, the FBI’s COINTELPRO was involved in the assassination of Black Panther revolutionary Fred Hampton. In December of 1969, the FBI paid an informant a monetary amount of “considerable value” after he had posed as Hampton’s bodyguard and drawn and transmitted a floor plan of Hampton’s apartment to

³¹⁴ See U.S. Gov’t Office Memorandum from L.V. Boardaan to A.H. Belmont, CP, USA – Counterintelligence Program; Internal Security (Aug. 28, 1956), in CHURCHILL & VANDER WALL, *supra* note 311, at 40; Memorandum from FBI Dir. to SAC, Newark, Counterintelligence Program; Internal Security; Disruption of the New Left (May 27, 1968), in CHURCHILL & VANDER WALL, *supra* note 311, at 181.

³¹⁵ See U.S. Gov’t Memorandum from FBI Dir. to SAC, Phoenix, Counterintelligence Program; Internal Security; Disruption of the New Left (Oct. 1, 1963), in CHURCHILL & VANDER WALL, *supra* note 311, at 55.

³¹⁶ See U.S. Gov’t Memorandum from FBI Dir. to SAC, New York, Socialist Workers Party; Distribution Program (Feb. 13, 1970), in CHURCHILL & VANDER WALL, *supra* note 311, at 58; Memorandum between SAC, Albany and FBI Dir., Counterintelligence Program; Internal Security; Disruption of the New Left (July 8, 1968) in CHURCHILL & VANDER WALL, *supra* note 311, at 183.

³¹⁷ Memorandum from Fed. Bureau of Investigation on Blackboard Underground Newspaper, in CHURCHILL & VANDER WALL, *supra* note 311, at 116.

³¹⁸ See Memorandum from SAC, St. Louis to FBI Dir. on Counter-Intelligence Program, Black Nationalist – Hate Groups, Black Liberators (Feb. 14, 1969), in CHURCHILL & VANDER WALL, *supra* note 311, at 113; see also CHURCHILL & VANDER WALL, *supra* note 311, at 112.

³¹⁹ See Memorandum from FBI Dir. on Proposed Anonymous Letters Relating to Assassination (Sept. 16, 1970), in CHURCHILL & VANDER WALL, *supra* note 311, at 150.

³²⁰ See FBI Report on Potential Land Sale to RNA (Dec. 2, 1970), in CHURCHILL & VANDER WALL, *supra* note 311, at 122.

³²¹ See Memorandum from FBI on Conveying Impression that Activist is a CIA Informant (July 10, 1968), in CHURCHILL & VANDER WALL, *supra* note 311, at 128; see also Memorandum from SAC, Newark to FBI Dir. on Counterintelligence Program, Internal Security, Disruption of the New Left (May 27, 1968), in CHURCHILL & VANDER WALL, *supra* note 311, at 181–82.

³²² Memorandum from FBI Dir. to SAC, Albany on Counterintelligence Program, Black Nationalist – Hate Groups, Racial Intelligence (Aug. 5, 1968), in CHURCHILL & VANDER WALL, *supra* note 311, at 118–19.

³²³ Memorandum from FBI Dir. to SAC, Albany on Counterintelligence Program, Black Nationalist – Hate Groups, Internal Security (Aug. 25, 1967), in CHURCHILL & VANDER WALL, *supra* note 311, at 92.

the police.³²⁴ Following the transmission, Hampton was assassinated in his bed during a police raid on his apartment.³²⁵ After fourteen years of civil litigation, Hampton's family agreed to a \$1.85 million settlement against local and federal officials for their roles in his assassination.³²⁶ Martin Luther King, Jr. was also a target of COINTELPRO; FBI memos stated a plan to "remove King from the national picture,"³²⁷ and listed him as a "primary target."³²⁸

