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Department of Justice Role in Countering WMD

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Encyclopedia of Bioterrorism Defense

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Introduction

The mission of the Department of Justice (DOJ) is “...to enforce the law and defend the interests of the United States according to the law; [and] to ensure public safety against threats foreign and domestic...” In accordance with this mission, the DOJ has a responsibility to prevent and respond to terrorist attacks against US citizens at home and abroad. This article will briefly review the history of the DOJ and summarize its role in countering biological, chemical and radiological terrorism, from prevention to prosecution.

History

The Judiciary Act of 1789 created the office of the Attorney General. The same act created the Supreme Court, circuit and district courts, the United States District Attorneys (now US Attorneys) and the United States Marshals. In 1879, the sole role of the Attorney General was to prosecute suits in the Supreme Court and give advice and counsel to the President and Federal Department heads. In 1861, the Attorney General was given control of the US Attorneys and the US Marshals. On June 22, 1870, nearly 100 years after the appointment of the first Attorney General, an Act of Congress formally established the Department of Justice and it officially became the government's legal department.

Responsibility for federal prisons (now the Bureau of Prisons) was added to DOJ by the Three Prisons Act of 1891 but it took another 17 years before DOJ obtained its own investigatory agency. In 1908, Attorney Charles Bonaparte created the forerunner of the FBI in response to a law preventing him from using Secret Service Agents for investigations. This group officially became the Bureau of Investigation in 1909. The DOJ continued to grow throughout the twentieth century, acquiring the Immigration and Naturalization Service (INS, including the Border Patrol) in 1940 and the Drug Enforcement Administration (DEA) in 1973.

In recent years DOJ has assumed a major role in training and equipping state, local and tribal law enforcement organizations, including preparing them for terrorist attacks utilizing weapons of mass destruction (WMD) - chemical, biological, nuclear and radiological. In 1996, the FBI responded to the growing threat posed by WMD by creating the Hazardous Material Response Unit (HMRU) to gather and process evidence at scenes involving chemical, biological and/or radiological materials. Responsibility for analysis of the material was moved to the FBI's newly created Chemical Biological Sciences Unit (CBSU) in April of 2002.

In 2000 the Nunn-Lugar-Domenici WMD training program was transferred from the Department of Defense to the DOJ, and the Office of Domestic Preparedness (ODP) was created. ODP's mission was to enhance the capability of first responders to handle WMD incidents. ODP owned facilities for training (such as the live chemical agent

training school at the Center for Domestic Preparedness) and equipping first responders. Within the FBI, the WMD Countermeasures Unit (WMDCU) is responsible for training and exercises. At the same time, DOJ's National Institute of Justice began research on, and testing of, equipment for first responders. ODP was transferred to the Department of Homeland Security (DHS) in 2003.

Today the Attorney General is recognized as the chief law enforcement officer of the federal government. In the last decade alone, the DOJ budget has nearly tripled. As of FY 2003, the DOJ was composed of 140,000 employees with a budget of nearly \$30B. (These numbers do not reflect the 2003 transfer of some functions to the DHS and the transfer of the Bureau of Alcohol, Tobacco, and Firearms to DOJ.) An early history of the DOJ can be found in *The Department of Justice, Its History and Functions* by James S. Easby Smith. [W.H. Lowdermilk & Company, Washington, D.C.; 1904.]

DOJ's anti-terrorist role today

Terrorism is a federal criminal offense. As the chief law enforcement agency within the federal government, the DOJ has a major responsibility in combating and responding to terrorist acts.

The Department of Justice's role in combating terrorism and the terrorist use of weapons of mass destruction is split into three broad categories:

- 1) Prevention
- 2) Investigation
and
- 3) Criminal prosecutions and general legal advice

Prevention activities are concentrated on detecting and accessing indications of terrorist planning and future attacks. It is primarily an intelligence function, although it does include tasks related to reducing vulnerabilities of sensitive and high value targets. Investigations commence when there is a specific threat. Investigation activities also include the DOJ's role in responding to a WMD attack. Criminal prosecution and legal advice reflects DOJ's 214-year role as the federal government's legal arm. Subsequent sections will go into each of these three functions in more detail.

1) Prevention

The consequences of a successful attack using a WMD are potentially so catastrophic that the Department's primary anti-terrorist objective is to "prevent, disrupt and defeat terrorist operations before they occur" [FY 2001-2006 Strategic Plan U.S. Department of Justice]. Prevention requires intelligence on terrorist plans and intentions. Domestic intelligence is specifically a law enforcement function assigned to the Attorney General.