Because many of the COINTELPRO actions taken by the FBI were illegal, in 1978 several high ranking FBI officials were indicted for conspiring to "injure and oppress citizens of the United States" in regards to their surveillance of Weather Underground radicals.³²⁹ In 1980, two of the FBI's top officials—former acting Associate Director of the FBI W. Mark Felt and former Assistant Director for the Domestic Intelligence Division Edward S. Miller—were found guilty after a lengthy jury trial.³³⁰ The criminals were pardoned by Ronald Reagan in 1981 so they were not imprisoned.³³¹ After this pardon was granted, former Weather Underground members filed a civil lawsuit against the FBI and the FBI eventually reached "a monetary settlement favorable to the plaintiffs."³³²

2. Infiltration/Discrediting of Radical Environmental Groups

In the context of the FBI's history of infiltrating and provoking other radical political groups, it is not surprising that the FBI has also infiltrated and provoked radical environmental groups. One example was the 1989 FBI operation to infiltrate and provoke Earth First! activists in Arizona, specifically an out-spoken and prominent "co-founder" of the Earth First! movement—Dave Foreman.³³³ As one agent put it, Foreman was the target because he was "the guy we need to pop to send a message."³³⁴ At least three FBI agents—Michael A. Fain, Ron Frazier, and Katherine Clark—infiltrated the group in a three-year, \$2 million surveillance operation involving 1300 hours of recordings, the involvement of fifty agents, and weekly reports to the U.S. Attorney.³³⁵

³²⁴ Memorandum from SAC, Chicago to FBI Dir. on Results of Raid on Apartment of BPP Members (Dec. 11, 1969), in CHURCHILL & VANDER WALL, *supra* note 311, at 141; *see also* CHURCHILL & VANDER WALL, *supra* note 311, at 139–41 (including a copy of the floor plan).

³²⁵ CHURCHILL & VANDER WALL, *supra* note 311, at 140.

³²⁶ John Kifner, *Ex-Panther in Prison Says Evidence Was Concealed*, N.Y. TIMES, Apr. 3, 1989, at B1; Jeffrey Haas, Editorial, *Why There Should Be a Fred Hampton Way*, CHI. DEFENDER, Apr. 24, 2006, at 9.

³²⁷ Memorandum from W.C. Sullivan to J.A. Sizou and Martin Luther King, Jr., (Dec. 1, 1964), in CHURCHILL & VANDER WALL, *supra* note 311, at 98.

³²⁸ Memorandum from FBI Dir. to SAC, Albany, Counterintelligence Program; Black Nationalist-Hate Groups, (Mar. 4, 1968), in CHURCHILL & VANDER WALL, *supra* note 311, at 111.

³²⁹ CHURCHILL & VANDER WALL, *supra* note 311, at 314–15.

³³⁰ *Id.*; *see also* THE WEATHER UNDERGROUND, *supra* note 252.

³³¹ CHURCHILL & VANDER WALL, *supra* note 311, at 314–15.

³³² *Id.*

³³³ MANES, *supra* note 35, at 193–99.

³³⁴ *Id.* at 197.

³³⁵ *Id.* at 195–96.

Although Agent Fain had repeatedly attempted to recruit Earth First! activists into committing ecotage, they repeatedly refused until he eventually convinced and led two activists to damage a power line.³³⁶ At the site, the FBI SWAT team of fifty agents wearing bulletproof vests and night vision goggles closed in on the activists on foot, in helicopters, and on horseback.³³⁷ Foreman was not there, but he was nonetheless arrested and charged with conspiracy to damage electrical lines leading to a nuclear weapons facility and two nuclear power plants.³³⁸ The \$2 million FBI sting operation led to a deferred five year sentence for Foreman³³⁹ and the arrest of saboteurs who caused \$16,000 damage to an electrical tower.³⁴⁰

Around the same time, another prominent Earth First! activist—Judi Bari—was also targeted by the FBI. On May 24, 1990, Bari was traveling through California organizing a summer of peaceful protest against old-growth redwood logging when a bomb exploded underneath her car seat, permanently crippling her.³⁴¹ Bari had previously received a number of death threats, but the FBI immediately concluded that Bari herself had been carrying the bomb with the intent to commit an act of terrorism.³⁴² Following the bombing, Bari's house was raided twice, and the FBI continued to imply that Bari had bombed herself.³⁴³ The FBI's statements to the media succeeded in damaging Bari's reputation, and discrediting the nonviolent protest movement she was organizing.³⁴⁴ No one was ever convicted for the attempted assassination of Judi Bari, but in 2002 Bari's estate won a \$4.4 million jury verdict against the FBI for framing her for the bombing.³⁴⁵

Another well-publicized example of FBI infiltration of radical environmentalists was the recent case of the FBI recruiting an eighteen year old girl as an informant to dress up as an activist, independent film-maker, and street medic, and attend large, nonviolent demonstrations.³⁴⁶ The

³³⁶ *Id.* at 196; see also Bari, *supra* note 111, at 126.

³³⁷ MANES, *supra* note 35, at 193–94; David J. Williams, *Eco-Warrior David Foreman Moves On To Another Battleground Image of an Outsider*, BALTIMORE SUN, Apr. 19, 1994, at 1D.

³³⁸ MANES, *supra* note 35, at 194.

³³⁹ Williams, *supra* note 337.

³⁴⁰ MANES, *supra* note 35, at 194, 196.

³⁴¹ See Bari, *supra* note 111, at 52.

³⁴² *Id.*

³⁴³ *Id.* at 52–53.

³⁴⁴ *Id.* at 53.

³⁴⁵ Jim Herron Zamora & Henry K. Lee, *Earth First Activists Win Case: FBI, Cops Must Pay \$4.4 Million for Actions After Car Bombing*, S.F. CHRON., June 11, 2002, at A1.

³⁴⁶ See Vanessa Grigoriadis, *The Rise & Fall of the Eco-Radical Underground*, ROLLING STONE, Aug. 10, 2006, at 73, 74–75; Melyn, *Freelance Infiltrator Sparks Thought Crime Incident*, EARTH FIRST! J., Mar.–Apr. 2006, at 10 [hereinafter *Freelance Infiltrator*]; Ben Rosenfeld, *War on the First Amendment: The Great Green Scare and the Fed's "Case" Against Rod Coronado*, COUNTERPUNCH, Mar. 10, 2006, available at <http://counterpunch.org/rosenfeld03102006.html>; Jennifer Van Bergen, *FBI Confidential Informant Also Said to be Provocateur*, RAW STORY, June 8, 2006, http://www.rawstory.com/news/2006/FBI_confidential_informant_also_said_to_0608.html (last visited Apr. 13, 2008); *Information on the Confidential Source in the Auburn Arrests*, PORTLAND INDEP. MEDIA CENTER, Jan. 26, 2006, <http://portland.indymedia.org/en/2006/01/332735.shtml> (last visited Apr. 13, 2008).

infiltrator, who called herself “Anna Davies” among other names, was paid \$75,000 over two years to spy on radical activists.³⁴⁷ The FBI paid for a California cabin for Davies, outfitted it with surveillance technology, and bought her a computer.³⁴⁸ Davies befriended three young activists for six months³⁴⁹ and—according to one of the activists’ attorneys—taught them to make bombs, supervised their activities, and threatened to leave them if they did not start doing “something.”³⁵⁰ The three activists were arrested on January 13, 2006 for allegedly planning an ELF action and were charged with “felony conspiracy to damage or destroy public and private infrastructure by explosives or fire.”³⁵¹ The infiltrator reportedly shared a bed with at least one of the activists,³⁵² and attempted to convince young radicals to fall in love with her as part of her infiltration strategy.³⁵³

One last example of the FBI’s intimidation of radical environmental activists was uncovered in a Freedom of Information Act request filed by the American Civil Liberties Union.³⁵⁴ An FBI memo shows that the FBI opened an inquiry into a meeting of environmental activists because the activists were planning on training participants in “nonviolent methods of forest defense, security culture, street theater, and banner making.”³⁵⁵ During a subsequent protest where activists trespassed and hung a banner, the local police copied the license plate numbers of all the protest attendees and faxed the list to the FBI.³⁵⁶