The Department utilizes its law enforcement components (FBI, United States Marshal's Service, Drug Enforcement Agency, and the Bureau of Alcohol, Tobacco and Firearms) to gather information on threats to the United States, and on terrorist groups, plans and intentions. Information-sharing among state and local law enforcement organizations and the federal agencies, such as the Secret Service and Customs and Border Protection, is facilitated by the FBI's Joint Terrorism Task Forces (JTTF). JTTFs are set up in each of the FBI's 56 major field offices and in several smaller offices. In addition, each of the 96 US attorneys have created an anti-terrorism task force (ATTF) and appointed an anti-terrorism coordinator to serve as a focus for anti-terrorism activities in their respective districts. A National JTTF (NJTTF) coordinates and disseminates information from the local JTTFs. Information from foreign law enforcement organizations is provided through the FBI Legal Attaché (Legat) program. Legats are located in embassies throughout the world.

Effective intelligence analysis requires merging and sharing of intelligence information collected by multiple agencies. Recent legislation, court decisions, and DOJ policy have set new, less restrictive guidelines for collecting and sharing intelligence information among agencies. Sections 203 and 504 of the USA PATRIOT Act of 2001 now permit the previously prohibited sharing and merging of foreign intelligence information and grand jury law enforcement information with "... Federal law enforcement, intelligence, protective, immigration, national defense, or national security officials." Furthermore, under revised Attorney General Guidelines, the FBI may now conduct "... online research even when not linked to an individual criminal investigation and may conduct preliminary inquiries whether to launch investigation of groups involved in terrorism, (i.e., "terrorism enterprise investigation)." [*Fact Sheet Attorney General Guidelines: Detecting and Preventing Terrorist Attacks 5/30/02*]. Information-sharing is further facilitated by the newly created interagency Terrorist Threat Information Center.

If the information is deemed reliable enough to issue a warning to local law enforcement agencies (either broadly or by specific jurisdiction), the FBI issues threat warnings and general guidance through the National Law Enforcement Telecommunications System (NLET), JTTFs and other avenues.

The DOJ seeks to prevent attacks by ensuring that terrorists do not have access to dangerous materials (i.e. hazardous chemicals, select biological agents, radiological sources) and are not employed in sensitive occupations. The DOJ is tasked with performing background checks on hazardous material drivers and student pilots. One of the responsibilities of the Foreign Terrorist Tracking Task Force (FTTTF, created in October 2001 by the Attorney General to prevent suspected foreign terrorist from entering the United States and tracking down those who do enter) is to perform background checks on foreign students seeking flight training. The Attorney General also has the responsibility to consult "... criminal, immigration, national security and other electronic databases ..." and to conduct Security Risk Assessments of individuals requesting access to select biological agents and toxins. [*The Public Health Security and Bioterrorism Preparedness and Response Act of 2002* .] Most recently, Homeland Security Presidential Directive 6 *Integration and Use of Screening Information* (HSPD-6)

directed the Attorney General to establish an organization to “... consolidate the government’s approach to terrorism screening ...” and to consolidate the government’s watch lists and provide full time operational support to law enforcement officers. The Terrorist Screening Center was formally created under FBI auspices to meet this directive in September 2003.

DOJ is also called upon to make vulnerability assessment of various cyber and physical infrastructure, both public and private.

2) Investigation:

Federal investigations regarding the use or potential use of WMD can be initiated in several ways. “The United States Attorney, as the chief federal law enforcement officer in his district, is authorized to request the appropriate federal investigative agency to investigate alleged or suspected violations of federal law... The grand jury may be used by the United States Attorney to investigate alleged or suspected violations of federal law.” [*United States Attorney’s Manual, Section 9-2.010*] WMD investigations include small-scale domestic use of biological weapons, (e.g., contaminating salad bars with *Salmonella* Typhimurium by the Rajhnee shees, in Dalles, Oregon), extortion, hoaxes (e.g. mailing envelopes of fake anthrax to abortion clinics by Clayton Waagner), or the mishandling of select agents or toxins.

The FBI can also initiate a National Security Investigation (NSI). The Attorney General guidelines define three levels of NSI. The three levels are

- i) Threat assessment
- ii) Preliminary investigation
- iii) Full investigation

The category of threat assessment is new and designed to permit the FBI to be more proactive in preventing acts of terrorism. It enables the FBI to collect information concerning National Security Threats on “individuals, groups, and organizations of possible investigative interest.” [*Attorney General’s Guidelines Regarding FBI National Security Investigations and Foreign Intelligence Collection (October 31, 2003)* as redacted and released under FOIA and *Attorney General’s Guidelines on General Crimes, Racketeering and Terrorism Investigation (May 30, 2002)*]

Each level of investigation requires a different level of approval and may utilize (generally) different categories of investigatory tools and techniques. The most intrusive techniques, such as physical searches and obtaining wiretaps, or installing trap and trace or pen register equipment, still require court approval. In terrorism cases involving foreign intelligence information, DOJ may obtain the required approval by showing “probable cause” to the Foreign Intelligence Surveillance Court (FISA), a special court setup under the Foreign Intelligence Surveillance Act of 1978. [c.f. *Foreign Intelligence Surveillance Act - Before and After the USA PATRIOT Act*, FBI Law Enforcement

Bulletin, June 2003 by Michael J. Bulzomi] Proceedings of this court are secret. The Office of Intelligence Policy and Review within DOJ is responsible for filing all requests to the FISA Court. Information obtained under a FISA court order may now, in some circumstances, be shared with other law enforcement officers to coordinate anti-terrorism activities.

When a specific threat is received, or an incident involving WMD occurs, the FBI's Weapons of Mass Destruction Operations Unit (WMDOU) may be asked to evaluate the credibility of the threat or provide technical assistance to state or local authorities. WMDOU may, in turn, access its own experts, other agencies, and possibly the Behavioral Science Unit of the FBI for support in making an accurate assessment of the threat.

The response to a major terrorist attack that utilizes WMD requires coordination from a large number of federal, state, and local government agencies. A series of Presidential Decision Directives (PDDs), Homeland Security Presidential Directives (HSPDs) and interagency plans specify the response roles and responsibilities of each of the federal agencies. These include *US Policy on Counterterrorism (PDD -39)*, *Protection Against Unconventional Threats to the Homeland and Americans Overseas (PDD-62)*, *Management of Domestic Incidents (HSPD -5)*, *National Preparedness (HSPD -8)*, *the Federal Response Plan (FRP)*, *U.S. Government Interagency Domestic Terrorism Concept of Operations Plan (CONPLAN)*, *National Oil and Hazardous Substances Pollution Contingency Plan*, *Federal Radiological Emergency Response Plan*, *Mass Migration Response Plan*, and *Initial National Response Plan*. As of this writing (December 2003), most of these plans are under revision in order to reflect the responsibilities of the new Department of Homeland Security.

The Federal Response Plan (FRP), first issued in 1992, describes how the Federal government will provide assistance to state and local governments under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. The terrorism annex to the FRP – first issued in 1997 – is in response to the policies and agency guidelines laid down by PDD 39 (1995). PDD -62, issued in 1998, further amplifies on US policy for responding to acts of terrorism. These documents provided the original framework for the federal government's response to a terrorist attack within the United States.

Fundamental to the government's response strategy is the concept of lead federal agencies (LFA). Under PDD -39 and the original FRP, DOJ was responsible for crisis management, defined as " ... measures to identify, acquire, and plan the use of resources needed to anticipate, prevent, and resolve a threat or an act of terrorism." This responsibility was delegated to the Federal Bureau of Investigation (FBI). The Federal Emergency Management Agency (now incorporated into DHS) was assigned to be the LFA for consequence management. Consequence management was defined as " ... measures to protect health and safety, restore essential government services, and provide emergency relief to governments, businesses, and individuals affected by the

consequences of terrorism.” Consistent with the fact that a domestic terrorist WMD attack is a criminal act, PDD -39 also directed that DOJ be the overall LFA until the Attorney General transferred lead responsibility to FEMA and consequence management became the principal federal role.

The CONPLAN, issued in February 2001, provided details as to how a terrorist incident involving WMD would be managed at the incident site. Under the CONPLAN, the FBI designates an on-scene commander (OSC) “... to manage and coordinate the response.” The local FBI field office and Special Agent in Charge (SAC) are directed to set up a Joint Operations Office (JOC) and Joint Information Center (JIC). The FBI can then request through the Attorney General and the National Security Council the deployment of a Domestic Emergency Support Team (DEST). The DEST is composed of subject matter experts who can provide advice and assistance from their home agencies.