*C. Industry Groups’ Motivation is Protection of Corporate Profit, Not
Protection of Citizens*

In addition to serving the government’s interest in silencing political dissent and finding “terrorists,” the branding of radical environmental activists as terrorists also serves the interests of private industry. In its statements regarding its “Animal and Ecological Terrorism Act,” discussed above, ALEC clarified that it is the protection of profit, not human life, that it is concerned about. The Model Act pamphlet reported that the ELF had caused \$50 million in property damages³⁵⁷ and that the USA PATRIOT Act is not powerful enough to punish ELF activists because it “requires the death of or harm to people, an element not characteristic of eco-terrorists.”³⁵⁸ Indeed this principal focus on profit protection alone is actually required of

³⁴⁷ *Freelance Infiltrator*, *supra* note 346.

³⁴⁸ *Id.* at 344.

³⁴⁹ *Id.*

³⁵⁰ Van Bergen, *supra* note 346.

³⁵¹ *Freelance Infiltrator*, *supra* note 346.

³⁵² Grigoriadis, *supra* note 346, at 74.

³⁵³ Van Bergen, *supra* note 346.

³⁵⁴ Nicholas Riccardi, *FBI Keeps Watch on Activists*, L.A. TIMES, Mar. 27, 2006, at A2.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ AM. LEGISLATIVE EXCH. COUNCIL, EARTH LIBERATION FRONT, *in* ANIMAL & ECOLOGICAL TERRORISM IN AMERICA, *supra* note 160, at 10.

³⁵⁸ *Id.* at 15 (emphasis added).

corporations by the doctrines of corporate business law, which hold that shareholder profit is the primary purpose of business corporations.³⁵⁹ Similarly, groups like the Center for the Defense of Free Enterprise and the Alliance for America were created to represent industries that profit from natural resource extraction and exploitation, as discussed above. Their concern is also the protection of profit, not protection of human life.

One final example of how profit making is involved in the rush to brand radical activists as terrorists is exemplified by the \$305 million contract³⁶⁰ recently awarded to Lockheed Martin to complete the updating of FBI technology necessary to keep up with the doubling population of FBI "intelligence analysts."³⁶¹ As one historian has noted, a perpetual war on terrorism translates into perpetual profits for those industries that provide materials and support for the war.³⁶²

VI. CONCLUSION

Throughout the past four decades, a powerful environmental protection movement has developed that has introduced new and influential ideas into mainstream USA, and cost extractive industries millions of dollars as they are sometimes forced to consider and address the destructive environmental effects of their actions. Radical environmental activists have played a role in this movement by slowing the pace of extraction, empowering others to resist environmental destruction, and publicly exposing and ridiculing environmentally irresponsible industries and the government that supports them—all of which has cost the industries millions of dollars. The backlash by those who want to fortify their profit margins and silence the criticisms is now at full force with the branding of radical environmental activists as "terrorists." But as one U.S. Senator stated at an "ecoterrorism" hearing: "[i]n our current state of fear, it is easy to get headlines by using the term 'terrorism.' But sometimes, a criminal is just a criminal."³⁶³ Indeed, if a pejorative label is necessary for law-breaking activists, let it be law-breakers, criminals, trespassers, vandals, saboteurs, or arsonists, but not "terrorists."

³⁵⁹ See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

³⁶⁰ *Making America Safer: An Update on FBI Progress: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Robert S. Mueller, III, Director, FBI), available at <http://www.fbi.gov/congress/congress06/mueller050206.htm>.

³⁶¹ *Id.*; Robert S. Mueller, III, Dir., Fed. Bureau of Investigation, Remarks at The Denver Forum: The Art of Information (Apr. 13, 2006), available at <http://www.fbi.gov/pressrel/speeches/mueller041306.htm>.

³⁶² ZINN, *supra* note 299, at 28.

³⁶³ *October 2005 Senate Hearing*, *supra* note 199 (testimony of Sen. James M. Jeffords).