HSPD-5, issued in February of 2003, eliminated the distinction between crisis and consequence management and designated the Secretary of Homeland Security as the “... principal Federal official for domestic incident management The Secretary is responsible for coordinating Federal Operations within the United States to prepare for, respond to, and recover from terrorist attacks...” HSPD-5 also reaffirms that the Attorney General has “... lead responsibility for criminal investigations of terrorist acts or terrorist threats... where such acts are within Federal criminal jurisdiction... as well as for related intelligence collections.” HSPD-5 directs the Attorney General and the Secretary of Homeland Security to establish relationships and mechanisms for cooperation. Finally, HSPD-5 directs the Secretary of DHS to develop a National Incident Management System (NIMS) and to prepare a new National Response Plan (NRP).

Although HSPD-5 eliminated the distinction between crisis management and consequence management, many of the structures set up under the FRP and CONPLAN remain. The Initial NRP (issued September 30, 2003) specifically states that authorities of federal officials defined in the FRP remain unchanged and support to law enforcement through groups such as the DEST will also remain unaltered. New structures are also created. The initial NRP sets up a National Homeland Security Operations Center as the national level “hub” to coordinate communications and information relating to a terrorist incident. The NRP also creates an Interagency Incident Management Group (IIMG) to facilitate incident management at the national level. DHS may appoint a Principal Federal Officer (PFO) to represent the Secretary at the incident and work with the OSC and FBI Special Agent in Charge. A new NRP plan will clarify many of these roles, but certainly DOJ will retain lead status for any law enforcement response or action.

Investigation of a WMD incident requires advanced forensics. In the event of a WMD incident, the event location becomes a crime scene and the FBI’s Hazardous Material Response unit may be called upon to retrieve evidence, including samples of biological, chemical or radiological evidence. The FBI Laboratory Division’s CBSU conducts its own forensics on these samples and may call upon other agencies (CDC, DOE, and National Laboratories) or even private entities to help with advanced analysis. All analysis is performed consistent with accreditation standards and the federal rules of

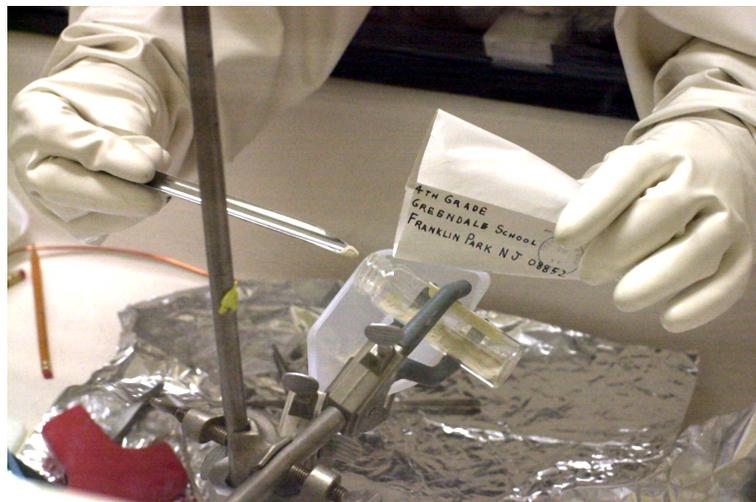
evidence. Standard forensics techniques (such as fingerprinting) can become especially challenging when the material is potentially contaminated with a pathogen. The material may need to be made safe without altering its forensic value.

3) Criminal prosecution and general legal advice

The DOJ and US Attorneys are ultimately responsible for prosecuting domestic terrorists and those who would use WMD for criminal intent. The counter-terrorism section of the Criminal Division of the DOJ supports federal attorneys prosecuting individuals accused of using WMD (under 18 U.S.C. 175 (biological weapons), 229 (chemical weapons), 831 (nuclear weapons), 2332a (a WMD)). In addition, DOJ provides general legal advice to the President and other executive agencies regarding potential violations of federal law regarding WMD. This may include everything from advice on quarantines to suggestions for new legislation to aid in the prevention of terrorist acts and the prosecution of terrorists.

Conclusion:

Stopping terrorist is most likely to be accomplished by state, local and federal law enforcement. With the creation of the Department of Homeland Security, the specific roles and responsibilities of the Department of Justice in preventing and responding to WMD terrorist attacks are under reversion, but unquestionably the DOJ, as the chief federal law enforcement agency, will continue to have major responsibilities.



FBI is responsible for forensics in the event of a Biological attack